

AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
LAW STUDENT DIVISION
STANDING COMMITTEE ON PARALEGALS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges Congress to amend the
- 2 U.S. Bankruptcy code to permit student loans to be discharged in bankruptcy
- 3 without proving “undue hardship,” as currently required by 11 U.S.C. § 523(a)(8).

REPORT

Student loan debt in the United States has been on a continual rise, becoming the second highest consumer debt category with more than forty-four million borrowers holding over one and a half trillion dollars in student loan debt.¹ This figure represents more than two and a half times the amount of student loan debt owed just a decade earlier.²

These numbers are staggering in the aggregate, but we must also look at the debt load carried by individuals. Recent analysis shows the average debt of a law school graduate is around \$145,000.³ Educational loan borrowers have increasingly found themselves unable to repay their student loans as indicated by student loan default rates, resulting in negative effects to an individual's financial well-being and leading to financial distress.⁴

The ABA Young Lawyers Division (the "Division") calls upon this Association to lobby Congress to swiftly address a critical crisis affecting the vast majority of its newest, youngest, and most vulnerable members. While there are other policy solutions to address the underlying causes of high student debt and the high cost of legal education, it is imperative to create a lifeline for those who are several years into practice and are drowning in debt, by removing hurdles to clearing insurmountable educational debt in bankruptcy proceedings. This resolution urges that the "undue hardship" burden be eliminated in its entirety, such that a loanholder would not have needed to hold the loan for a period of time in order to discharge the debt. This would put the student debt on the same footing as other debt in bankruptcy proceedings.

History of Student Loans and Bankruptcy

The bankruptcy process is made for just the kind of debt crisis that exists today for many student debtholders. It is an option of last resort, and the consequences of filing for bankruptcy are severe. But it also promises a fresh start for people—allowing them to continue working and providing for their families... That promise rings hollow for many people, however, because student loans—the single largest type of consumer debt—are effectively immune from the bankruptcy process.

As Congress greatly expanded the availability of student loans through the Middle Income Student Assistance Act in 1978,⁵ there were also fears of bankruptcy abuse by student

¹ Zack Friedman, *Have Student Loans Caused A Drop In Home Ownership?*, FORBES, <https://www.forbes.com/sites/zackfriedman/2019/01/18/student-loans-home-ownership/#28d2596c3d22> (Jan. 18, 2019, 8:32 AM).

² Anthony Cilluffo, *5 Facts About Student Loans*, Pew Research Center (Aug. 24, 2017), <http://www.pewresearch.org/fact-tank/2017/08/24/5-facts-about-student-loans/>.

³ Cochran, Tiffane. "What Do We Know About Law Student Indebtedness?" AccessLex, August 2019. Accessed 25 September 2020.

⁴ Press Release, U.S. Department of Education Releases National Student Loan FY 2014 Cohort Default Rate (Sept. 27, 2017); see also William Elliott & Melinda Lewis, *Student Debt Effects on Financial Well-Being: Research and Policy Implications*, 29 J. ECON. SURVS. 614, 624 (2015).

⁵ Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 504 (2000).

debtors.⁶ The Education Amendments Act of 1976 prohibited discharge of student loans in bankruptcy for the first five years of loan repayment unless the debtor could establish undue hardship.⁷ In 1990, the student loan discharge exception was extended to seven years.⁸ In 1998, the Bankruptcy Code was amended so that federally guaranteed student loans could not be discharged unless the debtor could prove undue hardship.⁹

Understanding “Undue Hardship”

Under current law, educational debt can only be discharged in bankruptcy if the borrower demonstrates that continued repayment of the debt would impose an “undue hardship” on the debtor and the debtor’s dependents.¹⁰ In practice, this standard has proven a nearly impossible hurdle to overcome in the courts. The relevant statutory provision does not provide a definition or standard to explain what constitutes an “undue hardship,” and the relevant section also fails to precisely specify how courts should determine whether a debtor qualifies for a discharge based on an undue hardship.¹¹ As a result, interpretation of this statutory framework has become the role of courts, although among the various tests that have developed, there is disagreement about what threshold a debtor must overcome to show that there is undue hardship.¹²

The vast majority of courts have interpreted “undue hardship” to require the debtor to prove three things:

- (1) the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for himself and his dependents if forced to repay the loans;
- (2) additional circumstances exist indicating that the debtor’s inability to pay is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) the debtor has made good faith efforts to repay the loans.¹³

Current Scope of the Student Debt and Bankruptcy Problem

Though the bankruptcy code has thus long contemplated student loans and provided a possible threshold for discharge, the bar is unusually high compared to other debt. In a study by LendEDU of 1,083 unique bankruptcy cases, almost 1/3 of the bankruptcies involve student loan debt.¹⁴ For those 32% of filers, student loans made up 49% of their

⁶ *Id.* at 512.

⁷ Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 363 (2013).

⁸ *Id.*

⁹ *Id.* at 363-64.

¹⁰ Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 330-31 (2013); *see also* 11 U.S.C. § 523(a)(8) (2018).

¹¹ Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 487, 419-28 (2005).

¹² Kevin Lewis, *Bankruptcy and Student Loans*, CONGRESSIONAL RESEARCH SERVICE REPORT 1 (Feb. 22, 2018).

¹³ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

¹⁴ Mike Brown, *It's almost impossible to get rid of student loan debt when filing for bankruptcy, but help may be on the way*, BUSINESSINSIDER.COM (Nov. 20, 2019, 10:00 AM), <https://www.businessinsider.com/loan-debt-student-borrowers-bankruptcy-relief-act-2019-11>.

total debt on average.¹⁵ Put another way, even if those that carry student loan debt get all of their other debts successfully discharged in bankruptcy, they will still be responsible for essentially half of their debt.

Legislative Solutions

Several members of Congress have taken notice of the high hurdle for student debt and have introduced legislation to address this issue. On January 24, 2019, Representative John Katko (R-NY-24) introduced the Discharge Student Loans in Bankruptcy Act of 2019.¹⁶ On February 13, 2020, Representative Glenn Grothman (R-WI-6) introduced the Discharge Student Loans in Bankruptcy Act of 2019.¹⁷ Only a few months later, on May 9, 2019, Representative Jerrold Nadler (D-NY-10) and Senator Richard Durbin (D-IL) cross-filed the Student Borrower Bankruptcy Relief Act of 2019 in the House and Senate.¹⁸ Despite coming from different parties, each of these bills would repeal the current limitation on educational debt and would place it on the same footing as other similar debt, by removing the special exception to student debt currently in the bankruptcy code.

Conclusion

Much of the ABA understands that young lawyers and law students are essential to its continued organizational relevancy and success. With the drastic and continued rise in student debt, which is outpacing other debt, income and inflation, young lawyers are struggling with little recourse under the current Bankruptcy Code. Passage of this resolution would assist the ABA to advocate for those who need a lifeline under their student debt.

Respectfully submitted,

Christopher L. Brown, Chair
Young Lawyers Division

August 2021

¹⁵ *Id.*

¹⁶ Discharge Student Loans in Bankruptcy Act of 2019, H.R. 770, 116th Cong. (2019).

¹⁷ To amend title 11 of the United States Code to make debts for student loans dischargeable., H.R. 5899, 116th Cong. (2019).

¹⁸ Student Borrower Bankruptcy Relief Act of 2019, H.R. 2648, S. 1414, 116th Cong. (2019).

GENERAL INFORMATION FORM

Submitting Entity: Young Lawyers Division

Submitted By: Christopher L. Brown

1. Summary of the Resolution(s).

This resolution urges Congress to enact legislation to amend the U.S. Bankruptcy code to permit student loans to be discharged in bankruptcy without needing to prove undue hardship.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution addresses the Association goals 1 through 3. Our members, especially our younger members, are burdened with an unrealistic debt load. This resolution would give them an emergency hatch as a last resort. By providing that escape hatch, we are also improving our profession and advancing diversity in our profession, as debt loads are disproportionately borne by minority students.

3. Approval by Submitting Entity.

The ABA Young Lawyers Division Assembly approved this resolution at the Midyear 2021 meeting, on February 19, 2021.

4. Has this or a similar resolution been submitted to the House or Board previously?

The House has not considered the merits of a resolution endorsing the dischargeability of student debt in bankruptcy. This resolution was previously submitted for the Midyear 2021 meeting but was withdrawn at that time.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

No known Association policies would be countered by the policies set forth in this resolution. Association policies relevant to this Resolution would be bolstered by the adoption of this policy. Known policies include:

- 92A118, which urged that Congress amend the IRS code to allow for full deduction of interest paid on student loans;
- 10M113, which urged corrections to various loan forgiveness programs;
- 10M301, which advocated for favorable repayment terms, use of TARP funds for temporary assistance, and additional accessibility of federal repayment programs;
- 11A111A, which advocated for extending federal student loan repayment terms

and federal student loan programs to those who used alternative sources of credit from commercial lenders, making repayment terms in federal law school loans as beneficial to the borrower as possible to allow as many law students and graduates as possible to qualify for such programs as income-based repayment, consolidation, and other forms of loan repayment assistance authorizing the use of federal funds to provide such individuals with temporary assistance to meet their obligations to lenders with a corresponding obligation to repay such assistance.

- 14A107, which opposed caps to Public Service Loan Forgiveness programs;
- 15M106, which urged law schools and bar associations to provide debt counseling and debt management education to law students, young lawyers, and newly admitted lawyers;
- 15A110, which encouraged the Council of the Section of Legal Education to mandate financial counseling and otherwise develop financial data and programming for those considering law school;
- 20A10D, which urged extension of administrative forbearance of federally-held student loans until September 30, 2021, and calls on governments, bar associations, and lenders to assist those experiencing financial hardship due to the pandemic; and
- 21M106C, which urged Congress and the Executive Branch to develop and implement programs to assist lawyers experiencing financial hardship due to their student loan obligations.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

7. Status of Legislation.

Though this resolution doesn't specifically endorse any single piece of legislation, several pieces of legislation that were introduced in the the current and recent sessions of Congress that achieve the goals of this resolution:

- 117th Congress
 - H. Res. 100, 117th Congress (2021)
 - Calling on the President of the United States to take executive action to broadly cancel Federal student loan debt
 - Does not address dischargeability of debt in bankruptcy but recognizes the scope of the student loan debt crisis and calls for executive action
 - Introduced 2/4/21 but no further action after referral to Committees on Education and Labor and Ways and Means
 - Lenders Offer Assistance Now Act or the LOAN Act, H.R. 1143, 117th Congress (2021)
 - This bill requires the discharge of a private education loan in the event of the student borrower's disability. Such a discharge is not

considered income for tax or other purposes. Additionally, the bill prohibits the automatic default of a private education loan due to the disability of a loan cosigner.

- Introduced on February 18, 2021 to the House; referred to Subcommittee on Antitrust, Commercial and Administrative Law on April 28, 2021; no further action
- 116th Congress (2019-2020)
 - Discharge Student Loans in Bankruptcy Act of 2019, H.R. 770, 116th Cong. (2020)
 - This legislation was introduced in the House on January 24, 2019. On March 5, 2019, it was referred to the House Subcommittee on Antitrust, Commercial, and Administrative Law. No other hearings or votes were held in the 116th Congress on this legislation.
 - To amend Title 11 of the United States Code to make debts for student loans dischargeable, H.R. 5899, 116th Cong. (2020)
 - This legislation was introduced in the House on February 13, 2020. On February 13, 2020, it was referred to the House Committee on the Judiciary. On March 5, 2019, it was referred to the House Subcommittee on Antitrust, Commercial, and Administrative Law. No other hearings or votes were held in the 116th Congress on this legislation.
 - Student Borrower Bankruptcy Relief Act of 2019, H.R. 2648, 116th Cong. (2020), cross-filed as S. 1414.
 - This legislation was introduced in the House on May 9, 2019. It was marked up in the Judiciary Committee on September 15 and 29, 2020. It was reported out of Judiciary on September 29, 2020, by a vote of 19-5. No other hearings or votes were held in the 116th Congress on this legislation.
 - The Senate bill was introduced and also referred to the Judiciary Committee on May 9, 2019. It has not been further considered. No other hearings or votes were held in the 116th Congress on this legislation.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The YLD plans to work with cosponsors and the ABA's Governmental Affairs Office on advocacy around this policy. Additionally, the YLD will work on a toolkit for young lawyers to implement advocacy efforts in their Congressional District offices as well.

9. Cost to the Association.

The only indirect costs to the Association are those for lobbying costs in association with the Government Affairs Office for purposes of promoting implementation.

10. Disclosure of Interest.

No disclosures.

11. Referrals.

Business Law Section
 Center on Children and the Law
 Commission on Racial & Ethnic Diversity in the Profession
 Commission on Sexual Orientation and Gender Identity
 Commission on Women in the Profession
 Criminal Justice Section
 Forum on Affordable Housing and Community Development Law
 Government and Public Sector Lawyers Division
 Health Law Section
 Judicial Division
 Law Practice Division
 Law Student Division
 Science & Technology Law Section
 Section of Civil Rights and Social Justice
 Section of Family Law
 Section of Labor and Employment
 Section of Litigation
 Section of State and Local Government
 Senior Lawyers Division
 Standing Committee on Continuing Legal Education
 Solo, Small Firm and General Practice Division (GPSolo)
 Tort, Trial, and Insurance Practice Section

12. Name and Contact Information

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EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution urges Congress to enact legislation to amend the U.S. bankruptcy code to permit student loans to be discharged in bankruptcy without needing to prove undue hardship.

2. Summary of the issue that the resolution addresses.

Under current Bankruptcy Code, student loans are virtually un-dischargeable in bankruptcy proceedings. This resolution would urge Congress to remove the impediment to dischargeability.

3. Please explain how the proposed policy position will address the issue.

By removing the statutory impediment to dischargeability, student loans would be dischargeable in bankruptcy proceedings like other debt.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None currently identified.