

# CLLA STUDENT LOAN CRISIS

A creditor's rights perspective

## PROLOGUE

For the last twenty years LJ Frank PC has proudly represented colleges and universities to collect student receivables as well as government backed, school and bank educational loans. LJ Frank has had the honor of speaking to the Michigan Association of Student Financial Services Administrators. As with all presentations: the information given today and within this document is not meant to be given as legal advice. The goal is to provide you with as a starting point. We will address what makes student debt unique from the perspective of a creditor rights attorney.

**A. Collection of a student loan is mostly the same as any other consumer collection. There are some unique aspects of collecting student debt. Remember, as always, the FDCPA will apply to the debt collector.**

1. Before sending a demand letter review the documentation to determine if the debt is:
  - A. an open accounts receivable (no written contract).
  - B. a non federal promissory note.
  - C. Check loan(s) for Co-Debtors.
  - D. Educational benefit contract through a bank (the document must say "educational benefit").
  - E. Federal Promissory note.
  - F. Students will have multiple loans from multiple sources. Note the date of the loans in your software system. This is helpful when the student calls that the loan upon which demand was made was paid off.
  - G. Check the collection fees and collection costs language in the loan. Make sure the calculations are accurate and comport with your state's laws. Word of caution: some schools charge up to 50% of what is owed.
2. The federal loan programs may have different resources to assist students to get the loan repaid. Things to know understand while communicating with the student:
  - A. Federal student loan programs do not allow the school to negotiate the student's debt.
  - B. Rehabilitation. Some loans provide the student has a one time right to get the loan out of default by making certain amount of timely payments. Even if suit is filed the loan can be rehabbed after suit but before a judgment.
  - C. Hardship/Forbearance/Deferments/Cancellation are all found in the terms of the Perkins loans. The student must meet under the Code of Fed Regulations.
  - D. Income Driven repayment plans. There is a yearly application process. There may be some tax consequences to the student.

More information about the various student assistance can be found in other parts of this program. Most of the time the student will speak directly with the school. It is important the attorney, collection agency and school must keep each other informed.

3. Things to watch for while drafting the complaint:
  - A. The schools have restrictions in order to have access to the federal dollars to fund student loans. Collection costs AND fees must be collected. 34 CFR Subtitle A Sec. 30.60 and 20 USC § 1091a(b)(1). I insert these citations into the complaint to start educating the Judge.
  - B. For “Perkins” or Sallie Mae there is NO Statute of Limitations (see 20 U.S.C. § 1091a(a)(1), 34 CFR Sec A 30.60 and 34 CFR 674.45 respectively). I insert these citations into the complaint to start educating the Judge.

## **B. DEFENSES IN LITIGATION**

1. In addition to the usual collection defenses the student will often be in pro se and allege the following:

- a. I did not go to class.
  - b. I was told that if I withdrew I would not owe the money. This one can be difficult because it is often the Professor who will provide this information.
  - c. I paid this loan or note.
  - d. Infancy.
  - e. Truth in Lending violation (see 15 USC 1603).
  - f. There may be confusion over a school year and the application of grant money.
    - i. Pell Grant is by school year
    - ii. Transfer student and different calendar (start fall v start summer).
  - g. Why did you let me go to school if you did not know my financial circumstances.
  - h. I don't owe the collection fees.
  - i. I timely dropped out of the class.
  - j. This debt was already collected by or sold to another entity.
4. The response to the defenses are usually:
- a. Check the Student Handbook. It usually provides the necessary disclaimers.
  - b. The Handbook also has a calendar of events which includes the last day to withdraw without costs.
  - c. The loan document will have the necessary verbiage for collection costs, collection fees and late fees.
  - d. Remember this is not the purchase of a product.

- e. The goal after graduation is a job.
- f. The school usually has a separate department for admissions, registration and collections. Sometimes you need to get after the client so the right department releases the necessary information.
- g. IF the loan was sold (and private loans may be sold) then make sure the assignment documents are part of the package. This is much like credit card tertiary paper.

**C. Bankruptcy by a student who has a written loan can be good news for the creditor. The other program material will go into student debt and bankruptcy but for the creditor's attorney here are some things to watch for:**

1. Once a bankruptcy case is filed all stakeholders, (collection agencies, college and attorney) must ALL be notified so all collection activity stops. Immediately.
2. Much to the school's dismay regardless of the type of student debt (a receivable or a written loan) the school MUST release the transcript if the student requests. Failure to do so is attempt to collect a debt. The school risks being held in contempt for violating the automatic stay.
3. There is no special category for student loans in bankruptcy. The same rules apply to this debt as to other unsecured debt. Wait for discharge then check to see if a hardship discharge was granted.
4. Type of debt the student owes will determine whether the debt survives a standard discharge. The key is whether or not there is a written note for an educational benefit attached to the debt. If it is a non written note receivable then the school should track the debt until discharge and then has no choice but to close the file.
5. IF there is a written instrument attached to the debt make sure no adversary proceeding to discharge the debt under 11 USC 523(a)(8). If no judgment of hardship discharge was entered then the school is in a better position to collect the debt.

**D. THE INTERSECTION OF BANKRUPTCY AND LITIGATION**

1. Often the student files the bankruptcy and lists the name of the school and the amount of the debt.
2. The bankruptcy schedules are filed under oath. Under the principle of estoppel the Schedule can be used to prove that a loan was entered into, and the amount owed. The student can't argue in bankruptcy that the debt should be discharged and then argue it isn't his/her debt in another. It will then take a motion for summary judgment to educate the Judge why the 727 general discharge is inapplicable.

## **E. POST LITIGATION AND BANKRUPTCY**

1. Once a general discharge is issued and if a student's debt was NOT discharged under 11 USC 523(a)(8) then the bankruptcy filing can actually be beneficial to the school's collection efforts. The bankruptcy schedules list a place of employment, assets and other relevant information. Further the other unsecured debt will likely have been discharged increasing the student's cash flow.
2. Any post discharge prejudgment motion or post judgment activity will likely bring a telephone call or motion from the student or the attorney that the debt was discharged in bankruptcy. It's a matter of educating the state court Judge about the difference between the hardship and general discharge.

## **F. CONSOLIDATION**

1. Consolidations is really refinancing the loan. Even one loan can be "consolidated".
2. It gives the student a new opportunity to make "one low low" monthly payment on all the federal student loans. The original loan school gets paid off, the collection agency and law firm get their contingency fee. It's a win for the student a win for the school and a win for the agency/firm.

## **EPILOGUE**

To look at the future we must take a look at the past. In 1991 the statute of limitations on federal loans, which was six years was repealed as part of the Higher Education Technical Amendments. This was applied retroactively.

This crisis has been brewing for a long time. According to Zach Friedman's article in Forbes.com dated August 29, 2018 there are more than 44 million borrowers who collectively owe \$1.5 trillion in student loan debt. The average student in the Class of 2016 has \$37,172 in student loan debt.

Tuition has outstripped the cost of living. At the state schools, financing has become a lot less dependant on the state legislative process and more dependant on student financing. We are seeing different movements from schools and Congress to alleviate the burden on the economic growth. Schools are moving away from loans all together and using endowment money so there is no or little cost to the student.

The Congressional changes we can anticipate:

- Definition of hardship
- Revising Chapter 13 to include a special category for student debt
- Some sort of statute of limitations
- Some sort of good faith repayment cap
- Regardless of who is in charge in DC expect to see significant changes.