CONTRACTS

Investigating and Defending Against Student Loan Claims

Lee Dunham—Senior Attorney
(ldunham@nlrg.com)

Student debt is the second-largest source of U.S. household debt, at nearly $1.4 trillion. Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit, https://www.newyorkfed.org/microeconomics/hhdc.html (accessed on Nov. 10, 2018). It is projected that nearly 40 percent of student loan borrowers will default by 2023. Judith Scott-Clayton, The Looming Student Loan Default Crisis is Worse than we Thought, https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf (accessed on Nov. 10, 2018). Many attorneys have seen increased requests for student loan advice.

Because students are often young and legally unsophisticated at the time they borrow, many understand little about their contracts, or have lost—or never obtained—copies of the essential documents. The first step in such circumstances is to have the client contact the servicer to request copies of the promissory note and related documents, payment history, name and address of the current lender, and documentation of any transfers. Some jurisdictions have enacted legislation requiring servicers to provide this information. *See, e.g.*, District of Columbia Student Loan Borrower Bill of Rights, September 8, 2017, issued pursuant to D.C. Code Ann. § 31-106.01; Cal. Fin. Code § 28130. Even in other jurisdictions, servicers generally cooperate with documentation requests.

Loans are rendered unenforceable, with surprising frequency, by various forms of sloppy paperwork by lenders. Lenders lose, or never acquire, essential documents. Where essential terms of the loan are contained not in the executed promissory note, but in a subsequent "disclosure" defining those terms, incorporated by reference in the note, the disclosures are often misplaced. Loans fail to comply with the Truth in Lending Act. The originating lender on the promissory note is acquired or dissolves without properly transferring the loan to another entity. Student loans are often resold by the originating lender and securitized in trusts, and transfer paperwork is fatally flawed or absent.

Many individual borrowers have obtained dismissal of collections suits due to lenders' failure to properly document loans. Additionally, in 2017, the Consumer Financial Protection Bureau brought an action against a student loan trust seeking injunctive relief and refunds for borrowers based on the trust's failure to maintain legally required records for thousands of loans. *See Consumer Fin. Prot. Bureau v. Nat'l Collegiate Master Student Trust*, C.A. No. 17-1323 (MN), 2018 WL 5095666, at *2 (D. Del. Oct. 19, 2018). A proposed consent judgment has been submitted but the litigation is still pending.

If a loan is unenforceable, the borrower may simply stop making payments. Of course, many borrowers default out of financial necessity, whether or not the loan is legally valid. In either case, if the lender continues with efforts to collect on the loan, the client should keep a "contact log" so the attorney can determine whether collections efforts violate state consumer protection acts, the Fair Credit Reporting Act, the Telephone Consumer Protection Act, the Fair Debt Collection Practices Act, and/or the Servicemembers' Civil Relief Act. These statutes can protect the client from harassment, and claims against lenders under them may also help a borrower who has defaulted on an otherwise enforceable loan negotiate a favorable settlement.

FAMILY LAW

Role of Assets in Determining Amount of Alimony

Brett R. Turner—Senior Attorney
(bturner@nlrg.com)

Permanent alimony awards are still alive and well in many states, especially when the marriage is long and there is substantial income disparity between the spouses. When the court determines the amount of alimony, what effect do the receiving spouse's *assets* have upon the award?

A good example of a modern permanent alimony case is *Sweeney v. Sweeney*, 420 S.C. 69, 75, 800 S.E.2d 148, 151 (Ct. App. 2017). The marriage there lasted for 28 years from marriage to filing of the divorce action. The husband had gross income of $34,100 per month, or $409,200 per year. The wife's gross income was very limited. *Sweeney* was clearly a permanent alimony case.

To limit his exposure to alimony, the husband made two main arguments. First, he retained a vocational expert to impute income to the wife. The wife had worked recently at a garden center, earning $8 per hour, and as a tutor, earning $25 per hour. The trial court accepted the husband's argument and imputed to the wife income of $1,500 per month. This amount is equal to 4.3 weeks for work at 40 hours per week earning $8.72 per hour. But the trial court rejected the husband's argument that the wife could earn even more if she were recertified as a teacher. The trial court also appears to have given only limited weight to the $25 per hour tutoring income. The appellate court affirmed on the imputed income issue, rejecting appeals by both parties.

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TORTS

Therapist's Liability for Eliciting False Memories of Sexual Abuse

Fred Shackelford—Senior Attorney
(fshackelford@nlrg.com)

When individuals are accused of sexual misconduct on the basis of "recovered memories," courts must sometimes decide whether a therapist can be held liable for eliciting such memories from patients. In *Mower v. Baird*, 2018 UT 29, 422 P.3d 837 (as corrected July 11, 2018), the plaintiff's ex-wife took the couple's child to a therapist, who suspected child abuse. The therapist contacted authorities and was told to gather more information. Contrary to established guidelines, the therapist continued therapy instead of asking a forensic interviewer to talk to the child. Subsequently, there was a "supported" finding of sexual abuse against the plaintiff.

The plaintiff sued the therapist for medical malpractice and negligence, but the trial court found that the therapist owed no duty to him. The *Mower* court examined five factors in deciding whether a duty exists: (1) whether the allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the parties' legal relationship; (3) foreseeability or likelihood of injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general policy considerations. 2018 UT 29, ¶ 17, 422 P.3d at 843.

The court found that a therapist's conduct is an affirmative act if he or she uses inappropriate treatment techniques or inappropriately applies otherwise proper techniques. *Id.* ¶ 21, 422 P.3d at 844. The affirmative act may create a duty even without a special legal relationship to a nonpatient parent. *Id.* ¶ 22, 422 P.3d at 844. Implanting false memories of sexual abuse may foreseeably injure a parent, and therapists can prevent harm because they control the instrumentality that creates nonexistent "abuse." *Id.* ¶ 29, 422 P.3d at 846.

The court decided that a therapist is liable only when he or she acts recklessly, and declined to extend its ruling to cases where the therapist's patient is an adult. The court also limited potential liability by requiring objective evidence of "severe" emotional distress. The court declined to decide whether a therapist's liability would be ordinary negligence or an independent cause of action. Summarizing, the court stated:

> The question before us today is "whether a [treating therapist] has the unfettered right to treat his or her patient using techniques that might cause the patient to develop a *false memory* [or allegations] of sexual abuse." *Roberts* [*v. Salmi*], 866 N.W.2d [460,] 472 [(Mich. Ct. App. 2014)]. We conclude that they don't. Treating therapists are obligated to conform to a standard of care when treating their patients. A therapist further owes a duty to a minor patient's parents to refrain from affirmative acts that recklessly violate the standard of care in a manner that gives rise to false memories or false allegations of sexual abuse committed by the plaintiff nonpatient parent.

2018 UT 29, ¶ 114, 422 P.3d at 863.

FAMILY LAW
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Second, the husband noted that the wife received $1.2 million as her share of the marital property, and he argued that she should support herself by spending this money. Both the trial and appellate courts disagreed. "It would be inequitable to require Wife to invade her only assets to support herself while Husband may save and continue to draw a substantial salary and dividends from his company." 420 S.C. at 79-80, 800 S.E.2d at 153. This is the general rule nationwide. "The law does not require the spouse who seeks support to exhaust his or her own estate in order to qualify, relieving the other spouse of all obligation of support until that estate is depleted." *Zipf v. Zipf*, 8 Va. App. 387, 398-99, 382 S.E.2d 263, 269 (1989).

But the wife would be earning investment income on the $1.2 million. The husband argued that the historical five-year return rate on the parties' investment account was 6.71%, so that investment income of $6,710 per month should be assumed. The trial court adopted a narrower focus, noting that dividend and income interest had been $1,282 per month on a 2014 quarterly financial statement, and that dividends, interest, and capital gains together were only $785 per month on a 2013 financial declaration. The appellate court affirmed the trial court's refusal to use a larger number for investment income.

The higher number used, $1,282 per month, is $15,384 per year, which is 1.28% of $1.2 million. The court's investment return number was therefore rather conservative. But it may not be reasonable to expect the wife to invest the entire $1.2 million. Also, the grounds for the divorce was the husband's adultery, a fact which operated significantly in the wife's favor.

The end result was an alimony award of $5,000 per month—14.66% of the husband's income. The South Carolina Supreme Court has agreed to hear a further appeal. It will be interesting to see how that court treats the trial court's investment return calculation.

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