



Student Debt Collection and the Impacts of Bankruptcy

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Agenda

- ▶ Debt Collection
- ▶ Bankruptcy

Debt Collection Issues

- ▶ Financing, Interest, and Late Charges
- ▶ Collection Agency Contracts
- ▶ Fair Debt Collection Practices Act
- ▶ Student Financial Responsibility Agreements

Financing, Late Charges, and Interest

- ▶ Each institution of higher education may, in the control and collection of any debt, impose reasonable financing and late charges, as well as reasonable costs and expenses incurred in the collection of such debts, if provided for in the note or agreement signed by the debtor. RCW 28B.10.293.
- ▶ Interest at rate of 1% a month shall accrue on debts owed to the state, starting on the date the debts become past due. RCW 43.17.240.

Collection Agency Contracts: RCW 19.16.500

- ▶ Public agencies may by written contract retain licensed debt collection agencies and may add to the debt a “reasonable” collection agency fee.
 - ▶ Sets out maximum percentages, but federal law governs.
 - ▶ Any fee agreement entered into by a public agency is “presumptively reasonable.”
 - ▶ **Practice Tip: Must provide notice before referral to collections.**

Collection Agency Contracts: Federal Regulations

- ▶ Limit collection agency fees for first collection efforts to **30% of amounts collected and 40% for subsequent collection efforts, plus court costs.** 34 CFR § 674.47.

Fair Debt Collection Practices Act

- ▶ FDCPA prohibits unfair debt collection practices.
- ▶ Cannot collect any amounts for interest or collection costs except as **(1) expressly authorized by debtor agreement or (2) permitted by law.**
- ▶ Interest charges permitted by RCW 43.17.240, collection costs by RCW 19.16.500.
- ▶ But for higher education, RCW 28B.10.293 permits interest charges and collection costs only if provided for in a signed debtor agreement.

Bradley v. Franklin Collection Service

739 F.3d 606 (11th Circuit 2014)

- ▶ *Bradley* involved two (non-student) debtors named Bradley and Calma. Both signed agreements to **pay collection costs**.
- ▶ Calma's agreement stated: *I agree to pay all costs of collection including reasonable collection agency fees*. Bradley's agreement stated: *I agree to **pay all costs of collection***.
- ▶ Calma's agreement was enforceable under FDCPA, but Bradley's was not. Calma expressly agreed to pay "collection agency fees." Bradley's agreement to pay "all costs of collection" was held to mean all actual costs of collection, not a percentage-based contingent fee.

But, but, but . . .

- ▶ Collection agencies after *Bradley* began refusing to collect student debts without a signed debtor agreement to pay collection agency fees.
- ▶ But aren't collection costs enforceable under the FDCPA if (1) authorized by debtor agreement or (2) permitted by law?
- ▶ And aren't collection agency fees expressly permitted under RCW 19.16.500?
- ▶ **Yes, and yes, BUT ONLY if there's a signed debtor agreement that addresses these items.**

Student Financial Responsibility Agreements—Key Provisions

- ▶ 1. Payment of Fees / Promise to Pay
- ▶ 2. Delinquent Account / Collection
- ▶ 3. Communication / Billing Methods
- ▶ 4. Debtor's Signature
- ▶ **Practice Tip: Periodically review the language of these provisions and ask for legal review to ensure that the language is current.**

Payment of Fees / Promise to Pay

- ▶ I agree that any amounts charged to my Student Account that are not paid by the due date shall constitute a nondischargeable student debt under § 523(a)(8) of the U.S. Bankruptcy Code that I am obligated to repay, to the greatest extent required law.
- ▶ Any overpayment of financial aid or other educational benefit that I receive for any period when I am not enrolled shall also constitute a nondischargeable student debt that I am obligated to repay.
- ▶ All such student debt shall also include any late fees, finance charges, and collection fees and costs as described in Section XX below.

Delinquent Account / Collection

- ▶ **Late Payment Charges.** I understand and agree that if I fail to pay my student account balance by the scheduled due date, the College will assess a finance charge at the rate of 1% a month on the past due portion of my student account. Such finance charge is in addition to late payment fees (see www.college.edu/registrar/latefees).
- ▶ **Collection Agency Fees.** If I fail to pay my student account balance by the due date, and fail to make acceptable payment arrangements, the College may refer my delinquent account to a collection agency. I understand that I am responsible for paying the collection agency fee of up to 30% of the amounts collected for first collection efforts (and up to 40% for subsequent collection efforts), plus court costs, and other fees permissible under the law.

Communication / Billing Method

- ▶ I understand that the College uses electronic billing and my student email address to communicate with me about my student account and that it is my responsibility to review College emails on a timely basis.
- ▶ I understand that I may request paper billing statements and mailed communications by submitting a request to Student Accounts@College.edu.
- ▶ I understand and agree that I am responsible for keeping College records up to date with my current mailing address and contact information.

Debtor's Signature

- ▶ Student debtor must sign and date the agreement.
- ▶ “I agree by signing this agreement that I will be bound by its terms.”
- ▶ If using electronic signature or click-through “I agree” button, College must be able to retain and authenticate the agreement including signature and date.

RCW 28B.10.293 – Debt Collection Limits

- ▶ Cannot use transcript issuance or withholding as a tool for debt collection
- ▶ Limits ability to withhold registration privileges
 - ▶ Requires notice to student

SBCTC Policy

- ▶ 5.30.35 Withholding student registration
- ▶ An institution may withhold registration privileges for students with unpaid debt, including but not limited to, failure to pay tuition and fees, room and board, and/or financial aid.

SBCTC Policy

- ▶ 5.30.45 Release of student transcript
- ▶ Institutions of higher education **may not withhold a student's official transcript, regardless of debt,**
- ▶ Except the fee charged to provide an official transcript,
- ▶ If the official transcript is requested by a student or entity for purposes, including but not limited to, job applications, transferring to another institution, applying for financial aid, pursuit of opportunities in the military or national guard, or pursuit of other postsecondary opportunities.

Federal Regulations

- ▶ Effective July 1, 2024
- ▶ Colleges are required to release transcripts for any semester/quarter in which a student received federal grants, loans, or work study funds
- ▶ Colleges can withhold credits from a transcript if the student still owes money for the semester/quarter (e.g. withdraws without having paid full tuition)

Bankruptcy



Purposes and Types of Bankruptcy

- ▶ Purposes of Bankruptcy Code are to provide (1) a “fresh start” for honest debtors and (2) equitable treatment of creditors.
- ▶ Types of Bankruptcy
 - Chapter 7 (Liquidation)
 - Chapter 11 (Reorganization)
 - Chapter 13 (Adjustment of Debts)

Chapter 7 Liquidation

- ▶ Classic bankruptcy liquidating debtor's nonexempt assets and distributing to creditors (most are "no asset" cases).
- ▶ General discharge operates as permanent injunction against collection of all dischargeable pre-petition debts.
- ▶ Some student debts are dischargeable, others not.

Chapter 13

Adjustment of Debts

- ▶ Debtor retains control of assets while repaying creditors under court-confirmed “wage earner’s plan.”
- ▶ Applies only to individuals with regular income.
- ▶ Discharge of all scheduled debts upon completion of repayment plan (3-5 years).
- ▶ Important to confirm that repayment plan does not include nondischargeable student debt.

Automatic Stay

- ▶ Prohibits any action to collect pre-petition debt once bankruptcy petition is filed.
- ▶ Penalties for willful violation include actual damages, attorney fees, punitive damages.
 - ▶ Violation “willful” if creditor knew of stay.
 - ▶ Formal notice not required.
- ▶ **Practice Tip: You should have a process for tracking cases subject to the stay and monitoring status of the bankruptcy.**

Automatic Stay

- ▶ Applies **to all student debt** until court determines debt to be nondischargeable.
- ▶ Does not apply after bankruptcy case closed
 - ▶ Need to determine whether the debt has been discharged (should not be a surprise)

Co-Debtor Stay

- ▶ Creditor in Chapter 7 case may proceed against a co-debtor (co-signer) without violating the automatic stay.
- ▶ Chapter 13 “co-debtor stay” prohibits any efforts to collect a consumer debt from a co-debtor.

Student Debts

- ▶ Dischargeable
- ▶ Non-Dischargeable
- ▶ Proof of Claim Form
 - ▶ Way to protect interests and share in distribution
 - ▶ Particularly important if the debt is dischargeable
 - ▶ Claim should include amount owed, interest, and fees incurred to collect
 - ▶ Must be filed 180 days after the first date set for meeting of the creditors

Dischargeable Student Debts

- ▶ Unpaid tuition account
- ▶ Housing and dining charges
- ▶ Mandatory student fees
- ▶ Child care fees
- ▶ Parking fees
- ▶ Bookstore charges
- ▶ Library late fees

Non-Dischargeable Student Debts

- ▶ Students debts not dischargeable unless requiring repayment would impose “undue hardship” on debtor and dependents.
- ▶ Same rule applies under Chapter 7 or 13, but only certain student debts are nondischargeable.
- ▶ Student debtor must file separate “undue hardship” proceeding (no general discharge).

What Debts Are Excepted?

- ▶ An educational benefit overpayment or loan made, insured, or guaranteed by a government agency or made under any program funded by a government or nonprofit agency.
- ▶ An obligation to repay funds received as an educational benefit, scholarship, or stipend.
- ▶ A “qualified education loan” under the Internal Revenue Code.
- ▶ **Practice Tip: Interest that accrues after the bankruptcy was filed is not dischargeable so track that BUT don't try to collect it while the stay is effective**

Undue Hardship – Discharging Nondischargeable Debt

- ▶ Nondischargeable student debt can only be discharged based on “undue hardship.”
- ▶ Debtor must file separate adversary proceeding (requires summons and complaint).
- ▶ Parents incurring nondischargeable debt for student’s education can also claim undue hardship.
- ▶ Parents filing for bankruptcy may claim “clawback” of “preferential” tuition payments.

DOE Guidance

DCL: GEN 23-13

- ▶ Applies to educational institutions or “holders” under the Federal Family Education Loan Program (FFELP) and Federal Perkins Loan Program (Perkins)
- ▶ Two part test on how to respond to adversary proceeding
- ▶ First, College must **evaluate undue hardship claim** and if facts support
 - ▶ Stipulate to the facts and recommend full or partial discharge
- ▶ Second, if no undue hardship would **costs of defending** exceed cost of amount owed

DOE Guidance

DCL: GEN 23-13

- ▶ Three part test for evaluating undue hardship
- ▶ Provides guidance on evaluating each component of test
- ▶ Promotes three goals:
 - ▶ Clear, transparent, and consistent expectations for discharge (that borrowers understand even when unrepresented)
 - ▶ Reduce borrowers burden in pursuing the adversary proceeding by simplifying the fact-gathering process
 - ▶ Increase number of cases in which the holder stipulates to the facts demonstrating undue hardship and recommends discharge, when the facts support it

DCL Adopts Three-Part *Brunner* Test

- ▶ Can debtor maintain a “minimal standard of living” if required to repay the loan?
- ▶ Is the current ability to repay the debt likely to persist over time?
- ▶ Has debtor made “good faith efforts” to repay the loan?

Minimal Standard of Living

- ▶ Based on IRS standards
- ▶ Do allowable expenses under IRS Standards exceed the debtor's gross income?
 - ▶ If yes, this element is satisfied.
- ▶ If actual expenses fall below expenses required for minimal standard of living, may need to project expenses they would incur

Persistence of Inability to Pay

- ▶ Will the debtor's inability to repay the debt, while maintaining the minimal standard of living, likely persist for a significant portion of the repayment period?
- ▶ Presumptive Factors: retirement age, disability, chronic injury, protracted unemployment history, lack of degree, or extended repayment status

Good Faith Efforts

- ▶ Debtor's efforts to earn income, lower expenses and repay loan.
- ▶ Factors considered include: efforts to repay, contact regarding payment options, take advantage of loan consolidation programs, and/or negotiate repayment terms.
- ▶ **Representations that can never be discharged**

Partial Hardship Discharge

- ▶ Bankruptcy court can grant partial discharge of student debt based on undue hardship.
- ▶ College can recommend partial or full discharge if undue hardship is satisfied.

Discrimination ('Fresh Start') Provisions

A government agency cannot—

- ▶ Deny a license, permit, or similar grant,
- ▶ Discriminate in employment, or
- ▶ Deny a student grant or loan—

- ▶ “solely because” a person has been in bankruptcy or has not paid a debt that is dischargeable in bankruptcy.

- ▶ § 525 violated if discrimination would not have occurred “but for” the bankruptcy or nonpayment.

When Prohibited

- ▶ While bankruptcy case is pending.
- ▶ After student debt is discharged or determined to be dischargeable.
- ▶ Whenever student grants or loans are denied “solely because” of bankruptcy or nonpayment of dischargeable debt.

When Permitted

- ▶ After student debt is determined to be nondischargeable or bankruptcy case is closed without a discharge of student debt.
- ▶ Whenever student grants or loans are denied for reasons other than student's bankruptcy or nonpayment of dischargeable debt.
- ▶ May consider post-bankruptcy credit history as evidence of future ability to pay. May impose non-discriminatory requirements (e.g., requiring all students to pay in advance).

Federal Program Rules— Student Eligibility

- ▶ Student is not eligible for Title IV loan, grant, or work study award if in default on any Title IV loan or grant overpayment.

(34 CFR 668.32)

- ▶ No default or overpayment liability if debt has been discharged or qualifies for discharge under bankruptcy law.

(34 CFR 668.35)

Discharge

- ▶ Releases debtor from paying specified debts
- ▶ Does not apply if bankruptcy case is closed without discharge of student debt

Questions?

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