

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| BRENDA KAY PFEIFFER, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| ARNE DUNCAN, Secretary of Education, et al., |) |
| |) |
| Defendants. |) |
| _____ |) |

Case No. 1:07-cv-00522
(Judge Sullivan)

REPLY IN SUPPORT OF DEFENDANTS’
RENEWED MOTION FOR SUMMARY JUDGMENT

Dr. Pfeiffer and Defendants agree that the only issue to be resolved before entry of summary judgment is the meaning of the word “due,” in the context of her promissory note, including the Department of Education regulations incorporated into that note. While Dr. Pfeiffer has repeatedly asked this Court to examine one clause to the exclusion of all else—including the unavoidable conflicts her interpretation creates—only Defendants have offered a coherent construction of the contract as a whole. As such, this is the only reasonable construction of the contract and under that construction, as a matter of law, Defendants have not breached any provision of the contract.

DISCUSSION

I. Interest is “Due” When it is “Owed as a Debt”

Dr. Pfeiffer asserts that the provision in the promissory note that the Secretary “may add interest that accrues but is not paid when due” must mean that the Secretary may only capitalize unpaid accrued interest if it is not paid on the scheduled payment date. Dr. Pfeiffer’s argument turns on her contention that interest is “due” only on the borrower’s scheduled payment date.

Dr. Pfeiffer's construction of "due" is unreasonable because it cannot be reconciled with other terms of the contract, the incorporated regulations.¹ The promissory note and regulations contemplate a "due" date for the scheduled payment that is distinct from when interest, which accrues daily, is "due." The applicable regulations authorize capitalization of interest in a number of circumstances in which there is no scheduled payment date, including grace periods, deferments, and forbearances. See 34 C.F.R. § 685.202(b)(2)-(3). Interest is "due" in those circumstances, even in the absence of a scheduled payment date. To construe the contract otherwise, as Dr. Pfeiffer suggests, would be to render 34 C.F.R. § 685.202(b)(2)-(3) meaningless, in violation of the "cardinal principle" that a contract "should be read to give effect to all its provisions and to render them consistent with each other." Segar v. Mukasey, 508 F.3d 16, 22 (D.C. Cir. 2007) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995)).

Similarly, under her construction of the word "due," interest for borrowers that participate in the Income Contingent Repayment Plan and whose loans are in "Negative Amortization" status (their scheduled payment is less than the accrued interest) would never be due. Moreover, only borrowers in Negative-Amortization status are subject to the interest capitalization practices complained of by Dr. Pfeiffer. Dr. Pfeiffer picks the scheduled payment date – the date by which

¹As explained in our Renewed Motion for Summary Judgment – and not challenged by Dr. Pfeiffer – the applicable regulations are explicitly incorporated in the contract. See Defs. Renewed Motion at 10-13. Indeed, the very provision emphasized by Dr. Pfeiffer actually ends with an express statement that the regulations govern how and when interest is capitalized. App. to Defs. Renewed Motion at 30 (2001 Form Promissory Note at 4) ("[The Department of Education] may add interest that accrues but is not paid when due to the unpaid principal balance of this loan, as provided under [the Higher Education Act and applicable regulations.]" (emphasis added)).

only the scheduled payment is required to be paid – and confusingly asserts that, for purposes of interest capitalization, this constitutes the date on which all unpaid accrued interest is “due.”² If a Negative Amortization borrower makes her scheduled monthly payments this would mean that Education could not capitalize *any* of the unpaid accrued interest because, under Dr. Pfeiffer’s position, the amount of accrued interest greater than the scheduled payment was not due (and, indeed, never becomes due). This would render 34 C.F.R. § 685.202(b)(1) and (4) a nullity and is thus a facially unreasonable interpretation of the word “due.”

Perhaps the consequences of Dr. Pfeiffer’s interpretation can be seen more clearly with a numerical example. Assume that as of the scheduled payment date \$500 of interest accrues each month on a borrower’s Income Contingent Repayment Plan loan, but the scheduled monthly payment is only \$400. This borrower is in Negative Amortization status (because \$400 is less than \$500). In this scenario, \$100 (\$500 - \$400) of interest accrues each month but is not “due” under Dr. Pfeiffer’s construction because it is not required to be paid on the scheduled payment date. Assuming the borrower makes her scheduled monthly payments, at the end of the year she will have \$1,200 (12 x \$100) of unpaid accrued interest.³ However, because none of this interest

² Even under other repayment plans, interest cannot reasonably be said to be “due” on the scheduled payment date. Pursuant to 34 C.F.R. § 685.211(a)(1), any payment received is applied first to any charges or costs, then to unpaid accrued interest as of the date the payment is received, then to the principal. The application of a payment to interest depends only on the date the payment is received, not on the scheduled payment date. A payment is delinquent if not paid by the scheduled payment date, but interest is owed as a debt, and is thus due, as it accrues on a daily basis.

³ Obviously, under current Education practices, there would also be an additional amount of unpaid accrued interest corresponding to the interest that accrued in the days after her last payment and before June 30, but for purposes of this example we are assuming that unpaid interest is capitalized on the date of her scheduled June payment, as suggested by Dr. Pfeiffer.

was required to be paid on the scheduled payment dates, none of this interest was ever “due,” according to Dr. Pfeiffer. Therefore, although the interest has clearly accrued and is admittedly unpaid, Education would be unable to capitalize this unpaid accrued interest, under Dr. Pfeiffer’s construction of her promissory note, because it was never due. Thus if the Court adopts Dr. Pfeiffer’s interpretation, Education will not be able to capitalize any unpaid interest as required by the HEA, 20 U.S.C. § 1087e(e)(5),⁴ and implemented by regulations at 34 C.F.R. § 685.202(b)(1) and (4).⁵ The provision in her promissory note that the Secretary “may add interest that accrues but is not paid when due” would also become a nullity.

Dr. Pfeiffer fails to acknowledge these absurd, but direct, consequences of her interpretation. Nowhere in her Renewed Motion for Partial Summary Judgment or in her Opposition does Dr. Pfeiffer explain how her position can be reconciled with the survival of the interest capitalization regulations and the HEA, 20 U.S.C. § 1087e(e)(5).

Dr. Pfeiffer asserts that Defendants’ construction creates a conflict between the note and the regulations, Plaintiff’s Opp. at 6-7, but she only reaches this conclusion by mischaracterizing Defendants’ position. Under Defendants’ construction, “accrued interest” is interest that has accrued on the loan; “unpaid accrued interest” and accrued interest “not paid when due” is accrued interest that is still owed as a debt, i.e., that has not yet been paid since it accrued. Accrued interest can be paid or unpaid, i.e., it can be paid when due or not paid when due.

⁴ Section 1087e(e)(5) provides that, for an income contingent repayment borrower, “[t]he Secretary may promulgate regulations limiting the amount of interest that may be capitalized on such loan, and the timing of any such capitalization.”

⁵ The consequences are particularly startling if one considers that the vast majority of borrowers in the ICR program have scheduled payments of \$0.

Defendants' interpretation of "due" – meaning "owed as a debt" – is the only construction that gives effect to and harmonizes all of the provisions of the note, including the applicable regulations.⁶ Defendants' interpretation is thus the only reasonable construction.⁷

II. Payments Cannot Be Applied to Unaccrued Interest

In her Opposition, Dr. Pfeiffer unaccountably chides Defendants, Plaintiff's Opp. at 8, for discussing in their Renewed Motion for Summary Judgment the regulation, 34 C.F.R. § 685.211(a)(1), that prevents Education from applying payments to unaccrued interest. In the Court's Order of March 16, 2009, however, the Court expressly asked the parties to address this topic in any renewed motion for summary judgment. Thus, while Defendants recognize that Dr. Pfeiffer has not requested such relief, Defendants were compelled to point out that this option is unavailable even if desired.

III. Dr. Pfeiffer's Requested Non-Monetary Relief Is Not Incidental to Monetary Relief

Dr. Pfeiffer concedes that ordinarily the Court has no Little Tucker Act jurisdiction over non-monetary requests for relief, but notes that such relief is permissible if incidental to a monetary claim. Plaintiff's Opp. at 8-9. Dr. Pfeiffer's attempt to recast her non-monetary requests for relief as merely incidental to her breach of contract claim is futile.

⁶ Dr. Pfeiffer's discussion of inapplicable Education regulations is puzzling. See Plaintiff's Opp. at 2-3. Each of these regulations applies to installment payments and none apply to the accrual of interest or discuss when interest becomes due. Installment payments, unlike interest, obviously do not accrue daily and thus could not be "due" daily. A payment is delinquent if not paid by the scheduled payment date, but interest is owed as a debt, and is thus due, as it accrues. Dr. Pfeiffer has already conceded that she understood that her interest accrues daily.

⁷ Because Dr. Pfeiffer's interpretation of the contract is unreasonable, her discussion of what happens when two reasonable interpretations of a contract exist, Plaintiff's Opp. at 5, is beside the point.

Although there is a narrow “exception” to the limits on Little Tucker Act jurisdiction when non-monetary relief would be in aid of a money judgment, see, e.g., Larionoff v. United States, 533 F.2d 1167, 1181 (D.C. Cir. 1976), aff’d, 431 U.S. 864 (1977), the D.C. Circuit has noted that “our own cases have found very sharp constraints on district court jurisdiction to grant equitable relief on contract claims against the government.” Greenhill v. Spellings, 482 F.3d 569, 576 (D.C. Cir. 2007). Indeed, in three of the four cases cited by Dr. Pfeiffer, jurisdiction under this narrow exception was deemed lacking. See Clay v. United States, 210 F.2d 686 (D.C. Cir. 1953); Lindy v. Lynn 501 F.2d 1367, 1369 (3rd Cir. 1974); Blanc v. United States, 244 F.2d 708, 709-10 (2nd Cir. 1957). And in the fourth, Nat’l Treasury Employees Union v. Reagan, 509 F. Supp. 1337 (D.D.C. 1981), because the plaintiffs had claims based upon the Constitution, statutes and contract theory, it is unclear whether the court asserted jurisdiction over the declaratory and injunctive relief claims solely under the Tucker Act. Indeed, the court noted that it believed it could issue this non-monetary relief “even as to those persons who later take their claims for damages to the United States Court of Claims.” 509 F. Supp. at 1343. On appeal, these jurisdictional issues were not addressed. See Nat’l Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981).

In any event, the broad-ranging injunctive and declaratory relief sought in Dr. Pfeiffer’s complaint does not fall into the narrow incidental relief exception. See Complaint, Prayer for Relief at ¶ 3(injunction against Education’s interest capitalization practices); ¶ 4 (injunction modifying interest capitalization practices); ¶ 5 (declaration regarding interest capitalization practices); ¶ 7(other equitable relief); ¶ 9 (retention of jurisdiction until interest capitalization practices are “determined to be in compliance with law”). As such, summary judgment should

be entered against Dr. Pfeiffer on these non-monetary claims.

CONCLUSION

For these reasons, Defendant's Renewed Motion for Summary Judgment should be granted.

JUNE 29, 2009

Respectfully submitted,

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/s/ Phillip M. Seligman

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Certificate of Service

I hereby certify that on June 29, 2009, a copy of the foregoing "Reply in Support of Defendants' Renewed Motion for Summary Judgment" was filed electronically with the Court's Electronic Case Filing ("ECF") system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

/s/ Phillip M. Seligman
