

Consumer Finance Monitor (Season 4, Episode 19) A Deep Dive into the Debate Over Federal Student Loan Forgiveness

Speakers: Alan Kaplinsky, Thomas Burke

Alan Kaplinsky:

The Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host Alan Kaplinsky with Ballard Spahr. And I'm very pleased that those of you who have downloaded the podcast are going to be in for a very interesting program, I believe. If you want more information either about the topic that we're going to be talking about today, which I'll get to in a minute, or anything else in the consumer finance world, make sure you subscribe to our blog, which also like our podcast, goes by the name of Consumer Finance Monitor. And our weekly podcast show are available, we release a new show every Thursday it's available on our website ballardspahr.com. Or you can obtain it wherever you access your podcasts, whether it's Apple, Google Play or Spotify, or any other podcast platform that you might use.

Alan Kaplinsky:

So we have during the past year explored a number of topics in the consumer finance world related to COVID-19. And that's what we're going to do today. We're going to focus on one particular aspect of relief or potential relief that many politicians have been advocating that the government should provide to people who have obtained, so-called federal student loans. We're not talking about private student loans today, we're talking about a federal student loans. And we're going to talk about the several proposals that have been made to relieve students of the very heavy burden that many of them have as a result of obtaining federal student loans during their educational period before they started going to work.

Alan Kaplinsky:

And I can't think of anybody more apt and suitable for talking about this subject than my guests today. So let me first introduce to you, Tom Burke. Tom is a partner at Ballard Spahr. He works at the Philadelphia office when our office reopens. He advises on and litigates student lending matters across the country on behalf of lenders guarantors and servicers. Tom has participated in several recent matters of national significance on issues such as federal preemption of state law, statutory and tort liability for loan servicers, and state oversight of federal student lending activity. So, Tom is among, I would say a small group of lawyers throughout the country that focuses their practices on student lending and servicing issues. So, Tom, a very warm welcome to you. And I'm really delighted you're joining us today,

Thomas Burke:

Alan, it's my great pleasure to be here today. I'm looking forward to talking about this.

Alan Kaplinsky:

Great, great. So let me first ask a, just a matter of clarification, okay? When we talk about federal student loans, what does that mean? Loans that are guaranteed by the federal government or does the federal government actually lend the money to students? Or parents?

Thomas Burke:

Sure, that's a great question. So right now the lion's share of student loan debt comes in the form of loans actually made by the federal government itself to student borrowers under what's called the direct loan program, that accounts for most of it. There is also a fairly sizable amount of what you might call legacy debt under the family federal education loan program, which people call FFEL or FFEL debt. And those are loans that are made by private lenders, but are guaranteed by private guarantors, and then ultimately backstopped by the federal government. So that would also fall under many people's definition of federal student loans. Last there's narrow pool of about \$5 billion worth of what are known as Perkins loans, which are actually made by institutions, and likewise have the support of the federal government.

Alan Kaplinsky:

I see. Tom, do you have any rough idea of what the dollar amount is of the aggregate of all these federal student loans?

Thomas Burke:

Yes, it's about \$1.6 trillion with a T.

Alan Kaplinsky:

With a T. And his antibody ever predicted, or does anybody have any idea how much of that is really collectible? I mean, obviously they're going to be people who default on their student loan debt and I'm leading up to we're going to talk about the proposal to forgive the student loan debt. And if you're forgiving debt, that's never going to get paid, that's not a hit that doesn't have any impact on the government. So I'm just curious of the \$1.6 trillion, what would you expect to get repaid?

Thomas Burke:

The vast majority of that is debt that is either performing or would be hopefully collectible. There are various forgiveness provisions that already exist under a congressional programs, and I'm sure many borrowers helped to take advantage of those such that they would not actually be ultimately collected. As we sit here today, it's impossible to know what the volume of that will be, but it could be fairly substantial.

Alan Kaplinsky:

So I'm glad you mentioned that because I'm trying to get a sense of what kinds of forgiveness programs exists today?

Thomas Burke:

Sure, that's a great question also. Congress has stepped in many times to provide opportunities for loan forgiveness to borrowers. One of the most prominent in recent headlines has been the public service loan forgiveness program, which provides the borrowers who make 10 years of qualifying payments while working for a public service employer subject to many complex caveats that we'll not get into here can have their entire loan balance forgiven. Likewise borrowers who are in income-driven repayment plans, where they're paying an amount that is affordable based on their income have the ability to have their debt forgiven after 20 to 25 years typically. And then there are also other niche forgiveness programs that Congress itself has created.

Alan Kaplinsky:

Right. If you go serve in the military service is there forgiveness then?

Thomas Burke:

I'm not aware of forgiveness in that space, but the interest rate reduction is available for service members. And there are other categories or various employment opportunities that can result in loan forgiveness.

Alan Kaplinsky:

Okay. But what we're going to be talking about today is a completely different kind of forgiveness, could you describe what it is that people are have been considering?

Thomas Burke:

Yes. There's no question that Congress, if it wanted to forgive a large portion of the outstanding federal student loan debt could do that. No one disagrees with that. The question is whether the executive branch, meaning the president could direct the secretary of education to unilaterally forgive some large volume of that debt. And that's an entirely different animal because the question is not whether the legislature has approved that forgiveness, but whether the president with a much simpler and more direct action could direct that to take place.

Alan Kaplinsky:

So what has President Biden... I take it some of the progressives in the democratic party have been pushing president Biden to act to eliminate all federal student loan debt or just up to a certain dollar amount?

Thomas Burke:

That's exactly right. Elizabeth Warren came out of the gates fairly strong and early 2020 as part of her presidential campaign with suggestion that all student loan debt should be forgiven. She eventually crystallized that into a proposal that up to \$50,000 per student borrower with federal loan debt should be forgiven. Since that time, there have been various bills introduced in Congress that have had what I would characterize as lukewarm congressional support. The idea gained no traction whatsoever in the Trump administration or among Republican members of Congress subject to certain interesting and fairly broad COVID related measures, which I can discuss separately. President Biden for a long period here was quite hesitant about whether he would support such action. He initially said he would support up to \$10,000 per borrower with congressional support, meaning not unilaterally by the executive branch. And he also said publicly that he did not then he had the authority to do what Senator Warren was advocating for. And since that time he has commissioned an analysis, a memo from the Department of Education about whether they believe he has the authority to do this?

Alan Kaplinsky:

Any idea when that memo is going to be issued?

Thomas Burke:

Well, that is the \$1.6 trillion question right now. And the White House chief of staff made public the fact that President Biden had requested that memo on April 1st, they suggested that it would be a matter of weeks. As we record today on April 27th, we did not yet have that memo, but it could be tomorrow, it could be a week now. I expect it'll be fairly soon.

Alan Kaplinsky:

Right. And I take it there's no way to predict with any degree of certainty what did Department of Education that's going to determine?

Thomas Burke:

That's correct, it's very hard to say. You could try to read the tea leaves based on the political bearing. We know that it's a Democratic administration. We know that there are many Progressive's currently in the department of education who likely support forgiveness, but what their analysis will say, I don't know.

Alan Kaplinsky:

Right. So I take it, the Republicans are still I would say opposed, right? To forgiving any student loan debt?

Thomas Burke:

It would not surprise me. If Republicans were presented with the question of facing a long public fight over executive action versus a narrower consensus action on say \$10,000 to certain student borrowers showing a demonstrated need, there might be some appetite for a narrow agreement on that. But if the question is what Republican support is there for the Warren proposal or anything like it? The answer is zero that I'm aware of.

Alan Kaplinsky:

Well, I take it the problem with the Warren proposal is that it's providing relief to it's using a meat cleaver rather than a scalpel, if I may describe it that way. That is there are many people who obtain student loans who are gainfully employed and they're making a lot of money and I'm sure many of them are millionaires. And she's saying that they should be given relief, am I right? I mean, she didn't distinguish based upon need?

Thomas Burke:

That's exactly right there. As a policy matter, there are many interesting arguments on both sides. However, there have been fairly sophisticated statistical analysis of what this forgiveness would look like economically. And there are concerns that the lion's share of those funds would go to borrowers who have professional degrees, doctors, lawyers, other people who may be perceived as not needing that support and that the number of truly distressed borrowers would be a much smaller fragment of that forgiveness.

Alan Kaplinsky:

I mean, I'd be very surprised if anything like that gets enacted. It would have to if it was in the form of a statute. Well, let me ask the question, do you know whether the Democrats could do something like that under using the process of budget reconciliation where they don't need to get 60 votes in the Senate?

Thomas Burke:

It's possible that they could pursue something narrower. I'm not an expert on that budget reconciliation process with respect to the financial repercussions of this kind of forgiveness. It would be a very expensive program, no matter what volume you're talking about, certainly billions and likely hundreds of billions of dollars.

Alan Kaplinsky:

Yeah. And I'm just curious under a Elizabeth Warren's proposal, where would the cutoff be? Forgive debt that people who just went to college in the fall and they incurred the first student debt they've ever incurred, that would be forgiven too? Or do you not have would work?

Thomas Burke:

There is literally no white paper or formal proposal that would explain exactly how the administration would work. And there is a very serious concern that if the forgiveness were applied as of some future date, that it would encourage people to go out and immediately take out a whole bunch of loans that are about to be forgiven. Whereas if you look backwards, then there's an arbitrary cutoff problem with why does a person as of one day get it and the person who another day does not? Why are we favoring one large tranch of student borrowers when tomorrow's student borrowers are going to face those same tuition rates and loan obligations and they won't get a penny? Unless the same kind of forgiveness thing happens again around the merry-go-round 10 or 20 years from now.

Alan Kaplinsky:

And I take it, this proposal... Well, let me ask the question, was that precipitated by the onset of the pandemic? Or was this the proposal that predated the onset of the pandemic?

Thomas Burke:

That's a really interesting question because the answer is that it predated the pandemic. It was announced and trumpeted quite publicly by Senator Warren in early 2020, before anyone was thinking about COVID. But she has used the COVID situation as a basis for both a different potential legal authority for that forgiveness and a sense of increased need for it.

Alan Kaplinsky:

All right. I want to go back now, Tom, to what the Department of Education is conceive what they've been charged to do. And that is to decide whether President Biden has got the authority on his own to do this through an executive order. Is there some argument to be made under an federal statute that he would have authority? I mean, what's the fighting over is it certain language would be vague?

Thomas Burke:

There are two federal statutes in play here that in the view of student loan forgiveness proponents would allow the president to take that action. The first is the Higher Education Act itself, which is the scaffolding on which the entire federal student lending platform exists. And one of the provisions in that very lengthy and complex statute allows the secretary of education to consent to the modification of various provisions of FFELP loans and Perkins loans, and arguably direct loans. So let me say that again, consent to the modification of various elements of these federal loans. And the criticism of that has been that the word modify has been interpreted by the Supreme Court in a case called MCI Telecom to mean a minor change or a change around the edges, not an enormous change to a fundamental characteristic of the thing being modified. And so those who say the president does not have the power to direct the forgiveness here would say that reducing a loan balance from \$50,000 to \$0 is not a modification of the loan, it is an obliteration of a loan, right? It is right in the line of existence.

Thomas Burke:

There's a second provision in the HA, which likewise indisputably textually gives the secretary the authority to waive and compromise Again, elements of FFELP loans and Perkins loans. And the question is, what does that mean to waive or compromise various debts or claims that the federal government may have? Loan proponents say it's quite clear to wave a claim means to basically forego collection of it. And there's another view, however, that when Congress has talked about things like loan forgiveness, it has literally used the word forgive or cancel or discharge a debt, it does not use the term waive, which you more often uses in connection with procedural requirements. So there is a textual debate about whether the HAs, plain language allows the secretary to take that action. And so for that reason, people have gone into the legislative history and they've gone into various other arguments that might inform whether Congress actually gave the power to the secretary of education to forgive a trillion dollars in loan debt.

Alan Kaplinsky:

Well, as I understand what you said, even if wave means to discharge or forgive, that's still wouldn't relate to direct student loans, right? It would only relate to the FFELPs and the Perkins?

Thomas Burke:

Yes. There's a quirk of statutory drafting here, which it's not quite clear how intentional it was, but there's something called the direct loan parody provision, which basically says that the secretary of education in some respects has the same powers and responsibilities with respect to direct loans that they would have with respect to FFELP loans. I won't get into it here, but it's not quite clear whether that captures that same waiver and modification authority and gives that to the secretary with respect to direct loans. Now there's an irony in that, in theory, the secretary should have more authority over direct loans that are actually made by the federal government than has over FFELP loans, which of course, implicate private lenders. And so there's a view that how would the secretary be able to waive or forego collection on FFELP loan that it does not even own? That a private bank has made that loan, right? And it's not until the federal government actually buys back that loan or obtains it that it could forgo collection.

Alan Kaplinsky:

Right. Right, right, right, right. So is the Department of Education basically going to be looking at this on a blank slate or have there been other published analysis of whether or not there is legal authority for Biden to forgive debt here?

Thomas Burke:

So there've been two analysis that have gotten attention. The first is an analysis published by the legal services center at Harvard Law School at the request of Senator Warren. And with all respect to the talented people who work there, I think it's clear that Elizabeth Warren approached an advisory body that she was familiar with and that she believed was likely to be supportive of her advocacy in that area. And the Harvard Law School analysis wrote a detailed memo that explained that they believe that the secretary does have that authority under the Higher Education Act. Now, the flip side of that coin is that the Trump administration, which again, you might expect would have the opposite view on the policy desirability of this kind of forgiveness also had a memo that was released by the Department of Education's office of general counsel in January, 2021, just before the administration of flipped over. And that memo took the opposite view, which is that the secretary does not have the authority to do that.

Thomas Burke:

Now, of course the Harvard Law School analysis is not binding on anyone for anything. The OGC analysis, likewise, may be perceived as relevant, but it would not be binding on Secretary Cardona and the new administration. And there is a question here about whether the Department of Education's OGC is going to essentially flip-flop on this issue? And if so, how they would finesse the fact that they're changing their position?

Alan Kaplinsky:

Right. And then I guess, regardless of what they ultimately conclude Biden isn't bound by anything they say, right? He could decide to ignore their advice or decide that basically say it's a closed question and I'd rather see Congress deal with the issue than for me to stick my neck out, right?

Thomas Burke:

Well, if they decided that he did not have the authority, I think it would be extraordinary for him to then proceed with it. But the opposite, which is if they said he did have the authority, certainly I think he personally might still have some hesitation about whether it is a good idea to try to do this unilaterally.

Alan Kaplinsky:

Right. So, Tom, apart from the texts of the Higher Education Act, is there anything else that loan forgiveness proponents have cited as a potential basis for forgiveness authority?

Thomas Burke:

Yes. And this ties back to your earlier question about how the COVID pandemic has affected this whole question. Is quite well-publicized and probably every federal borrower knows at this point, that collection on federal student loans and monthly payment obligations have been suspended during the COVID pandemic with respect to direct loans and Department of Education owned FFEL loans. There has also been a 0% interest provision that has been put in place, which said that your loan is now accruing interest during that time. And the Trump administration did that. So that that action had as a basis for it, the Heroes Act of 2003, which is different from the Heroes Act that we heard referenced earlier last summer as a potential COVID related measure. The Heroes Act of 2003, it allows the secretary of education to take what you might call extraordinary action to prevent direct economic harm to people who have suffered from a national emergency.

Thomas Burke:

And there's a very reasonable argument that the interest waiver and the payment suspension were legitimate exercises of the authority under the Heroes Act. You might argue that it was overboard, that there are people who are not materially financially affected by COVID, who got those things, but didn't need them. But generally speaking, there has been no real challenge to that. The interesting question is whether you can make the further jump and say that under the Heroes Act broad loan forgiveness would be a legitimate response to prevent direct economic harm to borrowers as a result of this national emergency. But the catch is that the relief has to be directed to put the borrower in basically the same position with respect to their federal student loans to make sure they're no worse off as a result of the emergency.

Thomas Burke:

So the administration's position has been that when you suspend the interest and when you pause payments that isn't sure, and the people aren't going to get any deeper in the hole because of COVID, right? They're going to come out of it exactly where they were when they went in. But those who are opposing loan forgiveness would say that when you forgive \$25,000 in debt that a borrower had before COVID and had in that same amount after COVID, you're actually leaving them much, much better off than they were before the COVID emergency.

Alan Kaplinsky:

Right, right, right. So let's look beyond the issue on the table right now. I take it, there must be other instances where the federal government has forgiven other kinds of debt, right? The government is involved in the mortgage area with FHA-insured mortgages. And my guess is there are probably a wide variety of lending programs where the government is the direct lender or the guarantor. Has there ever been an attempt to forgive that debt?

Thomas Burke:

Well, certainly Congress has in many instances directed the forgiveness of federally held debt, and sometimes it has done so sweepingly. I am not aware of any executive branch action that would be even a shadow of what is being proposed here.

Alan Kaplinsky:

Yeah. Okay. Well, let me ask you just finally, as we are bringing the podcast to a conclusion, is there anything else that we haven't covered yet it's relevant to this subject that you think our listeners should be aware of?

Thomas Burke:

Sure. There are a few final points. The first is the fact that there's virtually no direct precedent on point from the courts on this. So there's a lot of prognosticating here. There is an element of armchair interpretation of the statutes, but no one really knows what courts would do with this either lower courts or the United States Supreme Court. I think there's a reasonable view that on the current makeup of the Supreme Court, this could be a challenging road to hoe for loan forgiveness proponents. Further, there's a question about who would have standing to bring a lawsuit challenging this action if the executive department proceeded with it. And there are some analyses that have toyed with the idea that student loan servicers might have standing guarantors or other participants in the FFELP program could have standing. There are some other crazier suggestions that I won't get into here.

Thomas Burke:

But the standing issue is a potential hurdle, which raises the interesting question of even if federal student loan forgiveness by the executive branch were flagrantly unconstitutional or otherwise impermissible, is it possible that could go through because no one would have standards challenge it. And so that'll be something that people are watching closely, which industry participants are going to stand up and challenge this if it happens?

Alan Kaplinsky:

Well, I take it that's nothing has probably going to happen until the Department of Education comes down with its opinion, am I right?

Thomas Burke:

Yes, there's no chance of anything happening with that. My guess is that even after the opinion comes down, there'll be a period of months where there's some posturing about whether Congress can find a narrower bipartisan solution? And if not, whether the Biden administration is actually willing to take that leap of canceling some massive portion of debt?

Alan Kaplinsky:

Right, right, right, right. And I guess the further question is that if he decides to go the legislative route, can it be done through budget reconciliation or does it have to be done the conventional way of enacting legislation, which would require 60 votes in the Senate in order to avoid a filibuster?

Thomas Burke:

That's right.

Alan Kaplinsky:

Yeah. Okay. Well, Tom, thank you very much for joining us today. I really appreciate it.

Thomas Burke:

Alan, it's been a great conversation. Thank you very much.

Alan Kaplinsky:

And let me thank all of our listeners today who've downloaded the podcast. And again, just to remind everybody that a new show gets released every Thursday and it's available on our website or whatever other platform you may use to access your podcasts programs. That concludes our program today.