DISCHARGEABILITY OF STUDENTS' FINANCIAL OBLIGATIONS: STUDENT LOANS VERSUS STUDENT TUITION ACCOUNT DEBTS

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"Neither a borrower nor a lender be."[1] Unfortunately, the economics of higher education regularly renders the old adage obsolete. Colleges and universities often extend credit to students who are unable to pay tuition and fees on a current basis. By "extending credit," these educational institutions are then faced with the possibility of becoming creditors in the students' subsequent bankruptcy proceedings. Although student loans are exempt from the general discharge granted to debtor students, the landscape changes when the students' debt simply reflects unpaid bills or outstanding tuition accounts. These debts do not qualify for the student loan exception to discharge. Thus, the distinction between loans and unpaid tuition accounts is an important one. Not only can this distinction make a crucial difference in the ability to collect the amount owed, it can also significantly impact existing debt collection efforts as well as debtor students' future relationships with creditor institutions.

I. OVERVIEW OF DISCHARGE IN BANKRUPTCY

One of the central purposes of the Bankruptcy Code is to give worthy debtors a "fresh start."[2] At the heart of the debtors' abilities to obtain this fresh start is the discharge of debts under § 727 (liquidation) and § 1328 (personal reorganization) of the Code.[3] Upon being granted a discharge by the Bankruptcy Court, the debtors have their obligations and debts, with several exceptions, forgiven.[4] The

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1. WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 3.

2. Grogan v. Garner, 498 U.S. 279, 286 (1991); *In re* Bankvest Capital Corp., 360 F.3d 291, 296 (1st Cir. 2004) (quoting *In re* Carp., 340 F.3d 15, 25 (1st Cir. 2003)).

3. H.R. REP. NO. 95–595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 (legislative history to 11 U.S.C. § 727). As discussed in later footnotes, for the purpose of this article, no important distinction presently exists between discharges obtained under different chapters of the Code. Selections from the legislative history of the provisions of the Code are found in the *Collier Pamphlet Edition of the Bankruptcy Code*. *See* COLLIER PAMPHLET EDITION (Alan N. Resnick et al. eds., 2004).

4. 11 U.S.C. § 727 (2000); 11 U.S.C. § 1328 (2000). *See also* 11 U.S.C. § 524(a)(2) (2000) ("[A discharge] operates as an injunction against the commencement or continuation of an

slate is wiped clean with respect to these dischargeable debts; it is as if the debts have been satisfied. A creditor cannot take any steps to recover on debts that have been discharged.[5] This includes any action that could be regarded as harassment, discrimination, or a penalty for having obtained a discharge.[6] The Code also specifically bars discrimination in the issuing of insured or guaranteed student loans against persons who have applied for bankruptcy relief.[7]

In order for debtors to obtain a discharge, they must file a petition for bankruptcy relief along with a schedule disclosing all their debts and obligations.[8] A trustee is appointed; assets, if any, are liquidated; certain debts can be reaffirmed or reorganized; and proceeds and secured assets, if any, are distributed to the creditors according to a statutory priority scheme.[9] Absent any fraud or bad faith, the Bankruptcy Court then issues a general discharge.[10]

Certain debts, however, are not included in the general discharge: taxes, support obligations, liabilities for fraud or intentional torts, and student loans.[11] Specifically, the student loan exception to discharge applies to all student loans—including direct, insured, or guaranteed loans.[12] This exception is self-executing, and the lender or institution need not commence an adversary proceeding or file a motion to determine the dischargeability of any student loan.[13] In this sense, the

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action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.").

5. 11 U.S.C. § 524 (2000).

6. H.R. REP. NO. 95-595, at 365–6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; S. REP. NO. 95-989, at 80 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787.

7. 11 U.S.C. § 525 (2000).

8. *See id*. § 301 (filing petition) and § 521 (scheduling debts and debtor's duties).

9. *See id.* §§ 701–702 (selection of trustee); *id.* §§ 721–728 (collection, liquidation, and distribution of the estate).

10. *Id.* § 727 (discharge). For the purposes of this article, there is no present distinction between a discharge obtained under a Chapter 7 liquidation and a personal reorganization under Chapter 13. Chapter 13 allows the debtor to pay off creditors under an approved plan and to obtain a discharge under § 1328. Section 523, however, excepts from any discharge—including both §§ 727 and 1328—student loans. 11 U.S.C. § 523(a)(8) (2000). Section 1328 was specifically amended in 1990 to incorporate the student loan exception provided by § 523(a)(8). A line of cases prior to the amendment of § 1328 distinguished between discharges under Chapters 7 and 13. *See, e.g.*, Johnson v. Edinboro State Coll., 728 F.2d 163, 166 (3d Cir. 1984). *See also infra* note 49.

11. 11 U.S.C. § 523(a)(1)–(19) (2000). On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. P.L. 109-8 (April 20, 2005). This new Act, which amends several provisions of the Bankruptcy Code, places additional burdens on a debtor seeking to file for bankruptcy protection. While the impact of the Act on student debtors remains to be seen when the provisions go into effect in October 2005, the language of the student loan exception to discharge found in § 523(a)(8) remains largely unchanged, adding only text that clarifies that all educational loans defined in § 221(d)(1) of the Internal Revenue Code are included in the exception. Pub. L. 109-8, § 220, 119 Stat. 23 (to be codified at 11 U.S.C. § 523). See also *infra* note 17 and accompanying text (discussing HEAL loans).

12. *Id.* § 523(a)(8); S. REP. NO. 95-989, at 77–79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787.

13. S. REP. NO. 95-989, at 77–79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787.

bankruptcy laws not only benefit the debtor, but also provide certain creditors with protections consistent with public policy.[14]

This is not to say that student loans can never be discharged. Through the showing of undue hardship, a debtor may be able to have her student loans forgiven.[15] The courts, however, have been hesitant to grant these hardship discharges.[16] Courts have imposed a heavy burden on the debtor and look to several different, nondispositive factors in arriving at case-by-case determinations of hardship.[17] Just as the debtor can seek to expand the general discharge, a creditor can oppose the general discharge or the dischargeability of a certain debt.[18] Claims of fraud or concealment are grounds for challenging, as well as

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14. *In re* Marchiando, 13 F.3d 1111, 1115 (7th Cir. 1994). *See also In re* Burkhead, 304 B.R. 560, 565 (Bankr. D. Mass. 2004) (holding that the court must balance the general policy of preventing a discharge of a student loan with the fundamental bankruptcy principle of providing a "fresh start."); *In re* Joyner, 171 B.R. 762, 764–65 (Bankr. E.D. Pa. 1994) (holding that loans for fees other than tuition are nondischargeable, even if for room, board, and books). See *Mehta v. Boston University*, 310 F.3d 308, 311–12 (3d Cir. 2002), for a good discussion of the history and purpose behind this exception to discharge.

15. *Mehta*, 310 F.3d at 311-12; Andrew M. Campbell, Annotation, *Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978* (11 U.S.C. § 523(A)(8)(B)) *Discharge of Student Loans*, 144 A.L.R. FED. 1 (2005).

16. *See generally* TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 927–28 (1st Cir. 1995) (discussing the nondischargeability of student loans provided by a federal credit union); *In re* Burkhead, 304 B.R. 560, 566 (Bankr. D. Mass. 2004) (holding that debtor who was able to work part-time despite a debilitating medical condition failed to demonstrate that repayment of her student loan would cause her undue hardship).

17. *See In re Burkhead*, 304 B.R. at 565 (finding that the debtor failed to meet her burden on undue hardship). The court looked to:

> (1) whether the Debtor could meet necessary living expenses . . . if forced to repay the loans; (2) whether the Debtor has made good faith efforts to repay the loan; (3) whether the Debtor filed for bankruptcy for the sole reason of discharging the student loan debt; [and] (4) whether additional facts . . . such as a medical condition . . . weigh in favor of a hardship discharge.

Id. *See also TI Federal Credit Union*, 72 F.3d at 927 (suggesting hardship must be attributed to unusual circumstances such as illness or an unusually large number of dependants); Weller v. Tex. Guaranteed Student Loan Corp., 316 B.R. 708, 716–17 (Bankr. W.D. Mo. 2004) (collecting cases and identifying nine factors considered in determining undue hardship). It should be noted that with loan interest rates at record lows, the existence of forbearance and forgiveness programs and the ability to consolidate and restructure debt could weigh in favor of precluding hardship discharges.

A note on Health Education Assistance Loans ("HEAL"): Not all educational loans are governed by the general discharge provisions of the Code. For example, HEAL are governed by the discharge provisions of the act establishing such loans. 42 U.S.C. § 292 (2000). Under this separate statute, the "undue hardship" standard is replaced by a burden on the debtor to show that not discharging the loan would be "unconscionable." *Id*. § 292f. This standard has been described as "more exacting" than the undue hardship standard set forth in the Code. *See In re* Buracker, No. 02-83952, 2004 WL 950771, at *2 (Bankr. C.D. Ill. May 3, 2004) (citing U.S. Dept. Health & Human Serv. v. Smitley, 347 F.3d 109 (4th Cir. 2004)). However, the analysis of "unconscionability" to be employed by the reviewing court is largely the same as a determination of "hardship." *Id*.

18. *See* 11 U.S.C. § 523(a)–(d) (2000).

revoking, a discharge.[19] Creditors, however, should be aware that a court can award the debtor her reasonable attorneys' fees and costs for successfully defending against a challenge to a discharge.[20] Therefore, both the creditor and debtor must carefully consider the costs and benefits involved in seeking an expansion or diminution of the standard discharge.

II. STUDENT LOANS VERSUS STUDENT ACCOUNTS

Student loans, whether from the government or an educational institution, cannot be discharged absent an affirmative showing of undue hardship by the debtor. However, unpaid *bills* and *accounts* for tuition, fees, and other charges assessed by the college or university are included in the standard bankruptcy discharge.[21] With such different treatment between loans and unpaid tuition accounts, it is important to examine the distinction between the two. In most cases, the debts in question will be in the form of loans made under established programs, including those created and governed by state and federal statute or an established loan program.[22] In such cases, there should be no dispute that the debt qualifies as a loan. More problematic is the situation in which the circumstances surrounding the extension of "educational credit" are unclear and the documents, if any, are ambiguous.

With the term "loan" being undefined in the context of the discharge provisions of the Code, and also not defined under the general definitions in § 101 of the Code, courts addressing whether a debt is a true "loan" have looked to the traditional definition and use of this term. In *In re Renshaw*, the court applied the traditional common law notion that, "[t]o constitute a loan there must be (i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services to another, and (iii) the other party agrees to pay for the sum or items transferred at a later date."[23] The court added that "[t]his definition implies that the contract to transfer items in return for payment later must be reached prior to or contemporaneous with the transfer. Where such is the intent of the parties, the transaction will be considered a loan regardless of its form."[24] The court then instructed that the nonpayment of tuition could qualify as an educational loan only

19. Under § 727(c), a creditor, trustee, or the United States Trustee has an outside window of one year from the date of discharge or closing of the case in which to challenge the discharge on limited grounds including fraud and concealment. *Id*. § 727(c). Under Bankruptcy Rule 8002, a party has ten days in which to file a notice of appeal concerning any court decision, ruling, or judgment. FED. R. BANKR. P. 8002(a).

20. 11 U.S.C. § 523(d) (2000).

21. *See, e.g.*, *In re* Chambers, 348 F.3d 650 (7th Cir. 2003); *In re* Mehta, 310 F.3d 308 (3d Cir. 2002); *In re* Renshaw, 222 F.3d 82 (2d Cir. 2000); *In re* DePasquale, 225 B.R. 830 (B.A.P. 1st Cir. 1998).

22. Such loans include federal Perkins Loans, HEAL loans, Stafford Loans, or other traditional loans, both public and private, requiring detailed documentation. Another indicator of a traditional loan could be the loan's ability to be consolidated or transferred on a secondary market.

23. *In re Renshaw*, 222 F.3d at 88.

24. *Id.*

(1) where funds have changed hands or (2) where the school extends credit in accordance with a promissory agreement for repayment.[25] This approach, which adopts the principle that exemptions from discharge are to be interpreted narrowly in favor of the debtor, appears to be widely adopted by the courts.[26]

Other courts, including the First Circuit Bankruptcy Appellate Panel ("B.A.P."), have given a slightly more expansive definition of "loan" by looking to the overall substance of the transaction and to the understanding between the parties, but *not* to whether any money has changed hands.[27] The First Circuit B.A.P. has suggested that one or two bookkeeping entries, such as posting a paper balance to a debtor's account and then debiting the account to pay tuition, could create a loan if there was a mutual contemporaneous understanding concerning future repayment.[28] At least one court has found that the extension of short-term credit to a student awaiting receipt of other financing can constitute a loan.[29] Another court has stated that an agreement to perform future services in lieu of cash repayment might qualify as a loan.[30] Yet, even those courts that have relaxed the technical requirements of a loan still require that some common understanding exist between the parties.[31]

In re Roberts illustrates this distinction between a loan and an account.[32] In *Roberts*, the court held that amounts owed by the debtor to the college for certain evening and weekend classes on the college's campus were dischargeable.[33] On the other hand, the court also found that amounts owed for certain classes offered by the college but held at the debtor's place of employment were exempt from

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25. *Id.* at 90. *See also In re* Merchant, 958 F.2d 738, 740–41 (6th Cir. 1992) (holding that where student agreed to repay credit extensions used for educational expenses, the credit extensions were loans); *In re* Grand Union Co., 219 F. 353, 356 (2d Cir. 1915) (holding that a loan is a contract wherein one party delivers a sum of money to another party, and the latter agrees to return a sum equivalent to that which was borrowed). Whether or not funds or credits extended to students constitute a loan is just part of the analysis; the funds must also be for "educational" purposes. *In re* Shipman, 33 B.R. 80, 82 (Bankr. W.D. Mo. 1983). The courts generally have established a broad definition of the "educational" requirement, including funds and credits for room, board, and books. *In re* Joyner, 171 B.R. 762, 764-65 (Bankr. E.D. Pa. 1994).

26. *In re Chambers*, 348 F.3d at 656-57; *In re Mehta*, 310 F.3d at 316-17. *See also In re* Roberts, No. 03-009655, 2004 WL 2278773, at *2 (Bankr. N.D. Iowa Oct. 1, 2004) (holding that a "contract to transfer items in return for payment later must be reached prior to or contemporaneous with the transfer" and that "[w]here such is the intent of the parties, the transaction will be considered a loan regardless of its form").

27. *In re* DePasquale, 225 B.R. 830, 832–33 (B.A.P. 1st Cir. 1998) (listing cases stating and supporting this definition of "loan").

28. *Id.* It should also be noted that some creditor schools have argued that § 523(a)(8) excepts from discharge all "funds received as an educational benefit"—a term that includes unpaid tuition. The courts, however, have generally rejected this argument. *See In re Mehta*, 310 F.3d at 316–17 (citing *Renshaw*, 222 F.3d at 92). *But see In re* Najafi, 154 B.R. 185 (Bankr. E.D. Pa. 1993).

29. *In re* Hill, 44 B.R. 645, 647 (Bankr. D. Mass. 1984).

30. U.S. Dept. of Health & Human Serv. v. Smith, 807 F.2d 122, 124 (8th Cir. 1986).

31. *In re DePasquale*, 225 B.R. at 832–33.

32. No. 03-009656S, 2004 WL 228773 (Bankr. N.D. Iowa Oct. 1, 2004).

33. *Id.* at *3.

discharge.[34] Based on the college's varying policies concerning payment for those classes, the court drew distinctions between the treatment of the amounts owed for the different categories of classes.[35] The college *did not* require prepayment for classes at the debtor's place of employment and allowed *future* payment by either the debtor or the employer.[36] Thus, the extension of educational credit to be paid at a future date was considered a loan.[37] The college did, however, *require* prepayment for evening and weekend classes.[38] The student's failure to pay (and the college's failure to collect on) tuition bills due at the beginning of the term was *not* considered a loan where there was no agreement to *defer* payment of such bills.[39] In other words, no extension of educational credit could be repaid at a future date, and thus, no student loan existed.[40]

III. COLLECTING DEBTS AND PROTECTING AGAINST DISCHARGE

It may seem unfair or anomalous to treat student loans and unpaid tuition accounts differently when the result in both instances is an institution's failure to receive payments due for educational services. As one court has noted, however, in declaring a tuition account debt to be discharged:

> This decision does not leave educational institutions without the ability to protect their financial relationships with their students. Educational institutions may avoid the situation presented in this case by taking simple precautions. When students fail to pay tuition bills on time, institutions can withhold educational services until payment, or they can enter into a separate agreement with the student to accept later payment. A separate agreement to accept later payment would create a loan and would be excepted from discharge under § 523(a)(8).[41]

So to protect themselves against nonpayment, institutions are left with difficult decisions about whether to issue an additional number of traditional loans instead of billing students or to "lock the doors" on students unable to prepay their tuitions. Each of these potential remedies is imperfect. Locking the doors on students is a harsh measure that institutions usually wish to avoid. Institutions usually wish to avoid situations that can both disrupt the educational services and embarrass students with whom the institutions hope to establish a long-standing relationship. Logistically, it is also often a difficult policy to enforce. On the other hand, educational institutions should not have to be in the full-time business of issuing loans, as there are drawbacks to providing services on credit to each student. For example, loans reduce operating capital and can subject the institutions to lending laws. Additionally, the schools should not have to enter into

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *In re* Chambers, 348 F.3d 650, 658 (7th Cir. 2003).

promissory agreements with each student before each semester.

The case law hints that there could be a middle ground. The institutions can continue to bill students and *later* try to treat unpaid bills as loans. As illustrated by several courts, the essential component of a "loan" is the mutual understanding that the credit extended must be paid back at some future time, the agreement between the parties that the amount now due will instead be due in the future. While a unilateral statement by the institution that overdue tuition bills become loans is most likely insufficient, the institution may reach separate agreements with students for the future payment of the amounts presently due in exchange for the continuation of educational services.

For example, an institution might adopt a policy of identifying all delinquent accounts at an early stage and notifying the students. The institution could then require these students to enter into additional repayment agreements, credit their accounts with the "loan" proceeds, and then also debit the accounts to payoff the outstanding debts. The repayment terms could be as simple as a promise to repay once other loans or funds are obtained, a promise allowing the students and the institution to work together in finding alternate sources of financing. This approach could be useful when a student misses a loan application deadline or sees her financial situation change unexpectedly. Of course, it is in the institution's best interest to take these steps as soon as possible, and in any event before the student files for bankruptcy protection.[42]

How the courts will treat, on a case-by-case basis, institutions' attempts to classify unpaid tuition accounts as loans is uncertain. On one hand, a loan allows a student to pay for educational services after he or she obtains and has the ability to benefit from those services. For example, a loan allows a student to obtain a degree and then use the degree to obtain employment to pay for it. Thus, there is justification for the proposition that disputes be resolved in favor of a determination that a debt is a loan. On the other hand, the courts may be reluctant to impose loan obligations on unwilling or unwitting students. Permitting the conversion of unpaid accounts into loans could discourage institutions from issuing loans in the first place. Coupling the fresh start policy of the bankruptcy laws with

42. In any circumstance, a creditor is usually better off dealing with a debtor before that debtor obtains relief afforded by the automatic stay. In fact, acting as early as possible is most advisable, as payments from a debtor within ninety days (and up to a year in some instances) of the bankruptcy petition can be considered a preference and be recovered by the estate. *See* 11 U.S.C. § 547 (2000) (preferences and certain exceptions); *Id*. § 548 (fraudulent transfers and obligations). This is not to say, however, that prompt action after the date of the bankruptcy petition is futile. Even after the date of petition but before discharge, a creditor—being mindful of the automatic stay and working with debtor's counsel, the trustee, and the court—can attempt to design a repayment plan or reaffirmation of debts. *See id*. § 524(c) (reaffirmation of debts); *Id*. §§ 1321–1330 (personal reorganization plan). Formal reaffirmation in this context, however, should only be sought by an institutional creditor through its counsel, and will likely require court approval. *See, e.g.*, FED. R. BANKR. P. 408; *In re* Lucas, 317 B.R. 195, 206 n.9 (D. Mass. 2004) (discussing requirement under local bankruptcy rules that, except in expressly set forth circumstances, an institution may only be represented by counsel). It is worth noting that the Bankruptcy Abuse Pretension and Consumer Protection Act of 2005 requires that creditors include certain disclosures in any reaffirmation agreement. Pub. L. 109-8, § 202, 119 Stat. 23 (to be codified at 11 U.S.C.A. § 524).

the fact that—for financial or other reasons—institutions can choose whether to issue loans or simply bill the students at the start of their relationships, the courts might remain reluctant to favor loans over dischargeable accounts.[43]

IV. ADDITIONAL CONSEQUENCES OF DISCHARGEABILITY DETERMINATION

Determining the dischargeability of an unpaid student account or loan affects not only the institution's bottom line, but also influences the future relationship between the debtor student and the creditor institution. What if the debtor student wishes to reenroll in the creditor institution? What if the debtor student wants a copy of her transcript? While it is unusual for a debtor student and a creditor institution to be discussing a future relationship of a contractual nature, such a relationship is readily imaginable. More common, though, is a situation in which the debtor student asks for a transcript or recommendation from the creditor institution.

Section 524 of the Code prohibits a creditor from attempting to collect on any discharged debt from a debtor in bankruptcy. This section places a bar on any acts of the creditor that can be viewed as an attempt to extort post discharge payment on the discharged debt. A violation of this section warrants monetary and other sanctions for contempt against the creditor.[44] Often, allegations concerning alleged violations of § 524 are coupled with allegations of violations of the Code's automatic stay prohibiting actions against the debtor while in bankruptcy.[45]

The courts have consistently held that a discharged student debt on a tuition account cannot be grounds for withholding a school transcript.[46] The courts have viewed institutions' withholding of transcripts in these situations as an extortionate attempt to force a student to pay on a discharged debt. The reasoning of the courts, and the purpose and history of the applicable provisions of the Code, imply that the same analysis and decision could be applied to institutions that deny reenrollment to a former student on the grounds that she had a student account debt discharged.[47]

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43. As discussed above several courts have adopted the view that exemptions from discharge should be narrowly construed in favor of the debtor. *See, e.g., In re Chambers*, 348 F.3d at 656–57.

44. Besset v. Avco Financial Serv., Inc., 230 F.3d 439, 444–46 (1st Cir. 2000); Cox v. Zale Del., Inc., 239 F.3d 910, 915–16 (7th Cir. 2001). It should be noted, however, that § 524 does not appear to provide for a private cause of action; thus, the debtor must bring an action for contempt under §§ 105, 524(a)(2), or 362. *See* Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 422–26 (6th Cir. 2000).

45. A core feature of the Code is the "automatic stay" set forth by § 362. 11 U.S.C. § 362 (2000). The automatic stay is a general stay of all pending and contemplated proceedings or actions involving the debtor. It serves as a protective device for both the debtor (by providing him or her with breathing room) and the creditors (by ensuring a fair, common resolution of all claims and not a scramble for assets).

46. *See* Johnson v. Edinboro State Coll., 728 F.2d 163, 165 (3d Cir. 1984). *See infra* note 48 and accompanying text.

47. Providing still further protection to debtor students who wish to reenroll in or obtain a transcript is § 525's prohibition against discriminating against a bankrupt or former bankrupt person. 11 U.S.C. § 525(a)–(c) (2000). Thus, a debtor student might be able to obtain financing

On the other hand, where the debt is a nondischargeable student loan, the courts appear recently to have relaxed their restriction on allowing creditor institutions to withhold the debtor student's transcript.[48] In such instances, the courts have held

for future enrollment despite being in default on past tuition amounts. This is not to say that the institution would have no other nondiscriminatory, nonextortionate grounds for refusing to readmit the student. The institution, however, should be careful to classify the "alternative" grounds as the proximate and only reason for taking adverse action against the student. *See* FCC v. Nextwave Personal Communications, Inc., 537 U.S. 293, 300–02 (2003) (finding under § 525, even where the FCC had valid regulatory motive for revoking the license of the debtor, the debtor's bankruptcy and failure to pay a discharged debt were considered alone the proximate cause of revocation, whatever the agency's ultimate motive may have been). Prior to amendments in 1984 and 1994, the courts stated that § 525, in this context, applied only to government entities, and therefore, only to state schools. *See, e.g., In re* Ware, 9 B.R. 24, 25 (Bankr. D. Mo. 1981); Paula Aiello and Eric K. Behrens, *Student Loans, Chapter 13 of the Bankruptcy Code, and the 1984 Bankruptcy Amendments*, 13 J.C. & U.L. 1, 15 n.71 (1986) (stating that the 1984 amendments to § 525 leaves open the question whether private schools may withhold transcripts of student debtors). However, the present language of the statute appears to extend its application, in this context, to both private and public institutions. In any event, a private institution is still subject to § 362, and the courts appear to reach the same results whether applying § 362 or § 525. *See In re* Billingsley, 276 B.R. 48, 51 n.3 (Bankr. D.N.J. 2002); Sara Hollan, *Student Loan Debtors and the Automatic Stay: Can a University Lawfully Withhold the Transcript of a Defaulting Student Debtor?*, 56 Baylor L. Rev. 205, 211–25 (2004). Additionally, prior to the 1984 and 1994 amendments, debtor students challenged the withholding of transcripts by invoking the Supremacy and Equal Protection Clauses of the Constitution. *See Validity, Construction, and Application of Statutes, Regulations, or Policies Allowing Denial of Student Loans, Student Loan Guarantees, or Educational Services to Debtors Who Have Had Student Loans Scheduled in Bankruptcy*, 107 A.L.R. FED. 192 §§ 10, 11 (2004). Such challenges are not addressed in the recent, post-amendment cases. *See, e.g.*, *In re* Billingsley, 276 B.R. 48 (Bankr. D.N.J. 2002).

48. *In re Billingsley*, 276 B.R. at 54 (holding that withholding student's transcript did not violate automatic stay); Juras v. Aman Collection Serv., Inc., 829 F.2d 739, 742–43 (9th Cir. 1987) (stating that student's transcript was not security and that withholding the transcript did not violate the Code or collection laws); Johnson v. Edinboro State Coll., 728 F.2d 163, 166 (deciding that the college could withhold student's transcript and diploma without violating the Code's fresh-start policy and § 525*). But see In re* Howren, 10 B.R. 303 (Bankr. D. Kan. 1980) (concluding that is was a violation of § 525 to withhold student's transcript); Loyola Univ. v. McClarty, 234 B.R. 386 (E.D. La. 1999).

The bankruptcy court in *In re Billingsley* examined a Supreme Court case, *In re Strumpf*, 516 U.S. 16 (1995), in which the Court found that it was not a violation of the automatic stay for a creditor to refuse to perform under a contract with a debtor. *Id*. at 21. In *Strumpf*, a bank's administrative freeze on account was not a violation of the stay because it was simply a refusal to perform under a contract that was first breached by the debtor when the debtor defaulted on a loan. *Id*. The *Billingsley* court then applied *Strumpf* in ruling that supplying transcripts is a contractually based obligation and that the withholding of transcripts does not violate the stay where the debt is a nondischargeable student loan. In Re Billingsley, 276 B.R. at 51. In distinguishing the cases that arrived at contrary results, the *Billingsley* court stated that those cases were decided prior to *Strumpf* or did not consider *Strumpf*. *Id*. at 54-55. While *Billingsley* addressed only the facts of that case—involving an undisputed nondischargeable loan—it will be interesting to see if the same logic will be used in cases involving discharged or dischargeable tuition account debts. It warrants noting that in *Strumpf* and *Billingsley*, the courts addressed situations where the institutional creditors refused to perform under a contract that had been first breached by the debtor when the *debtor failed to perform*. The institutional creditors in those cases did not consider the debtor to have breached or terminated the relevant contracts through

that restrictions on releasing transcripts do not violate the provisions and intent of the Code.[49] At least one court has suggested that this rationale extends to reenrollment and that a creditor institution can deny the debtor student's request to take future classes.[50] Even with the recent case law permitting the withholding of transcripts because of outstanding loans, institutions, faced with the possibility of being found in contempt of the automatic stay and in violation of other sections of the Code, however, should proceed with caution and be sure that they are on firm ground for denying requests by debtor students.[51]

A more complicated issue arises when a student is not merely seeking a transcript, but—after she has filed for bankruptcy relief—intends to continue attending courses despite not paying her debts to the institution. In such a situation the student is not simply requesting access to her past records or seeking the right to reenroll after a discharge, she is attempting to obtain continuing services without paying for them. Here, if the debt is a loan, the institution will have promised the student that she could repay at some future time; thus, this scenario likely presents a moot issue because present repayment is not the question and the debt is nondischargeable. But if the debt is an unpaid tuition account, the institution may be able to cease providing the services to the student on the grounds that a creditor has no obligation to continue to perform under a contract where the debtor has not done so.[52] Still, the institution should proceed with caution and consider requesting permission from the bankruptcy court, the trustee, and debtor's counsel to terminate the contract for services.[53]

V. PROPER NOTICE AND COMMUNICATION CAN AVOID LATER PROBLEMS

It can easily be seen how unpaid student tuition accounts and student loans can create headaches for institutions. Some of the stress can be alleviated through

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the *filing for bankruptcy protection.* Section 365(e)(1) of the Code prohibits the enforcement of Ipso Facto clauses that terminate or modify contractual rights through a party's insolvency or filing for bankruptcy relief. 11 U.S.C. § 365(e)(1) (2000).

In this context, there is no distinction between the discharges provided by Chapter 7 and Chapter 13. *In re Billingsley*, 276 B.R. at 51 (discussing how student loan exemptions to discharge have recently been amended to apply to petitions under Chapter 13). It should also be noted that the court in *Billingsley* saw no need to draw a distinction between analyses under the present language of §§ 362 and 525. *Id*. at 51 & n.3.

49. *See supra* notes 42–48 and accompanying text.

50. Juras v. Aman Collection Serv., Inc., 829 F.2d 739, 742 (9th Cir. 1987).

51. Caution should especially be taken in situations where the student is in bankruptcy but has not yet obtained a discharge. Because that student could still request a specific discharge of the student loans, the courts might view withholding a transcript as a violation of the automatic stay. In *Loyola University v. McClarty*, 234 B.R. 386 (E.D. La. 1999), the court did not indicate whether the debt was a dischargeable account debt or a nondischargeable loan (the parties appeared to be disputing the status of the debt) but stated that the institution's withholding of the transcript violated the automatic stay. *Id*. at 387. In any event, with the costs and risks of litigation and appeals, an institution might, as a practical matter, simply release the transcript and avoid the fight.

52. *See supra* note 48.

53. *See, e.g.*, 11 U.S.C. § 365 (2000) (stating that a trustee has the authority to assume or reject executory contracts and unexpired leases).

better monitoring of unpaid accounts and opening lines of communication between all persons involved with accounts receivable, debt collection, and student services.

Starting with the monitoring of unpaid accounts, an institution should, if it does not already do so, flag accounts that have outstanding balances and discuss the matter with the individual students. Whether the institution chooses to allow the student to continue to receive services and whether it attempts to reshape the unpaid account as a loan, the institution is better served by early action—especially before the student files for bankruptcy protection. Policies and procedures should also be established to ensure that student services offices share the same basic understanding.

When an unpaid account goes into collection, the collection agency and collection attorneys need to keep the institution informed about the status of the action as well as the status of the debtor student—who may consider filing for bankruptcy protection. Upon notice that the student filed for bankruptcy protection, the collection agency and attorney not only must avoid problems with the automatic stay and § 524 in pursuing the collection action, but must also make sure that the institution does not violate these Code provisions through other actions adverse to the student—for example, by refusing to release the student's transcript.

Opening the lines of pre-bankruptcy communication will also allow the institution, and its collection agencies and attorneys, to evaluate the nature of the debt and chart the safest and most efficient course of action. At this planning stage, the institution can seek settlement or reaffirmation of the debt if there is doubt whether the debt is a loan or an unpaid tuition account. Proper notice and communication will enable the institution to capitalize on any leverage it might have before the bankruptcy.

Opening the lines of post-bankruptcy communication will allow the institution to evaluate whether it can pursue collection on the debt and withhold services. At this stage, the institution can decide whether it can presume that the debt is nondischargeable or whether it should seek clarification from the court before it risks contempt for future actions.

CONCLUSION

The fine line between unpaid tuition accounts and student loans has the potential of creating headaches for any educational institution. When a student files for bankruptcy protection, the law treats these two debts very differently. In facing the possibility that the debt is not a student loan, the institution not only must risk the loss of revenue, but also be wary of taking any action adverse to the student that could be viewed as an attempt to recover on a discharged debt. The important question then becomes whether the institution can take steps to protect itself if the tuition is not paid. While the institution may have some ability to classify otherwise ordinary tuition account debts as student loans, the courts will evaluate the institution's efforts on case-by-case bases. Given the consequences involved, any institution faced with such a situation should proceed with caution.