

The Elephant in the Room: The Trillion Dollar Student Loan Crisis and How Lawyers Can Help Solve It

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What's the BIG DEAL about The Student Loan Crisis?

EVERYONE has some kind of debt:

So **why** is Student Loan debt different?

What's the BIG DEAL about the Student Loan Crisis?

SL DEBT IS A HUGE BURDEN

- Extremely long-term (10-30 yrs.)
- High dollar: \$10k up to \$200k+
- Debt is tied to the person and not to property
- Extremely difficult to discharge in bankruptcy
- And for federal loans, extra-strong collection mechanisms
- Total Debt Owed Rises Every Year

The Trillion Dollar Problem

Current Student Loan Debt

Q4 2015: \$1,316,157,200,000 (1.3 Trillion)

And growing so fast, it will be \$8 Billion bigger by the end of this program!

WHY? College Costs Outpace Inflation

Wages are flat; Loan Debt keeps rising

How many borrowers aren't paying?

ENOUGH about the PROBLEM:

What are the SOLUTIONS?

A Client with a student loan crisis is **NOT** asking how to **THRIVE**.

These borrowers need a way to **SURVIVE**.

Borrowers who cannot discharge their loans

(Read: MOST borrowers) need a way to simply make ends meet.
Solutions require understanding and good triage

First: Know the Type of Student Loans

Three types of Student Loans are available to borrowers:

Federal Loans

90% of loan volume

Private Loans

Very inflexible, bad underwriting

State Loans – Rare; funded directly by states

Types of Loans – Federal

- **FFEL loans**
a/k/a/ Federal Family Educational Loan
Phonetically: “Feel Loans”
- **Direct Loans**
a/k/a/ William D. Ford Federal Direct Loan Program

- **PLUS Loans**
made under FFEL and DL Programs
- **Perkins Loans**
a/k/a Federal Perkins Loans Program

Types of Loans – Federal Cont.

FFEL loans (Federal Family Educational Loan)

- Loans made by banks and others
- Traditionally guaranteed by the Government
- All Federal Loans before 1993; later phased out
- Terminated completely in 2010
- Included:
 - “Stafford Loans”
 - PLUS loans
 - Consolidated loans

Direct Loans

- Direct from Department of Ed.
- Cuts out the “middle man” of the banks
- Loans made and backed by government
- Serviced by private companies, and quasi-government entities (e.g. Sallie Mae, Nelnet, Great Lakes, AES/PHEAA, MOHELA to name a few)

- Includes most federal loans from 1993 onward, and all (except Perkins) after 2010.

PLUS Loans - made under FFEL and Direct Programs

Parent PLUS Loan:

Made to supplement an undergrad when the student has maxed out her own financial aid

Grad PLUS Loan:

Used to pay for Grad School, made by the student directly without parent

Maximum Amount of PLUS Loan =

“Cost of attendance” – other financial aid already received

Perkins Loan

Low interest loan (5.0%)

Undergrad and Grad School

Requires “*exceptional financial need*”

School is the lender, from money given by Fed Govt.

Major Differences Federal vs. Private

Federal Loans

Made and/or backed by the government

Dept. of Ed. Guidelines and regulations apply

FAFSA dictates what will be offered

Private Loans

Banks and other private borrowers

NOT guaranteed by government

Limited regulations (same as other lending)

Driven by credit score or other qualifiers

Private Loans Cause Pain

Loans are NOT made using FAFSA guidelines

Dept. of Ed programs for Federal Loan relief don't work

Promissory notes often contain:

1. Variable interest rates,
2. Huge upfront fees,
3. Inflexible payment arrangements,
4. Quickly assigned to other companies or business trusts.

Practice Pointer: Borrowers (almost) never know what kind of loan(s) they have! You have to help them figure it out!!!

What kind of loan is this? Part II

The Department of ED holds the key:

National Student Loan Data System

w w w . n s l d s . e d . g o v

Second Key: CREDIT REPORT

Almost all student loan lenders report student loan debt.

w w w . a n n u a l c r e d i t r e p o r t . c o m

I Know What Loan Type Borrower Has:

Now what do I do?

5 Biggest Problems for Borrowers

1. Unsure HOW to pay
2. I'm not paying BUT – I have deferment / forbearance
3. I didn't pay – now the MAN is after me!
4. I shouldn't have to pay – I am sick / school cheated me/ I'm bankrupt
5. I can't afford my payment(s)

#1: HOW to Pay – Pt. 2

Solution for Federal Loans: NSLDS

Solution for Private Loans:

See the promissory note for details

OR

Contact servicer and ASK

Servicer is looking for borrowers to make them pay.

#2 Not Paying Federal Loans

FEDERAL:

Deferment: govt. pays the interest while deferred, but special conditions apply to obtain a deferment. Generally some sort of special hardship exists.

Forbearance: interest accumulates. Both discretionary and mandatory types of forbearance available.

Why is this a Problem?

Why are deferments and forbearances a problem?

A: Using up deferment or forbearances is like cashing in your get out of jail free card too early. If possible, maintaining payment history is better option.

#2 Not Paying Private Loans

Private Loans:

Deferment & Forbearance:

These are often a TRAP for the unwary.

Terms are governed SOLELY by the promissory note.

If note doesn't give you the right to defer or forbearance, then non-payment is likely a **default**.

COMMON PROBLEM: Telephone calls set up mythical payment plans that cannot be relied upon by the borrower.

(potential consumer claims abound)

#3 Didn't pay – now the MAN is after me!

Failure to Pay FEDERAL LOANS:

Delinquency <= 270 days missed

Default >270 days after missed payment

Exception: Perkins Loans are defaulted after day 1 of non-payment. Always pay Perkins!

Default on FEDERAL Loans Costs Big Buck\$

1. **Capitalization:** once in default, interest and collections costs(40% - 18.5%) are added to principal.
2. Will be listed as **default on credit report**, hindering credit
3. **Lawsuit** by federal govt. against the borrower is possible
4. Triggers other **extraordinary remedies:**

Federal Loan Default's Extraordinary remedies / effects

1. AWG - Administrative Wage Garnishment – no lawsuit needed, but notice is required;
2. Tax Refund Intercepts;
3. Social Security Offset;
4. If Federal Employee, can have additional offset of wages;
5. Ineligible to obtain federal employment while in default;
6. Ineligible for additional Title IV financial aid while in default;
7. No additional deferments while in default

Federal Loan Default Solutions

1. Rehabilitation
2. Consolidation

Federal Loan Solutions to Get out of Default

A. Rehabilitation of Loan

1. Advantage – it removes the default from borrower’s credit report
2. Disadvantage – much slower to do than consolidation
3. DL and FFEL can be rehabbed with minor differences in process
4. 9 voluntary payments in a 10 month period (9 of 10)
 1. 18.5% fee added to loan
 2. Can be done only once
 3. Payments must be “reasonable and affordable” so could be as low as \$0.00 under IBR

B. Consolidation of Loan

1. New Direct Loans only since 2010
2. Can cure this way only once
3. 18.5% penalty will be added to the loan
4. Takes 30-90 days
5. A single loan CAN be consolidated into a new loan. In effect this is a “re-fi” of the old loan amount

PRIVATE LOAN DEFAULT:

Lenders have all the power:

Loans can’t easily be discharged;

NO incentive for lenders to be flexible

Lawsuits are common:

National Collegiate Student Loan Trusts, Educap, Sallie Mae / Navien. MOHELA

Practice Pointer: ALWAYS read the promissory note to determine:

Method of computing date of default, remedies, and

- Choice of law
- Arbitration or other dispute resolution clauses
-

#4 I shouldn’t have to pay – I am disabled / school cheated / I am bankrupt

Federal Loans can be discharged in SPECIAL circumstances ONLY!

Most common of these:

- Disability of borrower
- School Failures
- Bankruptcy

Administrative Discharge For Disability

Granted by the Dept. of ED for FFEL, DL, Perkins for:

- VA rating as unemployable or
- SSDI granted for TPD
- Physician's certification needed

Administrative Discharges related to the School:

School Closure:

If borrower was at the school within 180 days of closure of the school

For False Certification:

- School Certifies a non-HS grad could benefit, or
- Enrolls student that can't meet employment requirements, or
- Forgery of loan docs or check, or
- ID theft

For Unpaid Refund: School failed to pay refund owed to student

Bankruptcy Discharge Federal or Private

BOTH Federal and Private School Loans are

NOT Discharged without **UNDUE HARDSHIP**

11 U.S. Code § 523(8) Exceptions to discharge

(A) i & ii: Loans or other funds received as educational benefit funded by government or nonprofit, OR

(B) Any other education loan that is "qualified loan" under IRC 221(d)(1)

Majority View:

Brunner v. NYS Higher Ed. Serv. Corp., 831 F.2d 395 (1987)

8th Circuit Test: The Totality-of-the-Circumstances Test:

In re Long, 322 F.3d 549 (8th Cir. 2003) (**1st & D.C. Cir. unclear**)

Bankruptcy Discharge of Loan – cont.

In re Conway, 495 B.R. 416 (8th Cir. B.A.P. 2013, aff'd June 2014)

(*pro se* debtor may discharge in Ch. 7 her private educational loans incurred as a student at Webster University, in light of the totality of her circumstances, despite gainful employment and making \$1,380 – \$2,040 per month net income.)

Bankruptcy as a Tool to Manage School Loan Debt:

GOOD

- BK Stay / Co-Debtor Stay: May take some pressure off student borrowers, or private loan cosigners
- Proofs of Claim might be attacked in Ch. 13 cases
- May “run out the clock” on the SOL

BAD

Nonpayment: May not get Dept. Ed to allow payments (usually SL debts are “frozen” in a bankruptcy forbearance, limiting payment options)

Default on loans b/c Bankruptcy = DEFAULT

#5: Can't afford my SL payments

Borrowers aren't Deadbeats!

As lawyers, we need to recognize the TRUTH about student loans:

Lawyers need to teach borrowers how to SURVIVE with the debt they have

SL Solutions – Income Related

Income Contingent Repayment (ICR)

Uses loan balance and income formula

Parent Plus loans ineligible

Income Based Repayment (IBR)

If borrower qualifies, restrictions apply

Income formula only (15% of discretionary income)

Can result in \$0.00 loan payment for some borrowers

Balance forgiven after 25 years of successful payments

- SL Solutions – Income Related

Pay As You Earn (PAYE)

Effective 2012, for those who qualify

Income formula only (10% of discretionary income)

Balance forgiven after 20 years of successful payments

Revised Pay As You Earn (REPAYE)

Began Dec. 2015 as expansion of PAYE

Like PAYE sets payments at 10% of discretionary income

Available to OLDER Direct Loans, not just recent borrowers

REPAYE is lower payment than IBR

20 years for undergrad; 25 years for grad loans

- SL Solutions – Income Related
- SL Solutions – PSLF

Public Service Loan Forgiveness

1. Work full time in **public service**
2. Make **120 qualifying payments** on loan
3. A **tax free discharge** of the entire balance in 10 years!

Direct Loan Program Only:

But - can convert most FFEL loans to Direct through Consolidation

Must have IBR, ICR, PAYE, REPAYE, or 10-Year Standard Plan or similar

Other restrictions apply read the program requirements CAREFULLY

- SL Solutions – TLF

Teacher Loan Forgiveness

For Teachers who teach 5 consecutive years in a qualifying school:

\$17,500 in loan forgiveness if:

Science or Math H.S.

Special Ed. in Elementary or H.S.

\$5,000 for other teachers

AND a forbearance for five qualifying years

#1 Reason SL Clients Need Us

Litigation Tools to Help Borrowers

Defending Private Loan Lawsuits on the merits

Common defenses:

- Standing – Plaintiff have major difficulties proving assignment
CACH v. Askew, 358 SW 3d 58 (Mo. 2012)
- Weak evidence, full of hearsay
- Statute of Limitations on private loans

Defending Private Loan Lawsuits on the Merits:

Advantage to Borrower

A good defense helps the borrower*:

1. Force a dismissal
2. Pre-judgment settlement (for MUCH less than demanded)
3. Last resort – judgment with stay of execution for payment

***All of the above provides the SL borrower with more control and more certainty than being unrepresented**

FDCPA – Fair Debt Collection Practices Act

- Servicers and Collectors chasing defaulted debt are debt collectors under FDCPA
- Misrepresentations about debt are common and actionable

FCRA – Fair Credit Reporting Act

- CRA Issues - “Hey! This debt isn’t me”
 - Mixed credit files
 - Identity theft
 - Failure to properly re-investigate will trigger liability
- Furnisher Issues - “Hey! This debt isn’t accurate!”
 - Consumer disputes and CRA investigates by contacting furnisher
 - Furnisher continues to supply wrong information

TCPA – Telephone Consumer Protection Act

- Based on robocalls or
- Unauthorized faxes, or
- Unauthorized calls or texts to cell phone
- Damages per call \$500 - \$1500

Real Life Examples –

Conclusions – More Resources

For a two day seminar on how to do Student Loan Law,
Go to Josh Cohen’s Student Loan Law Workshop:

www.thestudentloanlawyer.com

Or see **NCLC Student Loan Law Manual**

Or these websites:

NCLC: **www.studentloanborrowerassistance.org**

Dept. of ED: **www.studentloans.gov**

Questions? Contact me anytime:
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