LEGAL AID FOUNDATION OF LOS ANGELES
Justice • Equity • Hope

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April 12, 2021

VIA CAL. LEGISLATIVE PORTAL

The Honorable Mark Stone
California State Assembly
State Capitol
Sacramento, CA 95814

Re: **SUPPORT: AB 424 (Stone) – Private Student Loan Collections Reform Act**

Dear Assemblymember Stone:

I am writing on behalf of the Legal Aid Foundation of Los Angeles (LAFLA) to support AB 424, the Private Student Loan Collections Reform Act. LAFLA appreciates this opportunity to express our strong support for AB 424 based on our extensive experience defending low-income student loan borrowers, many of whom are people of color, against private student loan debt collection actions. AB 424 is a crucial step to begin levelling the playing field between unscrupulous private loan holders, whose attorneys file collection lawsuits even though they lack the evidence necessary to make a prima facie case for breach of contract, and student loan borrowers, most of whom cannot afford an attorney and do not understand that they have defenses that would support a judgment in their favor.

Our Background

LAFLA seeks to achieve equal justice for low-income people through direct representation, systematic change, and community education. LAFLA is a public interest leader on student loan work in California, having developed student loan and for-profit school expertise over the last 30 years. We provide critical outreach and education, self-help clinics, and quality direct legal assistance to financially distressed student loan borrowers. We also serve as a resource for other organizations carrying out this important work both inside and outside California.

Our policy and advocacy efforts are grounded in our direct legal assistance work with low-income clients in Los Angeles. We have helped a steady stream of clients who have struggled to repay their student loans – both federal and private – due to their difficult financial circumstances. Most of our clients and their families suffer debilitating, long-term consequences from student loan defaults. For

private student loans, they suffer from negative credit histories, which impact their ability to find housing and employment. In the event a judgment is entered against them, they also face long-term financial distress caused by wage garnishment and bank account levies because many of these lawsuits result in extremely large default judgments.

AB 424 Will Protect Low-Income Borrowers from Robo-signing and Other Unfair Practices Common in Private Student Loan Debt Collection

Private student loans create unique difficulties for borrowers. Unlike federal student loans, they often have extremely high interest rates and lack affordable repayment options. Unlike other unsecured debt, student loans are not eligible for bankruptcy discharge except in very limited circumstances. Therefore, when borrowers cannot make their monthly payments – because they are low-income, lack employment, or due to other difficult circumstances – they have few options to prevent aggressive debt collection tactics and lawsuits.

Each year, thousands of private student loan debt collection lawsuits are filed in state court against low-income borrowers. The vast majority of these lawsuits are resolved by default judgment for a number of reasons. In some cases, the borrowers have not been properly served. In others, borrowers do not attempt to defend themselves because they lack the legal expertise necessary to identify and assert complex legal defenses. Most cannot afford to pay an attorney or obtain free legal assistance because many legal services organizations lack sufficient funding to assist them. Once a default judgment is entered, the borrower can face a lifetime of wage garnishment because he/she does not have the safety net typically afforded by bankruptcy.

To be clear, LAFLA is the only legal services organization in California, as far as we are aware, that employs attorneys who work full-time on student loan cases. While we are able to provide some examples based on our experiences assisting borrowers, we want to be clear that LAFLA also has limited resources to provide student loan assistance. Currently, we are only able to fund 1.5 student loan attorneys and, due to our caseload of over 100 pending student loan cases (federal and private), we have stopped accepting new cases since August 2020.

Since 2014, LAFLA has represented many private student loan borrowers, sometimes in multiple simultaneous collection lawsuits. Each of these lawsuits sought damages that ranged between $5000 and $60000. Based on our experiences, we have noticed the following common abusive debt collection practices, which are addressed by AB 424.

A. Pre-litigation Issues:

Borrowers lack the information they need to decide whether they should negotiate a repayment plan to avoid litigation, if they can afford to. Important information for assessing a borrower's legal obligation to repay a loan holder for the amount demanded includes (but is not limited to) the following:

(1) The complete terms of the loan agreement, which are necessary to fully assess which state's statute of limitations applies, the interest rate, allowable fees, how the agreement defines default, whether the agreement includes the FTC Holder Rule clause, the identity of the original lender, and other information. Often, the loan agreement incorporates other

documents, such as the Truth-in-Lending-Act (TILA) disclosure, which is often the only document that specifies the original lender and the interest rate.

(2) A complete payment history to determine whether it was correctly calculated, whether any illegal fees were charged, and the date of default for purposes of assessing a statute of limitations defense.

(3) Documentation showing each transfer of the individual loan from the original creditor to the loan holder to assess the loan holder has a right to collect on the loan. The borrower usually has no prior knowledge of the loan holder because it is not a party to the loan agreement.

We routinely request this documentation from loan holders on behalf of our clients. In response, the loan holders often provide the payment history. They also often provide the loan agreement, but sometimes do not provide a copy of incorporated documents, such as the TILA disclosures. Loan holders rarely provide documentation of the loan transfers. And, even when they do, we have no assurance that those documents are complete, because the loan holders are not legally obligated to provide any of these documents prior to litigation. As a result, borrowers and their attorneys cannot fully determine their legal obligation with respect to private student loans until a lawsuit is served.

Without any legal requirement that private student loan holders or their debt collectors provide, upon request, the documentation specified above, borrowers are left in a distressing limbo. They have no idea whether they have any legal obligation to make payments to the loan holder or debt collector, and have to wait for a lawsuit to find out. While they wait, their credit is ruined. Only after they have been sued do they have a right to obtain this information through discovery.

AB 424 would enact a commonsense measure that helps to level the playing field between borrowers, who lack sufficient information to evaluate their rights, and loan holders and loan collectors, who have full information but are often unwilling to share it with the borrower. AB 4242 will ensure that private student loan holders and debt collectors can no longer abuse this information imbalance in order to force borrowers to repay student loan they have no legal obligation to repay.

B. Post-litigation:

Courts in California have routinely rubber-stamped default judgments against private student loan borrowers, even when the plaintiffs have failed to provide sufficient evidence to make a prima facie case for breach of written contract. To recover on a claim for breach of a written contract, a plaintiff must prove that (1) the borrower agreed to the contract; (2) the plaintiff is the present owner or holder of the contract; and (3) the borrower breached the contract per its terms. AB 424 will ensure that fewer student loan holders seek default judgment when they cannot prove-up these basic elements, as well as provide remedies to borrowers when plaintiffs obtain default judgments based on false affidavits or insufficient evidence.

Borrowers often have defenses based on private student loan holders' inability to prove one or more of these elements. First, in our experience, the lender who originated the loans, who is the only creditor named in the written loan agreement, is rarely the plaintiff in these lawsuits. Instead, the plaintiff is a securitized trust or debt buyer who acquired the loan after one or more transfers. When a plaintiff is not named in a written loan agreement, under California law it is not entitled to a judgment unless it can show

it is the real party in interest.[1] The real party in interest is the person who owns or holds title to the claim or property involved.[2] Thus, a plaintiff should not be able to obtain a judgment for breach of written contract to which it is not a named party, unless it provides admissible documentary evidence showing the complete chain of transfers of the individual contract from the original lender to the plaintiff. Otherwise, any person who has a copy of a written contract can file a lawsuit and obtain a judgment, based simply on a claim that the contract was transferred to it at some prior time.

Despite these basic legal requirements, private student loan holders often seek default judgments based on conclusory affidavits in which they falsely claim that attached documents show a complete chain of transfer of an individual loan agreement from an original creditor to a loan holder.[3] In the cases we have seen, these documents only show transfers of large pools of loans that do not reference or identify the individual loan at issue in the case or refer to a document that identifies the individual loan but was prepared for litigation long after the loan transfers. Courts are routinely entering default judgments based on these "robo-signed" affidavits.

Second, private student loan plaintiffs often fail to attach all the terms of the student loan agreements to the complaint. Instead, they often attach the first page of the agreement, which serves as both a loan application and the first page of the agreement. Plaintiffs also often fail to attach key documents that are incorporated into the loan agreement, such as the TILA notice which identifies both the original lender and the interest rate. Sometimes, they do not attach these pages because they do not have them. Despite this, courts grant default judgments even though it cannot determine whether a breach occurred or the damages are properly calculated according to the terms of the loan agreement.

Another common defense to these cases is the expiration of the statute of limitations. We have seen many private loan collection lawsuits filed after the applicable statute of limitations has expired.

Some borrowers are not properly served with a lawsuit and do not discover its existence until years later, when the plaintiff seeks to garnish wages. Others are properly served, but do not seek to defend the lawsuits because they do not understand that they have potential defenses. Often, they only seek help years later, after they are served with a wage garnishment notice or bank levy. For this reason, it is important that AB 424 provide sufficient time for borrowers to discover violations and seek damages and orders setting aside the default judgments so they can raise meritorious defenses.

One of our cases is illustrative. Ms. B, an African American woman, first enrolled in West Los Angeles College in 2006 to pursue her associate degrees in business and liberal arts. At that time, she obtained a private student loan of approximately $27,000 from Bank of America. After she graduated, Ms. B could not afford her student loan payments because she was unemployed. She never made any payments on the private loan.

In 2016, Ms. B decided to go back to school in hopes of pursuing a career in the culinary arts. The new college, however, would not let her enroll due to her defaulted private student loan (reported on her credit report). When she investigated further, she was shocked learn that a default judgment for over

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[1] Code Civ. Proc., § 367; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.
[2] *Gantman v. United Pac. Ins. Co*. (1991) 232 Cal.App.3d 1560, 1566.
[3] *See, e.g.,* Stacy Cowley and Jessica Silver-Greenberg, "As Paperwork Goes Missing, Private Student Loan Debts May Be Wiped Away," *New York Times* (July 17, 2017); Robyn Smith and Emily Green Kaplan, National Consumer Law Center, "Going to School on Robo-signing: How to Help Borrowers and Stop the Abuses in Private Student Loan Collection Cases" (April 2014).

$58,000 had been entered against her by a National Collegiate Student Loan Trust (NCSLT). She had never heard of the Trust or any debt collection lawsuit before. She discovered that her mother had been served with the lawsuit, although she did not reside with her mother. Ms. B immediately called plaintiff's counsel and agreed to make monthly payments of $75 by direct withdrawal. She believed that by agreeing to this payment arrangement no other collection action would be taken against her.

Then, just three months later, the plaintiff took several thousand dollars from Ms. B's bank account based on the default judgment. For the first time, she called several legal aid offices and private attorneys searching for help. After she reached LAFLA, we identified several defenses to the lawsuit, including that it had been filed after the expiration of the statute of limitations and that plaintiff lacked evidence that it owned her loan. The plaintiff had obtained a default judgment based on an affidavit attesting that it owned Ms. B's loan, when in fact the plaintiff had only provided documents showing the transfer of large pools of loans, not the transfer of Ms. B's individual loan. We agreed to represent Ms. B and filed a motion to set aside the default based on the lack of proper service. A few weeks before the hearing on the motion, plaintiff's counsel agreed not to contest the motion and to return the funds taken from Ms. B's bank account. They eventually agreed to dismiss the lawsuit.

Here are a few more examples, all of which were dismissed without prejudice after LAFLA obtained discovery showing that plaintiffs lacked evidence that they owned the loans and/or statutes of limitations issues:

- Mr. M is African American and attended a historically black college. In 2019, he was served with six different private student loan lawsuits seeking damages of $77,000. The plaintiffs were all Sallie Mae student loan trusts. His mother, also African American, co-signed 4 of the loans and was a co-defendant in 4 of the cases.
- Ms. S is an Asian American woman who cares for her elderly husband and has been a foster mother to many children. She co-signed private student loans for her daughter. In 2018, she was served with three lawsuits filed by National Collegiate Student Loan Trusts seeking damages of over $121,000.
- In 2006, Ms. T and her mother co-signed a private student loan for $21,000 so that Ms. T could attend college at Cal State LA. They never made any payments on the loan because they could not afford to and had no affordable repayment options. In 2018, they were served with a lawsuit filed by a National Collegiate Student Loan Trust, seeking damages of over $45,000.
- In 2020, Mr. W was served with 4 lawsuits, 3 filed by National Collegiate Student Loan Trusts and 1 filed by a debt buyer, seeking damages for breach of private student loans he obtained in 2007 to attend Brooks College of Photography, a for-profit school that had engaged in widespread fraud when he attended. The lawsuits sought a total of over $150,000.
- In 2014, Ms. B, who is African American, was sued by a National Collegiate Student Loan Trust for a loan she obtained in 2007 to attend LA City College. The lawsuit sought damages of $23,000.

In such cases, AB 424 will prevent abusive filing of private student loan lawsuits. AB 424 would require that private student loan plaintiffs attach the most fundamental documents to a complaint – the complete loan agreement, a payment history, and evidence that the plaintiff owns the loan – before they may obtain a judgment. Without these documents, a court cannot evaluate whether a plaintiff has stated a prima facia case for breach of written contract, nor whether the statute of limitations has expired. A private student loan holder should not be allowed to abuse the judicial process by filing

endless debt collection lawsuits when it knows it lacks the evidence necessary to make a prima facie case for breach of written contract or that the statute of limitations has expired.

Conclusion

AB 424 is crucial to ensuring that low-income borrowers, most of whom are unable to obtain legal representation, do not face of lifetime of wage garnishment to pay off default judgments for debts they do not legally owe. We thank you for authoring AB 424 and providing us with the opportunity to express our support.

Sincerely,

Robyn Smith

Robyn Smith
Senior Attorney