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Late payments on a promissory note after acceleration

A common legal issue for business creditors holding promissory notes is how to handle a debtor who is late with a payment. Most promissory notes contain clauses that grant the creditor remedies to pursue against the debtor if the debtor fails to pay. One such clause is an "acceleration clause."

An acceleration clause gives the creditor the right to "accelerate" the amount the debtor owes under the promissory note and immediately demand the entire balance due, not just a particular installment. Acceleration clauses are common features in loans secured by real property and other instruments in which a debtor is obligated to make installment payments over time on a total principal amount. Once the creditor elects to accelerate, the debtor is ordinarily obligated to pay the total amount in full.

But what happens when, after the creditor elects to accelerate, the debtor submits a late payment? Should the creditor simply say "better late than never," accept the late payment, and abandon the right to accelerate? Should the creditor return the payment and instead insist on payment of the total accelerated balance due? Can the creditor simply credit the late installment payment as a "partial payment" and insist that the debtor pay the remaining accelerated balance?

Under Oregon law, how a creditor treats a late payment after electing to accelerate will likely impact the creditor's ability to pursue the accelerated balance. Oregon courts may generally look to past behavior of the creditor in determining whether acceptance of late payment waives acceleration.

See, for example, *Wright v. Associates Fin. Servs. Co. of Oregon, Inc.* If the creditor has, in the past, accepted late payments and excused defaults, there may be an "implied waiver" of the creditor's right to enforce an acceleration clause. In other words, if the creditor accepted late payments in the past, the creditor may have waived the right to accelerate in the future and the court will not enforce the acceleration clause that the creditor relied on. The Oregon Court of Appeals in *Wright* laid out what a creditor

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should do in such a circumstance. Before declaring a default, the court held that a creditor must: 1, give the debtor reasonable notice of the creditor's intention to insist on strict compliance with the acceleration clause in the future, and 2, give the debtor reasonable opportunity to make up late payments.

On the other hand, if a creditor does not have a history of acceptance of late payments, the creditor does not necessarily waive the right of acceleration merely by accepting late payment. See, for example, *Salishan Hills, Inc. v. Krieger*. In this case, the Oregon Court of Appeals held that once a creditor has accelerated the debt in such a circumstance, the debtor cannot avoid acceleration by paying the past due amount. Instead, the debtor is obligated to pay the entire accelerated amount.

The *Wright* and *Salishan Hills, Inc.* cases provide useful guidance for what creditors under promissory notes containing acceleration clauses should do when a debtor makes a late payment. Creditors that have accepted late payments in the past but now seek to enforce an acceleration clause should send the debtor clear and unequivocal notice. The notice should state that the creditor requires timely payment going forward and that any future untimely payment will result in the creditor electing to accelerate the total amount due under the terms of the promissory note.

If the debtor fails to make a timely payment and defaults under the terms of the note, the creditor should immediately send the debtor notice of the debtor's failure to pay, the creditor's decision to accelerate the amount due, and make a formal demand for payment. If the debtor attempts to make a late payment, the creditor should make sure to comply with all notice and acceleration provisions under the promissory note. If appropriate under the note's terms, the creditor should send the debtor a notice stating that the late payment will only constitute a credit toward the accelerated amount due. The creditor should then make a demand for payment in full, minus the amount of the late payment.

Conversely, if a creditor has not accepted late payments in the past, the creditor may seek to enforce the acceleration clause immediately. In that instance, if a debtor makes a late payment, the creditor should follow the promissory note terms regarding giving notice of default and accelerating payment. Assuming all conditions precedent to doing so have occurred, the creditor may notify the debtor of the default and make a formal demand for payment for the entire amount, minus the amount of the late payment.

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