

**Before the MD House of Delegates, Appropriations Subcommittee, 1/20/21
HB750**

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Chairwoman McIntosh and members of the committee. My name is Austin Smith, and I'm an attorney in New York focusing on private student debt, particularly in the context of bankruptcy, which has given me a lot of experience with people in the most dire circumstances. I have helped a number of Marylanders during the course of my career. I am one of the few lawyers practicing in this space, and thus my counsel is sought out in most states at different times.

I wish I were not here today. I testified on this bill before the Economic Matters Committee back in March 2020, and at the time was asked why another law was necessary given whatever else was going on, penalizing attorneys for violating the rules was a matter for the Attorney Grievance Committee.

Well it can be and should be. But unfortunately, too often it isn't. I have tried to use the judicial system to enforce these preexisting rules, but the courts routinely tell me to take it up with the legislature. Courts can only enforce the laws written, and if the legislature was not very specific, no relief can be had. Today I ask you to make the law specific enough to be enforced.

State legislature are often called the laboratories of democracy. And the reason for this is that the states have general police powers. They can pass any law to protect the health, safety and welfare of its people provided nothing in the Constitution says it can't. Congress, however, can only pass a law if given a specific power in the Constitution. And this is why the solution to the problems discussed today lies with state legislature.

It is true that there is little if anything "new" in this law— except the remedy. All of this was already required under the common law or under the attorneys' rules of ethics about the information you must have before you file a lawsuit in court. The problem there is first, it doesn't happen as a practical matter; lawyers are disinclined to attack other lawyers. Second, and the bigger problem, is the perverse incentives encouraged by the current system. If the penalty is only on the lawyer, when out-of-state large financial institutions offer Maryland lawyers their business with the understanding and knowledge that they can give whatever documents they want to give, in whatever state those documents are in for the attorney to sort out, they know that if anything bad happens, it's on the attorney, and not them. In fact, the status quo is what hurts the Maryland small businesses engaged in this practice.

The Small Business Argument

Much has been said about the impact to small businesses in Maryland. This is a rather strange argument given that nothing in this law that any ethical attorney would take issue with; the only thing new is the remedy. And I think most small business owners would be rightfully not a little insulted that people think they cannot succeed without breaking or at least bending the law.

And I would like to point out: small businesses are on both sides of this problem. And the number of small business owners and entrepreneurs that our economy relies upon to grow the economy far exceeds the number of small business owners engaged in the third-party student debt buying industry. Most of those industries are in fact not located in Maryland at all; the entities are most often owned by hedge funds in New York and California.

And we cannot forget that small business owners are also the debtors. My client Kevin Rosenberg, for example, had been an undergrad in the late 1990s, and in law school in 2004. During that time he racked up about \$150,000 in federal loans, and another \$150,000 in private loans. Kevin then went to serve in the War on Terror, and when he returned, the federal government offered him various veteran-granted extensions and benefits. But the private lender continued to hound him for repayment. During that time Kevin was starting a small business and was gradually building the American dream; he was sleeping in a hammock in the basement of his store. But he was unable to pay his private loans. He was sued, they obtained a judgment and began garnishing his wages up to \$800 each month. Kevin was employing more than a half dozen persons, his business was growing, and then when the brick-and-mortar industry collapsed, he was driven into bankruptcy largely because of the private loans.

When a borrower is brought before the court, a lot gets missed partly because the borrower is not a trained attorney, and even sometimes when the borrower can figure these things out and argues “that’s not my loan” the response is “you’re not a lawyer.” And, of course, they can get a lawyer and the lawyer will show up and very often, it is quickly dismissed because there generally is not the proof that it exists, or proof that this person owes it.

The Most Historically Irrational Marketplace in History

Now everyone has their niche issue. But I will say that I do think this is a unique problem meriting a unique solution. The burgeoning weight of the private student debt industry is starting to consume many other industries; already the auto dealers, and restaurant owners, and the homebuilders are upset that an entire generation’s disposal income has been monopolized by a single industry. Navient’s solution remains constant: people need to be more frugal, and not buy

that latte or not go on an expensive date. But that's how the economy grows and thrives: people need to be buying that latte, and going on that date.

And we are talking about a marketplace that had become so irrational by 2048 that there is no historical comparison. Most FTC studies analyze private student loans through the prism and historical models of the credit card industry. But the credit card industry is a rational market. 18 year-olds with no credit history or score are not able to borrow more than \$500. The private lenders, like Navient and the National Collegiate Student Loan Trust, were lending \$40,000 at a time to students and the money was being sent directly to their mailboxes. The lifetime limit was usually about \$120,000, and there was no cross referencing between lenders. That means many students—and I've had several as clients—who were able to borrow \$160,000 on top of their federal ad statute backed loans. And so today we have an outstanding pool of private credit loans, somewhere around \$30-50 billion that are in distress. A drastic remedy is called for to deal with so ahistorical a marketplace.

Due Process or “But these debtors borrowed the money right?”

People are inclined to glaze over when one begins to speak of due process. And the general counterargument to a due process challenge in this context is most often: but the person borrowed the money, right? Respectfully, I believe that is the improper way of thinking of the question. Because only through due process can we reach the correct answer. The whole purpose of due process is to create a consistent and predictable course of events through which that question will be answered under law: “The history of American freedom, is in no small measure, the history of procedure.” *Malinski v. New York*, 324 U.S. 401, 414 (1945) (opinion of Frankfurter, J.).

That quote doesn't just sound good; it's true. Every person and entity is entitled to the prescribed level of notice for the process to be due and only thereafter may the coercive power of the government be used against them. I think it's very important to clarify that this is not this is not an attempt to play semantics with people. These are basic due process requirements that certainly the other side demands of people and I think that it is only fair that both sides are held to the same standard of conduct when they are going to use the court system to try to collect debt.

If you are going to walk into a Maryland court and file a fraudulent affidavit about information you don't know or information you don't have or documents that aren't what you say they are, there are actual penalties for that. It is true that some of this could be handled through the Attorney Grievances Committee, and Maryland Rule 3-306. But in all candor, that is merely a tool out of state ledgers that debt buyers use against lawyers.

If only the lawyer is on the hook, then it quickly becomes a race to the bottom; lawyers are willing to overlook things here and there to ensure their out-of-state clients remain happy with their work.

But if the penalty were imposed on the lender or debt collector, that would actually protect Maryland attorneys who very often are also working people trying to make a living. When the liabilities are placed on the debt buyer, suits would perhaps not be filed so haphazardly.

Due process is a two-way street. I have spent more than 5 years embroiled in litigation with many of these actors. And I would never dream of trying to file a motion or a complaint without being certain that I had all the documents and all my Ts crossed and Is dotted. And the reason for that is, first, it is my duty as an attorney, but second, I know there are severe penalties for failing to do that and there is a watchdog: the defense lawyers.

But even in response to the most egregious lawsuit filed against a *pro se* debtor, there is still little chance of any sanctions. The worst that happens is the case is thrown out. I believe it was Judge Learned Hand who remarked, “making a thief return the money they stole is no deterrent to the thief; because thieves will not always be caught, they must be punished more on the occasions they are caught.” His point, I believe was, that if people break the law, they must pay more than the cost of what they intended to obtain illegally. The statutory damage is, I imagine copied mostly from the Telephone Consumer Protection Act which was passed by the first President Bush. It was already illegal at the time, but President Bush knew that without a remedy, rights are mostly illusory. As has long been recognized, *Ubi Jus, Ibi Remedium*. **There is no right without a remedy.**

MD HB750 provides the remedy. It says that the state of Maryland can no longer rely on the good faith of the industry; they have abused that privilege of trust, and now it is time to impose penalties for illegal conduct when operating in the judicial system

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