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Non-Student Co-Signers and Section 523(a)(8) of the Bankruptcy Code

Melissa A. Hall†

When Congress undertook its reform of the Bankruptcy Code in 1978, there was sharp debate on the topic of student loans. Armed with statistics showing that students were defaulting on their educational debts with alarming frequency, Congress excepted these loans from its otherwise liberal "fresh start" policy of allowing bankrupt debtors to discharge nearly all of their obligations. Accordingly, under section 523(a)(8), students who take out educational loans are not permitted to discharge them in bankruptcy proceedings during the first five years of repayment.

The statute defines an "educational loan" as any educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend.

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1 Although the "fresh start" policy dominates the Bankruptcy Code, Congress has created specific discharge exceptions to it. These discharge exceptions attempt to deter debtors from discharging particular liabilities for public policy reasons. For example, in addition to educational loans, § 523 also excepts the following debts from bankruptcy discharge: debts for taxes or customs duty; debts for money, property, services, or an extension, renewal, or refinancing of credit obtained by false pretenses; debts not scheduled or listed under § 521(1) which requires debtors to file a creditor list and schedules of assets-liabilities and current income-expenditures; debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny; debts for willful and malicious injury by the debtor to another entity or to the property of another entity; debts arising from a judgment or consent decree entered in court against the debtor; or debts previously waived or denied discharge. See Bankruptcy Code 11 USCA § 523 (1979 and 1991 Supp).

2 11 USCA § 523(a)(8). See also 104 Stat 2865 (Nov 15, 1990).
Students who show "undue hardship" are exempted from this provision and permitted to discharge their loans. Congress apparently thought that making these loans non-dischargeable would safeguard the pool of educational loan funds, the solvency of which depends upon student repayment.

Student loan practices have changed in the past decade. In particular, educational lenders frequently require student borrowers to find a co-signer, who is often a spouse or a parent. Because co-signers promise to repay the debt if the student defaults, lenders perceive a decreased likelihood that these loans will sour. However, when Congress revised the Bankruptcy Code in 1978, students did not need a co-signer to obtain an educational loan.

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* 11 USCA § 523(a)(8)(B). Debtors who declare bankruptcy under Chapter 7 give up their assets, but have full rights to their future earnings. Discharge of educational loans is prohibited in Chapter 7 proceedings. Thus, under § 523(a)(8), a Chapter 7 debtor must pay back an educational loan in full unless the court discharges the debt, because payment of the debt would be an "undue hardship" for the debtor or his dependents. 11 USCA § 523(a)(8)(B).

Most educational loans excepted from discharge under Chapter 7 may be discharged under Chapter 13. 11 USC § 1328(a),(c); Lawrence King, ed. 5 Collier on Bankruptcy, § 1328.01(1)(c) (Times Mirror Books, 15th ed 1990). Although the two chapters treat educational loan discharge inconsistently, this result is typical of the difference between Chapters 7 and 13.

Debtors may retain their assets in Chapter 13 proceedings, but must file a plan to repay their debts that requires them to give up part of their future income. 11 USCA §§ 1321, 1322, 1325. The broader discharge provisions in Chapter 13 provide an incentive for debtors to fulfill their obligations under their plan. 11 USCA § 1328. To qualify for Chapter 13 treatment, an individual debtor must owe less than $100,000 in unsecured debts and less than $350,000 in secured debts. Thus, a Chapter 13 debtor may only pay back part of his educational loan. For a discussion of this inconsistent treatment of educational loans in the Bankruptcy Code, see Paula Aiello and Eric Behrens, Student Loans, Chapter 13 of the Bankruptcy Code, and the 1984 Bankruptcy Amendments, 13 J Coll & Univ L 1 (1986); Ted D. Ayres and Diane R. Sagner, The Bankruptcy Reform Act and Student Loans: Unraveling New Knots, 9 J Coll & Univ L 361 (1982-83); and Joel Kauffman and Robert Schupp, Discharge of Student Loans Under Chapter 13 (Wage Earner Plans) of the Bankruptcy Code, 93 Com L J 101 (1988).

* Some cases, such as In re Bawden, 55 Bankr 459 (M D Ala 1985) and In re Boylen, 29 Bankr 924 (N D Ohio 1983), use the terms co-signer, guarantor, or co-maker interchangeably. These terms, however, have different meanings that should be distinguished. This Comment will refer to these terms according to the definitions below:

A co-signer assumes liability for a loan only if the primary obligor (student) defaults.

The federal or state government or an agency funded by the government acts as a guarantor. A guarantor promises to repay the lending institution if the student defaults on the loan and the lending institution is unable to collect from the co-signer.

Co-makers assume equal liability for the debt, unlike co-signers who are secondarily liable for the debt. A lending institution has no obligation to attempt to collect from one co-maker before the other.

Section 523(a)(8) is silent on the topic of co-signers. There is no evidence that Congress considered the issue in 1978, nor has it addressed the problem since then. The issue has, however, arisen in bankruptcy court, where co-signers have asked with uneven success to be relieved of their obligations. Of those courts that have considered the issue directly, a majority has held that because section 523(a)(8) was created solely to prevent students from discharging their educational debts through bankruptcy, non-students may discharge these education loans. The remaining courts have applied the language of the section literally, holding that co-signers may not discharge educational loans. Yet, the question of co-signer discharge remains unresolved in most bankruptcy districts.

This Comment advocates interpreting section 523(a)(8) to permit a co-signer of an educational loan to discharge the debt in bankruptcy. This result is most consistent with the “fresh start” policy of the Bankruptcy Code, which is designed to allow debtors to discharge their existing debts, to relieve them from prior financial obligations, and to prevent harm to debtors that might otherwise result from the negative financial consequences of declaring bankruptcy. Congress’s clear intent—to preserve the pool of educational funds with the least possible damage to the “fresh start” policy—advises against applying section 523(a)(8) to non-student co-signers.

* See In re Bawden, 55 Bankr at 461; In re Behr, 80 Bankr 124 (N D Iowa 1987); In re Boylen, 29 Bankr at 924; In re Meier, 85 Bankr 805, 806 (W D Wis 1986); In re Washington, 41 Bankr 211 (E D Va 1984); In re Zobel, 80 Bankr 950 (N D Iowa 1986).

* See Matter of Barth, 86 Bankr 146 (W D Wis 1988); In re Hammarstrom, 95 Bankr 160 (N D Cal 1989); In re Reid, 39 Bankr 24, 26 (E D Tenn 1984); Matter of Selmonosky, 93 Bankr 785 (N D Ga 1988). Although In re Feenstra, 51 Bankr 107 (W D NY 1985), technically involved a co-signer, the court interpreted § 523(a)(8) to prohibit non-students from discharging educational loans. This reasoning has influenced other courts' interpretation of this statute. See notes 31-36 and accompanying text.

* Only ten of the 92 federal bankruptcy courts have decided this issue. See Matter of Barth, 86 Bankr at 146; In re Bawden, 55 Bankr at 461; In re Behr, 80 Bankr at 124; In re Boylen, 29 Bankr at 924; In re Hammarstrom, 95 Bankr at 160; In re Meier, 85 Bankr at 806; In re Reid, 39 Bankr at 26; Matter of Selmonosky, 93 Bankr at 785; In re Washington, 41 Bankr at 211; In re Zobel, 80 Bankr at 950.


* Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv L Rev 1393 (1985). Professor Jackson acknowledges that these “protections are described in sections 524 and 525 of the Bankruptcy Code, and include an injunction against any act to collect on the debt as well as protections against actions taken by governmental units or employees on account of the discharge.” Id at 1393 and n 2 (citation omitted). Any contingent liability which is not discharged during bankruptcy and eventually becomes non-contingent could cause financial harm to a debtor, forcing him to declare bankruptcy again. If all debts are discharged at one time, the debtor can start over without the possibility of any of his past debts reappearing.
Although a literal interpretation of section 523(a)(8) prevents co-signers from discharging obligations on educational loans, this Comment suggests that such a result is inconsistent with the purpose of the statute. The infrequency and the small monetary impact of these discharges refute the argument that permitting discharge endangers educational loan funds. Additionally, courts who read the statute literally sometimes permit co-signer discharge anyway, further muddling interpretation of section 523(a)(8).

Part I of this Comment describes the types of educational loans to which section 523(a)(8) applies and the obligations of co-signers under each. Part II recounts the legislative history of section 523(a)(8). Part III summarizes the bankruptcy cases that have interpreted this statute. Part IV analyzes these cases and argues that non-student co-signers should be permitted to discharge educational loan obligations.

I. LIABILITIES ASSUMED BY CO-SIGNERS OF EDUCATIONAL LOANS

Congress has established a number of educational loan programs that make funds available to students who might otherwise have difficulty financing their education. Some of the programs are entirely need-based, while others simply ease student access to loan funds. Generally, students do not have to begin repaying their loans until they are out of school.

Section 523(a)(8) primarily affects loans made under two programs. First, the National Direct Student Loan ("NDSL") program directly funds colleges and universities that agree to contribute in proportion to the federal assistance made available to them. Through the NDSL program, institutions provide financial aid directly to students who demonstrate financial need. Also referred to as Perkins Loans, these loans can only be used for tuition costs. No co-signer is required for a student to obtain this type of loan.

Second, under the Guaranteed Student Loan ("GSL") program, created by the Higher Education Act of 1965, government

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11 See notes 18 and 81 and accompanying texts.
12 Due to amendments enacted November 15, 1990, § 523(a)(8) has been expanded to include any "obligation to repay funds received as an educational benefit, scholarship or stipend." 11 USCA § 523(a)(8). See also note 2 and accompanying text.
guarantees encourage private lenders to make student loans. The amount borrowed cannot exceed the difference between a student’s educational costs and any other financial aid that student may receive.\footnote{Id.} Unlike the NDSL program, which the government funds directly, the Department of Education has only secondary obligations in the GSL program. Its guarantees become payable only when students default on their loans.

The Treasury spends about $2 billion each year to repay defaulted student loans.\footnote{Eric N. Berg, Crisis at Top Loan Insurer: A $1.5 Billion ‘F,’ NY Times D1 (Aug 13, 1990).} And although both the NDSL and GSL programs are covered under section 523(a)(8), only under the latter does the problem of non-student co-signers arise.\footnote{Recent Development, 38 Vand L Rev at 1091-93 (cited in note 14). Two systems exist to guarantee student loans. Under the state system, the state or a private agency operates as a direct insurer of the loans, and the Department of Education (“DOE”) acts as a secondary guarantor. Id. On the federal level, the Federal Insured Student Loan (“FISL”) programs, the DOE guarantees student loans directly if the lender proves that they cannot obtain insurance from a state or a private agency. Id. Congress made educational loan funds available directly to the parents of a dependent student in the form of “PLUS” loans. 20 USCA § 1087-2. Parents may borrow up to $4,000 annually for one student in any academic year, not to exceed $20,000 total for each student. 20 USCA § 1087-2(b)(1)-(2). Courts have explicitly ruled that a parent who obtains loans under the PLUS program may not discharge the loan in bankruptcy. See, for example, In re Reid, 39 Bankr 24; In re Hammarstrom, 95 Bankr 160; In re Hudak, 113 Bankr 923 (W D Pa 1990).}

Co-signing requirements for student loans began appearing in the 1980s. Although no data exist to explain this trend,\footnote{One should note that the appearance of co-signing requirements cannot logically be traced to 11 USCA § 523(a)(8), because the discharge exemption should make student borrowers more likely to repay their loans.} the requirement makes sense to both lenders and borrowers. Faced with prospective student borrowers who have no collateral or credit rating, a lender, not surprisingly, is somewhat reluctant to make the loan. Moreover, it is unlikely that impecunious students can afford interest rates commensurate with the risk they present. When a third person with an acceptable credit rating co-signs the loan, the risk to the lender is greatly reduced. As a result, some lenders offer lower interest rates on loans if third parties co-sign them.\footnote{A number of educational loans permit a student to receive a lower interest rate on the loan guarantee fee if another person agrees to co-sign. For example, HEMAR Insurance Corporation of America through Norwest Bank South Dakota offers the following terms on their guarantee loan fees to business and law students through the Tuition Loan Program (“TLP”) and Law Student Loan (“LSL”) Program:

\begin{quote}
6 percent for loans which are co-signed and interest is paid.
\end{quote}
Some unwary third parties, however, co-sign educational loans unnecessarily. Simply because some supplemental loans may be co-signed does not mean that a third party should do so if the lender does not require a co-signer or reduce the interest rate when the loan is co-signed.

Educational loan documents contain notices summarizing the co-signer's financial obligations. The following is a typical co-signer provision:

**NOTICE TO ALL CO-SIGNERS OF THIS NOTE**

You are being asked to guarantee this debt. Think carefully before you do. If the borrower does not pay the debt you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The Lender [bank] can collect this debt from you without first trying to collect from the borrower. The Lender [bank] can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.

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8.875 percent for loans which are not co-signed and interest is paid.
7.5 percent for loans which are co-signed and interest is capitalized.
7.5 percent at disbursement and 3.25 percent added at repayment for loans which are not co-signed and interest is capitalized.

Professional Education Plan ("PEP")/The Education Resources Institute ("TERI") offers:
- 5 percent on guarantee fee with co-signer.
- 8 percent on guarantee fee without a co-signer.

Business Student Loan ("BSL") offers the following interest rates on loan guarantee fees:
- 6.5 percent for loans that are co-signed.
- 9.5 percent for loans that are not co-signed.

Although large private lending institutions provide these reduced rates for co-signed loans, some local banks do not offer better terms on educational obligations if the loan is co-signed. For further information, see loan documents available on file at the Legal Forum office.

If two non-students (usually parents) sign a PLUS loan together, they are referred to as co-makers. See note 4. As co-makers, they have equal primary liability for the debt. A non-student who co-signs with a student is secondarily liable for the loan obligation.

For example, loan documents for the SHARE and GradSHARE loans do have signature lines for co-signers. A student, however, is not required to have a co-signer in order to obtain an educational loan through these programs. See loan documents available on file at the Legal Forum office.
This notice is not the contract that makes you liable for the debt.\(^4\)

This notice implies that co-signers are secondarily liable for the debt, making their obligation contingent on student default. However if default occurs, the second and third paragraphs notify co-signers that the lender has full recourse against them for any unpaid amounts. Other co-signer provisions are less clear, but essentially require co-signers to pay only if the students default.\(^5\)

Section 523(a)(8) affects non-student co-signers under two different scenarios. In the first, students default, making the co-signers primarily liable for the educational loans. If a co-signer then declares bankruptcy, the court must decide whether the co-signer may discharge the debt. In the second, co-signers declare bankruptcy while their obligations are still contingent. The co-signer is not presently liable for the debt, either because the student is still in school or because he has not defaulted on the loan. This latter scenario, however, is merely hypothetical at present; all the cases that have come before bankruptcy courts have involved co-signers whose obligations have already come due.

\(^4\) This provision appears in the loan documents for Share, GradSHARE, LSL and TLP. These loans, which students or parents may use for various educational expenses, are backed by government guarantees. See loan documents available on file at the Legal Forum office.

\(^5\) The following provisions are part of the SHARE and GradSHARE loan contract offered by Nellie Mae:

6. DEFAULT: If I default on this loan, the Lender may declare the entire unpaid amount of the loan, including interest, immediately due and payable without notice to me. "Default" means the occurrence of any of the following events: . . . my filing or a filing against me of a petition in bankruptcy.

15. MULTIPLE BORROWERS: If this Note is executed by more than one borrower, each borrower agrees that any communication between the Lender and any one of the borrowers will be binding on all of the borrowers, and that the provisions of this Note will apply to all borrowers individually and collectively.

A promissory note to obtain funds from the Supplemental Loans for Students Program ("SLS") contains the following provisions:

NOTE TO CO-SIGNER: At the lender's option, a co-signer (but not a co-maker) may be required. In a co-signer relationship, both parties are not equally liable for the loan. The borrower assumes primary liability and is fully responsible for repaying the debt. The co-signer is secondarily liable. Only in the event that the primarily liable person fails to honor the repayment obligation will the lender attempt to collect from the co-signer.

CANCELLATION: If a borrower dies or becomes totally and permanently disabled, the obligation to make any further payments on the loan is discharged. However, if the student and a co-signer obtain a loan and only one of the borrowers dies, becomes totally or permanently disabled or has his/her debts discharged in bankruptcy, the surviving borrower remains obligated to repay the loan.

See loan documents available on file at the Legal Forum office.
II. LEGISLATIVE HISTORY OF SECTION 523(a)(8)

The Bankruptcy Reform Act of 1978 was the first substantial revision of the Bankruptcy Code in 40 years. The 1978 Act transformed the Bankruptcy Code in two major respects. First, it enacted statutes that reflected changes in debtor-creditor relations and consolidated the bankruptcy statutes into Title 11. Second, it restructured the bankruptcy court system, granting them independence from district courts and relieving judges of administrative burdens.

Section 523(a)(8) relates to a statute passed one year earlier as an amendment to the Higher Educational Act of 1965. The previous student loan discharge provision differed from section 523(a)(8) only in that it covered fewer types of loans. Many House members apparently assumed the old provision would be incorporated into the new Bankruptcy Code. The House Judiciary

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27 Id.


29 HR Rep No 95-595 at 132, reprinted in 1978 USCCAN at 6093 (cited in note 5).

30 "During the 94th Congress, the Education and Labor Committee proposed . . . to [add] a new section 439(A) to the Higher Education Act of 1965 to make loans guaranteed or insured under that Act nondischargeable in bankruptcy for a period of five years after the loan first becomes due, unless payment from future income would impose an undue hardship on the debtor." Id.

At the same time, a similar provision was enacted to except loans under the health professions law to except educational loans from bankruptcy for a five year period. Id. This provision, although subsequently amended, permits discharge of an educational loan debt only "after the expiration of a five year period . . . when repayment of such loan is required; [and] upon a finding by the Bankruptcy Court that the nondischarge of such debt would be unconscionable." 42 USCA § 294f(g)(1-2).


32 124 Cong Rec 1791, 1792 (remarks of Rep. Dodd), 1796 (remarks of Rep. Ford) (Feb 1, 1978). Both of these Representatives opposed the Ertel amendment and contended that the amendment to the Higher Education Act of 1965 became law automatically since Congress failed to deal directly with the issue.
Committee, however, did not adopt the old provision. Relying on General Accounting Office reports, the committee concluded that the real problem was the high default rate on student loans, a problem not effectively addressed by a bankruptcy discharge provision.

Consequently, Representative Allan E. Ertel (D-Pa) introduced section 523(a)(8) as a floor amendment to the revised Code. Although aware that a provision excepting educational loans from discharge in bankruptcy proceedings would frustrate the “fresh start” policy, Ertel argued that this provision was nevertheless necessary to insure funds for future students. Because these programs rely on graduate repayment to provide funds for future students, Ertel suggested that this provision was necessary to curtail the abuse of the bankruptcy process and to insure the continued availability of loan funds. Student borrowers needed this deterrent, Ertel argued, because they did not put up any collateral and in general did not have the same incentive as other borrowers to meet their financial obligations. Compared to other borrowers, students had much less to lose by filing bankruptcy.

Both proponents and opponents of the amendment used statistics to support their respective positions. Ertel and others argued that bankruptcies by student debtors were, according to the following data, on the rise:

During the 1965-72 period, the amount of student loan bankruptcies totaled $2.4 million nationally, or $300,000 per year. From 1972 to February 1975, the national value of the bankruptcies totaled $11.3 or $3.7 million per year. This is a 1,200 percent increase.

Ertel’s opponents, however, offered a more persuasive argument: student bankruptcies were not a major problem; the real threat to educational loan funds was student borrowers who simply

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32 HR Rep No 95-595 at 133 (cited in note 5).
33 Id at 134-38. The GAO apparently conducted a study of former students who declared bankruptcy to discharge their debts and concluded that the real problem facing the student loan program was the rate of student defaults.
34 H 8200, 95th Cong, 2d Sess (Feb 1, 1978) in 124 Cong Rec 1783, 1791 (Feb 1, 1978).
35 Id at 1791-92.
36 Id at 1792.
37 Graduates who declare bankruptcy in order to discharge their debts which consist primarily of student loans abuse the bankruptcy process. Id.
38 124 Cong Rec at 1792. See also id at 1793 (remarks of Rep. Erlenborn).
39 Id at 1792 (remarks of Rep. Mottl).
The University of Chicago Legal Forum refused to repay their loans. Representative William Ford (D-Mi) claimed that the Department of Health, Education and Welfare, which administered the program, had failed to collect the loans properly. Representative Christopher Dodd (D-Ct) cited statistics from the Office of Education to show that only five percent of losses incurred were caused by bankruptcies, while 90 to 92 percent of the losses resulted from defaults. Essentially, Dodd argued that since the underlying problem was caused by defaults and administrative deficiencies, not bankruptcy filings, the proposed discharge exception was an unjustifiable intrusion on the “fresh start” policy.  

Despite opposition, the House amendment passed and was enacted in the Bankruptcy Reform Act of 1978. Neither the initial legislation nor subsequent amendments have revealed how this exception affects co-signers of educational loans; the only legislative references to co-signers appeared in the House Report, stating that educational loans are made without co-signers. Thus, courts receive no specific guidance from either the statute or accompanying legislative material.

III. Cases Applying Section 523(a)(8) to Non-Student Co-Signers

Courts differ in their analysis of the applicability of the student loan discharge exception to non-student co-signers. The first bankruptcy courts to address the issue reasoned that Congress intended section 523(a)(8) to apply only to students; these courts therefore permitted non-students to discharge their obligations. More recently, however, courts have construed the statute strictly, refusing discharge to all debtors with educational loan obligations.

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40 Id. For example, Representative Dodd cited a congressionally commissioned GAO study that determined the losses incurred when former students defaulted on their education loans. Dodd asserted that the study showed that “the problem is with defaults, and there is a distinction between defaults and bankruptcies.” Id.
41 Id at 1796.
42 124 Cong Rec at 1796.
43 For example, Representative Dodd contended that “to suggest that we are going to somehow alleviate a problem that may exist in defaults by accepting an amendment to the Bankruptcy Act is just a misconception.” Id at 1793. He continued his argument, noting that this amendment directly frustrates the “fresh start” policy for students.
44 Id at 1798.
45 CIS Index for 1978, vol 9, no 12 at 1219.
46 HR Rep No 95-595 at 136 (cited in note 5).
The first reported case to address the issue was *In re Boylen.* In this case, the debtor co-signed a $1,200 student loan for his former wife and sought to discharge the loan in bankruptcy proceedings. The court held "that Congress had no intention to except a co-signer's liability on a student loan debt from discharge."

Further, the court noted that "[t]he language of a statute must be given its plain meaning unless the intent of the legislature or the purposes served by the statute would be frustrated by such an interpretation." Acknowledging that the statutory language of section 523(a)(8) was straightforward, the court relied instead on the legislative history as proof that Congress intended the section to prevent only students from discharging their educational debts. Thus, the court concluded that the debtor was "a far cry from the debtor about whom this exception to discharge was drafted."

The court justified its result with three largely unrelated arguments. First, it held that section 523(a)(8) applied only to student borrowers, and that applying it to non-student co-signers would frustrate the Bankruptcy Code's "fresh start" policy. Second, even if section 523(a)(8) could apply to non-students, it did not in this particular case, because the debtor derived no significant benefit from his former wife's education. Third, the court held that even if it was wrong with respect to the preceding arguments, the debt should be discharged under the statute's "undue hardship" exemption.

The next case to address the question relied heavily on the analysis in *Boylen.* In *In re Washington,* the court discharged the obligation of two Virginia parents who co-signed their daughter's student loan, noting that the two did not benefit from their child's education. Subsequent cases have relied heavily on *Boylen* and *Washington* without doing much further analysis of their own.

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47 29 Bankr 924 (N D Ohio 1983).
48 Id at 927.
49 Id at 926, citing *Roth Steel Products v Sharon Steel,* 705 F2d 134, 152 (6th Cir 1983).
50 Id.
51 *In re Boylen,* 29 Bankr at 926.
52 Id.
53 Id.
54 Id at 927.
55 41 Bankr 214 (E D Va 1984).
56 In another case, a bankruptcy court permitted a parent who co-signed her child's educational loan to discharge the debt, holding that it was not an "educational loan" since the debtor was not a student borrower. *In re Bawden,* 55 Bankr 459, 461-62 (M D Ala 1985). The loan in this case was made by First Southern Federal Savings and Loan Association. The "loan was made under the Alabama Guaranteed Student Loan Program and assigned to
These courts allow discharge on the theory that the statute does not apply to non-students, or that these particular non-students did not benefit from the educational loan, or both.

Other courts, however, apply the plain-language approach rejected in Boylen and Washington, holding that section 523(a)(8) plainly prohibits the discharge of all educational loan obligations absent a showing of "undue hardship." In short, the statute applies regardless of who owes the money.

This rationale was first applied in In re Feenstra, where only the parent, not the student, signed the note for an educational loan. In this case, the parents signed for a loan that paid their son's college tuition and then declared bankruptcy, seeking to discharge their debts, including the educational loan. The Feenstra court held that section 523(a)(8) excepted all government funded educational loans from bankruptcy discharge, even those taken out by parents. Thus, the court concluded that "an educational loan guaranteed by a governmental unit or non-profit institution regardless of whether the loan is made directly to the student or to the student's parent," is not dischargeable under this provision. However, the court did find "undue hardship"—the co-signer's family included five recovering alcoholics—and ultimately relieved the parents of their obligation.

the Alabama Commission on Higher Education, who is the guarantor." Id at 460. In addition to specifically adopting the holdings of Boylen and Washington, the court focused on whether the debtor was a student. The court held that if the debtor is not a student, the loan is not an educational loan, and may be discharged since § 523(a)(8) does not apply.

A bankruptcy court in Iowa summarily stated that § 523(a)(8) did not apply to a spouse who co-signed his wife's student loan, and discharged the student's debt for undue hardship. Id. The Wisconsin Higher Education Corporation ("WHEC") made the $2,500 loan to Mr. Meier as the "maker," and the debtor signed as the "endorser." When Mr. Meier defaulted on the loan, WHEC sought to collect from the debtor. Id.

Similarly, a Wisconsin court discharged a guaranteed educational loan for a debtor who co-signed her spouse's student loan. In re Meier, 85 Bankr 805, 806 (W D Wis 1986). The Wisconsin Higher Education Corporation ("WHEC") made the $2,500 loan to Mr. Meier as the "maker," and the debtor signed as the "endorser." When Mr. Meier defaulted on the loan, WHEC sought to collect from the debtor. Id.

Using the Washington rationale, another court determined that parents who co-signed their child's student loan did not benefit from the loan, and discharged the loan. In re Behr, 80 Bankr 124 (N D Iowa 1987). Northwestern University Student Loan Office made the $7,680 loan to the debtor as a "co-maker" for his son. Id at 124.

In re Feenstra, 51 Bankr 107, 108 (W D NY 1985). The debtor obtained the educational loan from Monroe Savings Bank. Id. The New York State Higher Education Services Corporation guaranteed the loan, and purchased the loan from the bank when the debtor defaulted. The proceeds of the loan were paid directly to the University of Rochester, which the debtor's son attended.

Id.

Id at 110.

Id at 111.

Id at 112-13.
Although the *Feenstra* case was not a co-signer case, it is analogous to the situation in which a non-student co-signs a loan taken out by a student. Moreover, the *Feenstra* court's interpretation of the discharge provision has influenced the cases that prohibit co-signer discharge.\(^{62}\)

The first reported case to apply *Feenstra* to a non-student co-signer was *Matter of Barth*.\(^{63}\) In this case, the court refused discharge to a non-student who had co-signed her son's educational loan.\(^{64}\) The court declared that any loan which was "made, insured, or guaranteed by a governmental unit" for educational purposes was an educational loan.\(^{66}\) The court rejected the *Washington* "benefits" test, holding that it was irrelevant to section 523(a)(8) whether the co-signer had benefitted from the education financed by the loan.\(^{66}\) Additionally, the court found that nothing in the legislative history of section 523(a)(8) expressed a clear intent to exempt co-signers.\(^{67}\) In the absence of such intent, the court refused to discharge the co-signer's obligation. The only other non-student co-signer case since *Barth* has followed its reasoning.\(^{68}\)

\(^{62}\) Not surprisingly, *Feenstra* has also influenced similar cases where parents were the primary obligors. In *In re Reid*, the court held that the PLUS loan could not be discharged under § 523(a)(8) because the parent failed to prove that the loan imposed undue hardship on the family. 39 Bankr 24 (E D Tenn 1984). First Tennessee Bank of Knoxville made the PLUS loan to the debtor, and the Tennessee Student Assistance Corporation guaranteed the debt. Id.

Similarly, another court concluded that an educational loan signed only by a parent was not dischargeable. *In re Hammarstrom*, 95 Bankr 160 (N D Cal 1989). The SHARE loan was made by Bay Bank Boston, and the note was immediately purchased by Nellie Mae pursuant to a prior agreement. The Education Resources Institute guaranteed repayment of the loan.

In *In re Hudak*, the court rejected the parent's motion for summary judgment that contended that the discharge prohibition did not extend to PLUS loans. 113 Bankr 923 (W D Pa 1990).

\(^{63}\) 86 Bankr 146 (W D Wis 1988).

\(^{64}\) Id. The student obtained a loan from the Bank of Waunakee, "which the debtor signed as an endorser." Id at 147. When collection proceedings became necessary, the bank assigned the loan to the Wisconsin Higher Education Corporation.

\(^{65}\) Id at 148.

\(^{66}\) Id.

\(^{67}\) *Matter of Barth*, 86 Bankr at 149.

\(^{68}\) A bankruptcy court in Georgia held that § 523(a)(8) makes educational loans non-dischargeable in bankruptcy, even for parents who co-signed student loans. *Matter of Selmonosky*, 93 Bankr 785, 787 (N D Ga 1988). First National Bank of Boston loaned $15,000 to the student and the parents co-signed this loan. South Shore Bank made a $46,875 loan to the debtors, but it was unclear whether parents co-signed the loan with the student or signed the loan themselves. TERI guaranteed both of these loans, and Nellie Mae provided a guarantee for the South Shore loan. Id at 785-86.
IV. Analysis of Judicial Interpretations of Section 523(a)(8)

A number of courts have relied extensively on the legislative history of section 523(a)(8) to hold that the statute does not apply to co-signers. These courts hold that Congress’s sole intent was to prevent students from using the bankruptcy laws to renege on their obligations. Thus, section 523(a)(8) should not apply to non-student co-signers. Accordingly, courts ought to permit all non-student co-signers to discharge these loans pursuant to the “fresh start” policy.

Admittedly, this approach is subject to reasonable criticism. The legislative history is not instructive on this specific issue because Congress did not contemplate the effects this provision would have on co-signer rights.66 As courts have noted, the only reference to co-signers is a brief observation in the House Report that student loans generally did not require them.67 The floor debate included no mention of co-signers at all.68 And during the twelve years this statute has been in effect, Congress has revised the exception, but has never addressed the issue of whether section 523(a)(8) applies to co-signers.

Another compelling criticism is that courts should not go beyond the text of the statute where, as in this case, the language is unambiguous. Section 523(a)(8) is clear: any money obtained from a student loan program is an “educational loan,” regardless of how the money is used or who obtains the loan. Influential proponents of this approach argue that when the text of the legislation is clear, “there is no justification for resort to the legislative history.”70 At least one court has embraced this “plain meaning” approach in applying section 523(a)(8) to a co-signer.71

Additionally, the Supreme Court has advocated interpreting bankruptcy statutes according to their “plain meaning.”72 “The plain meaning of legislation should be conclusive, except in the

66 HR Rep No 95-595 at 133 (cited in note 5).
67 Id at 136.
68 124 Cong Rec at 1791-98 (cited in note 30).
71 Matter of Barth, 86 Bankr at 149.
72 Kelly v Robinson, 479 US 36, 43 (1986), quoting United States v Heirs of Boisdore, 8 How 113, 122 (1849). The court in Kelly precedes this phrase with the statement: “In expounding a statute, we must not be guided by a single sentence or member of a sentence but look to the provisions of the whole law, and to its objective and policy.” This cannon of interpretation is followed by this Comment. See notes 51-55 and accompanying text.
'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' Thus, courts declining discharge to non-student co-signers may refer to the first point above—that this result cannot be "demonstrably at odds with the intention of the drafters" because the subject of how to treat these obligations never arose. These courts can also note that declining discharge in these instances is entirely consistent with the legislative goal of preserving loan funds.

Moreover, one of the key arguments made by courts favoring discharge—that co-signers received no "benefit" from the loan—has no basis in either the statute or logic. Nothing in the text or the legislative history suggests this approach. Nor is it conceivable that a co-signer would incur the obligation without receiving some benefit, psychic or otherwise: A parent may benefit from knowing his child attends an excellent educational institution, and a spouse may see real economic gain from his wife's professional education.

Although criticism of the "benefits" analysis is certainly correct, the overall argument that co-signer discharge should be prohibited is too simplistic. The legislative history does reveal a specific purpose for section 523(a)(8): to protect the pool of educational loan funds with the least possible intrusion on the "fresh start" policy. The "fresh start" policy underlies the entire Bankruptcy Code, and the philosophy behind this policy is that discharge permits "an individual's human capital (as manifested in future earnings), as well as his future inheritances and gifts," to be free of "liabilities [ ] incurred in the past." By allowing discharge, the Code releases debtors from prior financial obligations and attempts to prevent the negative consequences that might otherwise follow from a declaration of bankruptcy.

Limiting the discharge exception to students only is most consistent with the "fresh start" policy. As members of Congress noted, without section 523(a)(8), student debtors—whose debts come almost entirely from educational loans—might see the Bankruptcy Code as an attractive and comparatively painless means by which to eliminate their obligations. That this exception is an ac-

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77 See notes 35-36 and accompanying text.
79 Jackson, 98 Harv L Rev at 1396 (cited in note 10).
80 Id at 1393. See note 10 and accompanying text.
ceptable intrusion on the "fresh start" policy is a decision Congress unquestionably made.

Extending section 523(a)(8) to non-student co-signers does not return the same benefits. Co-signers do not have the same incentive to declare bankruptcy that recent graduates do. Their financial relations—mortgages, car loans, credit cards—are presumably more established; an established credit history is what makes them attractive as co-signers in the first place. That they would "abuse" the bankruptcy process in the way envisioned by Congress is at best improbable.

Moreover, co-signer discharge will have little effect on the pool of educational loan funds. Only nine co-signer cases have been adjudicated since 1983; the average amount discharged in each case was $10,915, a total of $98,240. By comparison, taxpayers spent more than $2 billion in 1990 covering government loan guarantees for student borrowers who defaulted but did not file for bankruptcy.81 While predicting the amounts future co-signers might discharge is difficult, these cases suggest that co-signer discharges affect educational loan funds only minimally. If nothing else, these figures support allowing discharge for co-signers whose obligations remain contingent, should such a case ever go to court. Interestingly, courts that permit co-signer discharge have not made this point.

Also, no evidence indicates that lenders have reacted negatively in those jurisdictions that exempt non-student co-signers from section 523(a)(8). In those jurisdictions that discharge non-student co-signers, lenders might react by making loans available on less favorable terms or by limiting the number of loans offered—both of which would be adverse to the general goals of student loan programs. However, lenders have not responded to co-signer discharge in this manner, nor does it appear likely that they will, given the fact that the marginal risk these loans present has increased only slightly. The number of cases in which co-signers declare bankruptcy is simply not significant enough to alter lender behavior.

Making section 523(a)(8) inapplicable to non-student co-signers would also eliminate inconsistent judicial treatment of the statute's "undue hardship" exemption.82 Four of the eight section 523(a)(8) co-signer cases have considered whether the co-signer

81 See note 18 and accompanying text.
82 Three tests are used together to determine whether the loan is an undue hardship on the debtor:
qualified for relief under this standard. Only one of these courts refused to grant an “undue hardship” discharge. The remaining three held that non-student co-signers were exempt from section 523(a)(8), and that even if they were not, they would qualify for discharge under the “undue hardship” standard. Thus, if section 523(a)(8) were read to include co-signers, fact-specific “undue hardship” analysis would nevertheless relieve some debtors of their obligations. As a result, inconsistency in these cases is perhaps to be expected, as it has surfaced in dozens of similar cases involving student borrowers.

Permitting non-student co-signers to discharge their obligations does not mean that parents who obtain loans to defray the expense of educating their child should be exempt from section 523(a)(8). Some loans that qualify as educational loans under the statute are available to parents. In these cases section 523(a)(8) should apply, because the parent undoubtedly realizes that he, and not his child, will be responsible for the debt. Moreover, these cases do involve the potential for abuse of the bankruptcy process that prompted Congress to create the discharge exception.

CONCLUSION

Congress created section 523(a)(8) of the Bankruptcy Code to insure that student borrowers would not renege on their loans by filing for bankruptcy shortly after graduation. Since this provision was enacted in 1978, student loan practice has changed considerably. Many educational lenders now require students to find a co-signer before they will make an educational loan. Section 523(a)(8)’s silence on how co-signer obligations should be treated,

(1) the mechanical test (focusing on the debtor’s expenses and future financial resources);
(2) the good faith test (factors include debtor’s efforts to obtain employment, minimize expenditures, and maximize resources); and
(3) the underlying policy test (amount of student loan debt, percentage of indebtedness, and benefit from education).

In re Feenstra, 51 Bankr 107, 112 (W D NY 1985), citing In re Clay, 12 Bankr 251, 254 (N D Iowa 1981) and In re Johnson, 5 BCD 532, 544-45 (E D Pa 1979).

In re Reid, 39 Bankr 24 (E D Tenn 1984) (denied discharge). In contrast, a court that applied § 523(a)(8) to a parent who signed the educational loan did permit discharge for reasons of “undue hardship” on the debtor and his family. In re Feenstra, 51 Bankr at 107.

In re Boylen, 29 Bankr 924 (N D Ohio 1983); In re Washington, 41 Bankr 211 (E D Va 1984); In re Zobel, 80 Bankr 950 (N D Iowa 1986).


See notes 15-20, 60 and accompanying text. This issue was the essential question the court addressed in In re Feenstra, 51 Bankr at 107.
and Congress's continued failure to address the issue, have left the issue to the courts. The few that have considered the question have reached different results.

Allowing non-student co-signers to discharge their obligations—the result favored by most courts that have considered the issue—is the best approach. This result is most consistent with the goal of protecting the pool of educational funds with the least intrusion possible on the "fresh start" policy that animates the Bankruptcy Code.