Consumer Track

Student Loan Update

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CONCURRENT SESSION

2014

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Student Loans under the Bankruptcy Code

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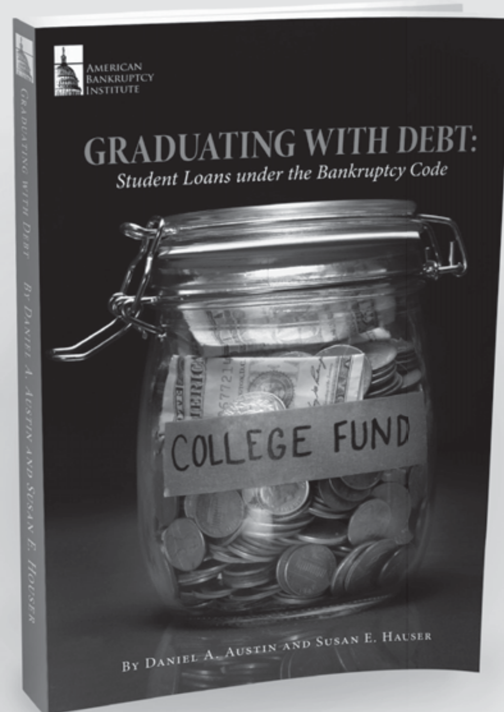

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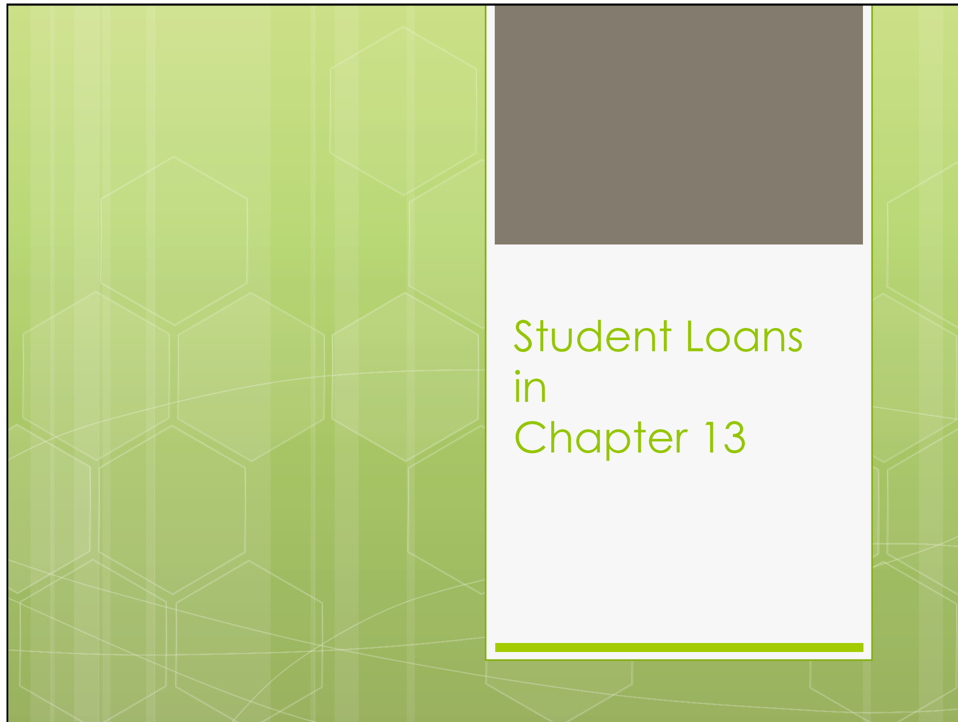
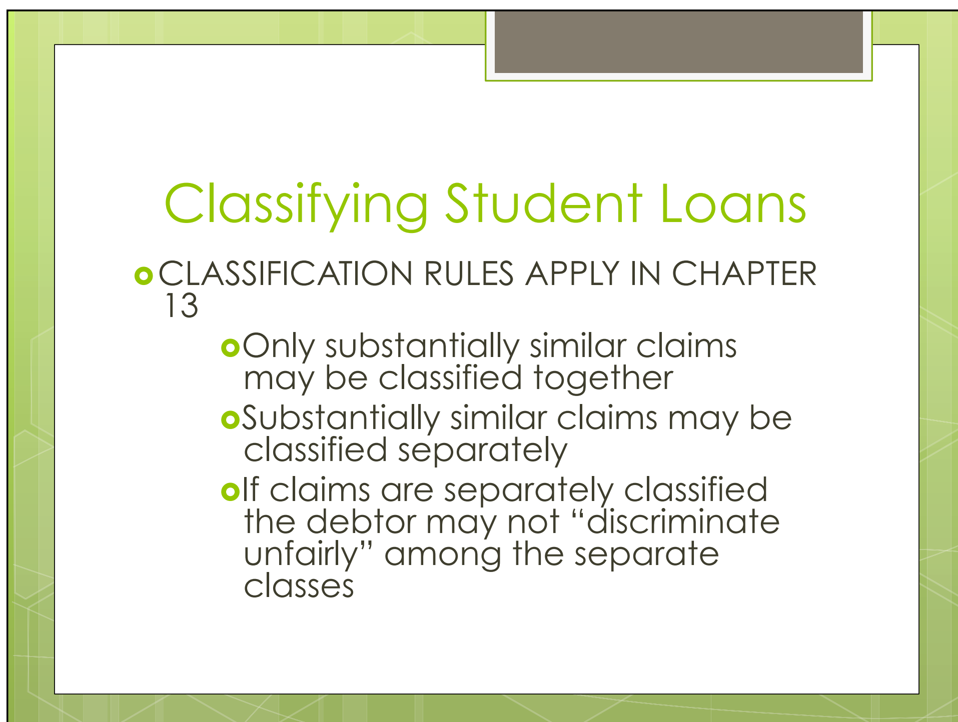

Student Loans
in
Chapter 13


Classifying Student Loans
CLASSIFICATION RULES APPLY IN CHAPTER 13
Only substantially similar claims may be classified together
Substantially similar claims may be classified separately
If claims are separately classified the debtor may not "discriminate unfairly" among the separate classes

Unfair Discrimination "Defined"

- LOTS OF TESTS!!!!!
- *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008)
- THE BENTLEY TEST (*In re Bentley,* 266 B.R. 229 (1st Cir. BAP 2001)
  - **Equality of distribution** reflects the general expectation that, absent an express grant of priority, unsecured creditors will share equally in any dividend.
  - **Nonpriority of student loans** incorporates the notion that the Code does not grant student loans priority status. The baseline expectation here is simply that nothing in the Code mandates treating student loans more favorably than general unsecured claims
  - **Contributions: mandatory v. optional** expresses the chapter 13 requirement that a debtor devote all of his or her projected disposable income to a plan if the plan does not pay the full amount of allowed unsecured claims. The expectation emanating from that requirement is that unsecured creditors would share pro rata from distributions funded with the debtor's mandatory contributions.
  - **A fresh start for honest debtors** is one of the Bankruptcy Code's fundamental purposes. This baseline is tempered against the notion that Chapter 13 does not contemplate that debtors "will necessarily emerge from Chapter 13 entirely free of student loan obligations."

Unfair Discrimination "Defined" contd.

- THE LESER/WOLFF TEST
  - Whether the discrimination has a reasonable basis
  - Whether the debtor can carry out a plan without the discrimination
  - Whether the discrimination is proposed in good faith
  - Whether the degree of discrimination is directly related to the basis or rationale for the discrimination

Mickelson v. Leser (In re Leser), 939 F. 2d 669 (8th Cir. 1991); *Amfrac Distrib. Corp. v. Wolff (In re Wolff),* 22 B.R. 510 (9th Cir. BAP 1982).

Unfair Discrimination "Defined"
contd.

- THE "OBSCENITY TEST" (CASE BY CASE)
  - "[T]he facts and circumstances of each case dictate whether the proposed discrimination is unfair." This requires a fair balancing of "(1) The Debtor's fresh start; (2) the clear legislative objective of student loan repayment; and (3) fair treatment of creditors as a whole."

In re Harding, 423 B.R. 568, 574-575 (Bankr. S.D. Fla. 2010)

  - "In determining whether any such discrimination is fair or not, courts consider various factors, applied to the circumstances of each particular case. These factors are variously formulated but bear upon the equitable allocation of plan resources and the furtherance of underlying policy objectives."

In re Machado, 378 B.R. 14, 16 (Bankr. D. Mass.2007)

Separate Classification Of Student Loans

DIFFERENT TREATMENT IS NOT UNFAIR DISCRIMINATION

- The Debtor is an above-median debtor and the payment to the student loan lender is from "excess income" (all PDI is being paid to unsecured creditors).

See, e.g., In re Abaunza, 452 B.R. 866 (Bankr. S.D. Fla. 2011)

- There is a benefit to the other creditors for the separate treatment (e.g., if student loan is not paid on time the debtor could lose her professional license necessary to work and make her plan payments).

See, e.g., In re Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009)

Separate Classification contd.

- The student loan is a long term loan and the Code allows separate classification (but NOTE other cases hold that the debtor must still show different treatment is not unfair)

Compare Labib-Kiyarsh v. McDonald (In re Labib-Kiyarash), 271 B.R. 189 (9th Cir. BAP 2001) *with In re Truss,* 404 b.r. 329 (Bankr. E.D. Wis. 2009).

DIFFERENT TREATMENT IS UNFAIR DISCRIMINATION

- Different treatment only because the student loan is NOT dischargeable constitutes unfair discrimination
  - But the non-dischargeability of the loan may be a factor to be considered

Student Loans And The Cost Of Chapter 13

- Student loans accrue regular interest plus late fees, penalties, collection fees and default rate interest if the student loan is not paid on time and in the required monthly amount.
  - When the Chapter 13 case is over, the student loan debt may even be higher than when the case was filed.
  - This result is inconsistent with the purpose of the Bankruptcy Code (fresh start) and the 2005 BAPCPA push to Chapter 13 rather than Chapter 7

Protecting The "Code"

- Accrual of any charges other than the contract rate of interest (e.g. late fees, penalties, collection fees, or default interest) during the chapter 13 case is a violation of the automatic stay AND any attempt to collect anything other than the accrued contract rate of interest after the Chapter 13 case is concluded is a violation of the discharge injunction.

In re Harding, 423 B.R. 568 (Bankr. S.D. Fla. 2010); *see In re Boscaccy,* 442 B.R. 501 (Bankr. N.D. Mass. 2010)

What's New with Undue Hardship?

Brook Gotberg

Recent legal decisions have indicated a potential shift in attitude regarding the appropriate judicial standard for determining the existence of "undue hardship," when ruling on the dischargability of student loans pursuant to §523(a)(8). Although the standard set forth by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (1987), has long dominated decisions regarding undue hardship, recent decisions stemming from the Seventh Circuit, the Ninth Circuit Bankruptcy Appellate Panel (BAP), and several bankruptcy courts suggest that the *Brunner* standard may be falling out of favor due to its perceived inflexibility and unnecessary stringent requirements. These developments should be of particular interest to practitioners who deal with cases involving student loans, although it may be too early to say whether such developments represent a true change in direction for student loan dischargability cases, and also whether the changing standard is likely to have an impact on case outcomes.

§ 523(a)(8)'s "Long and Tortured" History[1]

Up until the Education Amendments Act of 1976, student loans were treated much like any other debt in bankruptcy, in that they were fully dischargable under normal conditions. However, in that year, Congress introduced a rule (later codified in 11 U.S.C. § 523(a)(8)) that prohibited a debtor's discharge of federally guaranteed student loans in the first five years of loan repayment absent a showing that payment of the debt from future income would "impose an undue hardship on the debtor or his dependents."[2] Several years later, Congress increased the prohibitory time period from five years to seven years through the Student Loan Default Prevention Initiative Act of 1990, but kept the same language regarding undue hardship.[3] By 1998, the law was amended to prohibit any discharge for federally guaranteed student loans, again preserving the exception for cases where the debtor could demonstrate undue hardship.[4] The 2005 amendments to the Bankruptcy Code expanded this rule to all student loans, including private loans not guaranteed by the federal government.[5]

Throughout thirty years of amendments, Congress retained the "undue hardship" terminology, without any significant alterations to the language, or, unfortunately, any clarification as to how the language should be interpreted. This lack of direction created some consternation among the courts,[6] and eventually, a discernible Circuit split came into existence.

Application of "Undue Hardship" By the Courts

[1] *See In re* Mallinckrodt, 260 B.R. 892, 897 (Bankr. S.D. Fla. 2001), *rev'd*, 274 B.R. 560 (S.D. Fla. 2002).
[2] Education Amendments Act of 1976, Pub. L. No. 94-482, § 127(a) (codified at 20 U.S.C. 1087-3 (1976)).
[3] Student Loan Default Prevention Initiative Act of 1990, § 3006(b), Pub. L. No. 101-508, 104 Stat. 1388, 1388-28 to 1388-29.
[4] *See* Higher Education Amendments Act of 1998, § 971, Pub. L. No. 105-244, 112 Stat, 1581, 1837 (1998).
[5] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. 109-8, 119 Stat. 23 (2005); 11 U.S.C. § 523(a)(8).
[6] *See, e.g.,* Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("As an additional irritation, the statute Congress crafted gives the Courts absolutely no guidance as to what would constitute 'undue hardship' other than a Webster's dictionary.").

In 1987, the Second Circuit had occasion to consider the appeal of Marie Brunner, a graduate with a Master's degree in Social Work who filed for bankruptcy approximately seven months after receiving her degree. In her bankruptcy, Brunner sought to discharge approximately $9,000 of student loans; the bankruptcy court initially granted her discharge in a bench ruling. In considering the loan guarantor's appeal, the district court observed that "Congress itself had little to say" regarding application of the undue hardship standard, leaving it to the courts to provide a mechanism for meaningful application.[7] Carefully reviewing prior decisions, the district court then identified three categories of requirements, all of which the court applied to Brunner's case.[8] These requirements were: "(1) that the debtor cannot, based on current income and expenses, maintain a 'minimal' standard of living for himself or herself and his or her dependents if forced to repay the loans, 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and 3) that the debtor has made good faith efforts to repay the loans."[9] Finding that Brunner satisfied neither the second nor the third requirement, the district court reversed the bankruptcy court's decision. When Brunner brought the case before the Second Circuit, the panel both affirmed the district court's decision and adopted its three-part analysis, amending the second prong to require "that *additional circumstances* exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans."[10]

One by one, over the course of the next two decades, eight other circuits adopted what came to be known as the *Brunner* test in all cases considering undue hardship.[11] However, not all circuits elected to adopt the *Brunner* test, which was criticized among some courts as an unnecessarily formulaic standard, prone to "[t]endentious moralizing."[12] Rather than joining the other circuits in adopting *Brunner*'s three prongs, the Eighth Circuit adopted a "totality of the circumstances" test, intended to be a "less restrictive approach" that would permit bankruptcy judges to consider the unique facts and circumstances surrounding each particular bankruptcy.[13] The First Circuit consistently declined to formally adopt one test over another, although the First Circuit BAP recently concluded in *In re Bronson* that the third prong of the *Brunner* test, requiring a showing of good faith efforts to repay, was "without textual foundation."[14] Instead, the BAP adopted the totality of the circumstances test as the one to "best effectuate[] the determination of undue hardship while adhering to the plain text of § 523(a)(8)."[15]

Recent Developments

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[7] *In re* Brunner, 46 B.R. 752, 753-56 (S.D.N.Y. 1985).
[8] *Id.* at 755-56.
[9] *Id.* at 756.
[10] Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (emphasis added).
[11] *See In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 300 (3d Cir. 1995); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Hemer Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); U.S. Dept. of Educ. v. Gerhardt, (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005).
[12] *See* Pollard v. Superior Cmty. Credit Union (*In re* Pollard), 306 B.R. 637, 652 (Bankr. D. Minn. 2004).
[13] *See* Long v. Educational Credit Management Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) ("We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B).").
[14] Bronsdon v. Education Credit Management Corp. (*In re* Bronsdon), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) (internal citations omitted).
[15] *Id.*

Among the circuits that have accepted the *Brunner* test, recent decisions suggest that there may be some dissatisfaction with this analysis, indicating the possibility that some circuits may be moving away from *Brunner*'s formalistic approach. In an opinion issued last year by Judge Frank Easterbrook in *Krieger v. Educational Credit Management Corporation*, a Seventh Circuit panel reversed the district court's denial of discharge under the *Brunner* test, warning that "[i]t is important not to allow judicial glosses, such as the language in . . . *Brunner*, to supersede the statute itself."[16] In considering the three prongs of the *Brunner* test, adopted in the Seventh Circuit by *In re Roberson*, the opinion mused that *Roberson*'s characterization of the three criteria, which boiled down to "the certainty of hopelessness,"[17] "sounds more restrictive than the statutory 'undue hardship,'"[18] but in any case, the bankruptcy judge had not erred in finding that the standard of hopelessness had been met.

The Ninth Circuit BAP has also re-examined the *Brunner* test this past year in the case *In re Roth*.[19] In overturning the district court's finding that the debtor had failed the "good faith" prong of *Brunner*, the court declined to find that either the debtor's failure to make payments or her failure enroll in the federal Income Based Repayment Plan (IBRP) was dispositive. Instead, it concluded that the preponderance of the evidence indicated that the debtor had made good faith efforts to maximize her income and minimize expenses, and that there would be "no real purpose in making [the debtor] jump through the hoops of applying for, and enrolling in, the IBRP," given that she would probably never be required to make a payment.[20] More tellingly, Judge Leo Pappas drafted a separate opinion to highlight his view that:

> the analysis required by *Pena/Brunner* to determine the existence of an undue hardship is too narrow, no longer reflects reality, and should be revised by the Ninth Circuit when it has the opportunity to do so. Put simply, in this era, bankruptcy courts should be free to consider the totality of a debtor's circumstances in deciding whether a discharge of student loan debt for undue hardship is warranted.[21]

Describing *Brunner* as a "relic of times long gone,"[22] Judge Pappas observed that the expansion of both the size of the loans and the anticipated repayment period from the time *Brunner* was decided to the present time has been dramatic, such that the general expectation that a student loan excepted from discharge could still be repaid in a reasonable time is no longer justifiable.[23]

Since these two opinions were issued, bankruptcy courts in both the Seventh Circuit and the Ninth Circuit have signaled similar responses to the *Brunner* test. In the case *In re Myhre*, a Wisconsin bankruptcy court cited *Krieger* heavily in its ruling discharging the debtor's student loans despite the debtor's failure to make payments on the loans or enroll in IBRP.[24] Myhre, the debtor, is a quadriplegic whose monthly expenses had consistently exceeded his monthly income

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[16] Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013).
[17] *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).
[18] Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 886 (7th Cir. 2013).
[19] Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908 (B.A.P. 9th Cir. 2013).
[20] *Id*. at 919-20.
[21] *Id*. at 920 (Pappas, J., concurring).
[22] *Id*.
[23] *Id*. at 922 ("[T]hings are different now.").
[24] Myhre v. U.S. Dept. of Educ. (*In re* Myhre), 503 B.R. 698, 702 (Bankr. W.D. Wis. 2013) ("*Krieger* provides a refreshing reevaluation of the standard for undue hardship.").

despite his full-time employment as a database administrator and website developer. The decision in *Myhre* particularly celebrated *Krieger*'s apparent acknowledgement of the changing landscape of educational loans, and the corresponding need for reevaluation of what constitutes undue hardship.[25] In the Ninth Circuit, a Hawaii bankruptcy court cited to *Roth* in defense of its determination that the 65-year-old debtor had met the good faith prong of the *Brunner* test despite refusing to sign up for a repayment plan which required a minimum term of twenty-five years.[26] Bankruptcy courts in other circuits have also recognized the tenor of these decisions, even while acknowledging the fact that they are bound by their own circuit precedent.[27]

Potential Ramifications

Some commentators have suggested that these developments may represent what will be a growing trend away from the *Brunner* model in favor of a more flexible standard, better adapted to the realities of today's student loan system.[28] If so, practitioners should be prepared to promote and defend against arguments that will embrace more flexible considerations regarding what constitutes undue hardship. These arguments are likely to be analogous to the "totality of the circumstances" standard currently embraced by the Eighth Circuit, accordingly, decisions and briefs from that circuit may be helpful materials to review, even for practitioners in circuits that currently embrace the *Brunner* test. It may also be that this stated preference for a more flexible standard reflects a growing willingness among courts now bound by the formalities of the *Brunner* test to interpret the standard of undue hardship more broadly, permitting the full or partial discharge of student loans in a greater number of cases.

However, even if it there is a move away from *Brunner* and towards a totality of the circumstances test, it may be both premature and inaccurate to assume that such a move will translate into higher rates of discharge for student loans. Empirical analyses over the past decade or so have indicated that debtors experience roughly the same rate of success in discharging their student loans whether their cases are subject to the *Brunner* test or a totality of circumstances review.[29] However, these studies (and others) also suggest that it may be easier for debtors to obtain a discharge than is generally believed.[30] Accordingly, the best response to these developments may be for debtors as a group to be more aggressive in testing the standard for undue hardship by attempting to discharge their debts in greater numbers. In this way, the standard may be clarified, and a larger proportion of debtors who qualify pursuant to the undue

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[25] *Id*. at 702-03.
[26] Evans v. U.S. Dept. of Educ. (*In re* Evans), 11-02960, 2013 WL 6330951 at *6 (Bankr. D. Haw. Dec. 5, 2013).
[27] *See, e.g.*, Ward v. U.S. Dept. of Educ. (*In re* Ward), 2013 WL 4136093 at *4 (Bankr. E.D.N.C. Aug. 9, 2013); Wolfe v. U.S. Dept. of Educ. (*In re* Wolfe), 501 B.R. 426, 433-34 (Bankr. M.D. Fla. 2013); Morrison v. Sallie Mae, Inc. (*In re* Morrison), 2014 WL 739838 at *2, n. 8 (Bankr. E.D. Wash. Feb. 26, 2014).
[28] *See e.g.,* Michael J. Fletcher and J. Jackson Waste, *Student Loans Discharge Decisions Poke Holes in the* Brunner *Test*, ABI Journal February 2014, at 42.
[29] *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405, 487 (2005) ("Debtors whose claim of undue hardship was analyzed pursuant to the Brunner test received a discharge approximately 49% of the time, whereas debtors whose claim of undue hardship was analyzed pursuant to the totality test received a discharge approximately 46% of the time."); Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 Am. Bankr. L.J. 495, 497 (2012) (finding no statistically significant differences between outcomes in *Brunner* circuits and the Eighth Circuit).
[30] *See* Pardo & Lacy, *Undue Hardship*, *supra* note 31, at 487 (study indicates about a 50% success rate for full or partial discharge); Iuliano, *Empirical Assessment*, *supra* note 31, at 505, 512 (although study indicates about a 40% success rate for full or partial discharge, it also suggests that less than 0.1% of debtors pursue discharge); *see also* Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, 399 (2013) (study indicates that debtors tend to self-select to not discharge student loan debt).

hardship standard, however it is applied, may obtain relief from otherwise crushing student loan debt.

Non Bankruptcy Options for Student Loans

Federal Loans

The Actors:

- Department of Education
- Guarantors
- Private Banks
- Servicers
- Third Party Debt Collectors

Payment Options

- 10 year standard
- Graduated
  - Steps up every two years
    - 10 year term
- Extended
  - Balances over $30k can take up to 25 years
  - Can be either fixed or graduated payment plan (payment rises every 2 years)

Income **Contingent** Repayment

- Considers income and balance of loan DL only
- Parent Plus cannot have ICR, but consolidated loan containing a Parent Plus can so if dealing with Parent Plus and need lower payment, consolidation may be the option.

Income Based Repayment

- Perkins alone cannot have IBR, but if consolidated it can
- Parent PLUS cannot have IBR, even if consolidated
- Definition of family size includes all children supported at least half-time regardless of tax status or physical custody
- If married and file jointly, both incomes used in calculation
- If married file separate, only borrower's income used in calculation

Other IBR/ICR Details

- Balance forgiven after 25 years
  - Balance forgiven after 20 years for loans taken on or after 2014 also known as "Pay As You Go"
- Economic Hardship Deferment time counts towards the 25 years
- Discharge amount may be taxable

Collection Costs

- Costs of up to 25% – based upon settlement of Gibbons v Riley (E.D.N.Y. Nov. 9, 1994)
- Perkins – 30% first attempt, 40% thereafter including litigation
- Debt Collectors involved (FDCPA!)

Offsets

- Tax refund intercept – 31 U.S.C. § 3720A
  - 20 days to request hearing
  - Non-borrower spouse can get refund via IRS "injured spouse" claim Form 8379
  - Collection fee is not paid with offset
- Social security offset
  - SSI exempt from offset
  - SS benefits including Part B of Black Lung Act not exempt
  - Exempts $9,000 per year ($750 per month) – Capped at 15 %

  Offset of federal workers' wages up to 15% (military too!)

Wage Garnishment

- Capped at 15% of disposable pay (amount after health insurance, SS taxes, and all other required deductions)
- Must be left with 30 x federal minimum wage ($217.50)
- Takes lesser of difference between minimum wage amount or 15%
- Can be avoided by entering into acceptable repayment
- Cannot consolidate once garnishment starts

- Notice must be sent 30 days prior to start of garnishment
- Request hearing within the 30 days, ceases garnishment until hearing outcome
- Hearing can be requested after garnishment starts, will not cease garnishment until outcome

Federal Student Loan Lawsuits

- Not common and tough to defend
- Usually brought against self-employed
- May either be brought by DOJ or private attorney (usually balance driven)

Consolidation

- Consolidate to Direct Loans
- Payment prior consolidation to not required - But can make three payments OR choose IBR/ICR "forced consolidation" or "forced IBR".
- 18.5% collection fee if in default at time of consolidation

Rehabilitation

- Nine payments within ten months
  - Perkins only allows 9 consecutive months
- Reasonable and affordable, based upon document review
- 18.5% collection fee
- Collections may not cease

- Can only do this once
- Negative remarks removed from credit report
- Start with IBR payment but cannot have a $0 Rehabilitation payment
- Once loan is rehabilitated, can choose IBR with potential $0 payment

Judgments

- Loans cannot cure while Judgment is in place - must vacate before borrower can consolidate or rehabilitate
- Can usually be vacated after 24-48 payments at discretion of creditor – Will require financial disclosure
- Interest usually reduced to 1% or current T-bill
- Stipulated Judgment for payments can protect assets
- DOJ will usually assist with home refinance if client needs to do so.

First Steps

1 – Identify status of loan and whether private or federal.

- 2 – If in default, identify cure methods:
  - – Rehabilitation v Consolidation
- 3 – If delinquent, identify time until default and methods to avoid default.
  - 4 – Forbearance and/or deferment if in temporary financial distress (and if IBR isn't feasible).

First Step When Dealing With Potential New Clients

- ALL federal loans are listed at the National Student Loan Data System:
    - www.nslds.ed.gov/nslds_SA/
  - Will Need PIN – if missing go to PIN website
    - https://pin.ed.gov/PINWebApp/pinindex.jsp
- Private loan information should be supplied by collection agency, servicer, or loan holder.

Collection Law Violations

- Federal – FDCPA
  - Only covers default, not delinquent period. Determine who got loan when in default (270 days or more delinquent)
  - Does not apply to lenders, or servicers.
  - Mixed case law about guarantee agencies
    - Originated by guarantee agency or assigned – how integral to fiduciary duty?
- State – FDCPA like protections and UDAP
  - Preemption – key issue

Discharge: School Related

- School Closure
  - Borrower must have been enrolled or withdrawn within 90 days of closure. School closes after 90th day = no discharge.
- School's False Certification
  - Falsifies non-HS graduate's ability to benefit
  - Enrolls student unable to meet minimum state employment requirements for the job
  - Forgery or alter loan note or check endorsement
  - Identity theft
- School's Failure to pay refund to student

Federal Student Loan Discharges

Discharge

- Death
  - Borrower no longer liable (Federal Loans)
  - Death of student discharges Parent PLUS loan
  - Check for Community Property Laws with respect to surviving spouses and private student loans.

Disability Discharge

- 3 types of qualifications for Disability Discharge
- Nelnet handles all Disability Discharge Claims
- First, Nelnet will provide you with the information you need to apply for a TPD discharge.
- Second, Nelnet will review its records and identify your federal student loans and/or TEACH Grant service obligation that may qualify for a TPD discharge.
- Finally, Nelnet will contact your loan holders and instruct them to suspend collection activity on your loans for a period of up to 120 days. This means that during the 120-day period you will not be required to make payments on your loans.

Disability Discharge #1

If you are a veteran, you can submit documentation from the U.S. Department of Veterans Affairs (VA) showing that the VA has determined that you are unemployable due to a service-connected disability.

Disability Discharge #2

- If you are receiving Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits, you can submit a Social Security Administration (SSA) notice of award for SSDI or SSI benefits stating that your next scheduled disability review will be within five to seven years from the date of your most recent SSA disability determination.
- Can be expected to result in death,
- Has lasted for a continuous period of not less than 60 months, or
- Can be expected to last for a continuous period of not less than 60 months

Disability Discharge #3

- You can submit certification from a physician that you are totally and permanently disabled. Your physician must certify that you are unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that
- Can be expected to result in death,
- Has lasted for a continuous period of not less than 60 months, or
- Can be expected to last for a continuous period of not less than 60 months.

Public Service Loan Forgiveness

- Must be consolidated to Direct Loans or loans made by Direct Loans.
- Qualifying jobs
  - 501(c)(3) or government job based on employer eligibility, not job type
  - full time = 30 hours a week
- Qualifying payments
  - 120 on-time full monthly payments after July 1, 2007
  - IBR/ICR/10 year standard payments
- Tax free discharge in **10** years!

Teacher Loan Forgiveness

- $5,000 for full time, 5 years, consecutive and complete, employed as a teacher in eligible areas/schools

- $17,500 for full time, 5 consecutive years
  - math, science in eligible secondary school
  - special education in eligible secondary or elementary school

Teacher Loan Forgiveness

- Check requirements as they are very specific as to when worked as a teacher.

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RECENT CONGRESSIONAL INITIATIVES DEALING WITH STUDENT LOAN DEBT

By
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In recent years, legislation has been introduced in Congress to address the growing problem of student loan debt. Specific issues considered by Congress have included interest rates, treatment of student loans in bankruptcy, notice to borrowers, loan forgiveness, employer-assistance programs, and refinancing. This memo will review recent Congressional action regarding student loan debt.

I. ENACTED LEGISLATION: THE BIPARTISAN STUDENT LOAN CERTAINTY ACT OF 2013

The Bipartisan Student Loan Certainty Act was enacted on August 9, 2013 and deals with interest rates on new student loans.[2] The Act sets the interest rate on new loans to federal interest rate benchmarks at the time the loan is made. The interest rate remains fixed at that rate for the life of the loan. The rates are as follows:

Undergraduate Loans – the lesser of the 10-year Treasury Note yield plus 2.05% or 8.25%;

Graduate Loans – the lesser of the 10-year Treasury Note yield plus 3.6% or 9.5%;

PLUS Loans - the lesser of the 10-year Treasury Note yield plus 4.6% or 10.5%.

II. BILLS IN THE HOUSE

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[2] H.R. 1911, 113th Cong. (2013) (enacted).

Members of the House of Representatives have introduced various bills dealing with loan discharge, loan forgiveness, and loan repayment.

1. *Student Loan Borrowers' Bill of Rights Act of 2013*[3]

This act would modify §523(a)(8) of the Bankruptcy Code to permit discharge of student loan debt in bankruptcy pursuant. In addition, the act would impose a six-year statute of limitations for institutions to bring claims against borrowers.[4]

2. *Private Student Loan Bankruptcy Fairness Act of 2013*[5]

This act would amending §523(a)(8) to allow discharge of private student loans in bankruptcy, but would retain the current exception to discharge of federal student loans.

3. *Student Loan Forgiveness Tax Repayment Act of 2014*[6]

This act would allow borrowers to pay the tax on forgiven loan amounts (i.e., loans forgiven under various loan forgiveness programs) as gross income over a period of 15 years. Under present law, the portion of student loans that are forgiven under income driven repayment is considered taxable income in the year in which it is forgiven. The act would also require that such "income" be disregarded in determining eligibility for federal means-testing programs.

4. *Student Loan Employment Benefits Act of 2013*[7]

This act would allow borrowers to exclude from gross income up to $5,000 of any student loan amounts paid or incurred by an employer. To qualify, an employer offering a student loan payment assistance plan have to meet certain non-discrimination criteria.

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[3] H.R. 3892, 113th Cong. (as referred to the Committee on Education and the Workforce, and the Committees on Ways and Means, the Judiciary, and Oversight and Government, Jan. 15, 2014).
[4] *See*, 20 U.S.C. 1091a(a).
[5] H.R. 532, 113th Cong. (as referred to the Committee on the Judiciary, Feb. 6, 2013).
[6] H.R. 4020, 113th Cong. (as referred to the Committee on Ways and Means, Feb. 6, 2014).
[7] H.R. 395, 113th Cong. (as referred to the Committee on Ways and Means, Jan. 23, 2013).

5. *Student Loan Fairness Act*[8]

This act would provide a "10/10" loan repayment plan under which debtors would not pay more than 10% of discretionary income in repayment, with total interest accumulation capped at 10% of the principal, plus a 10 year (120 month) repayment period, after which the loan balance would be forgiven.

III. BILLS IN THE SENATE

1. *Student Loan Borrower Bill of Rights*[9]

This legislation would add certain Truth-in-Lending disclosures to student loans. These would include a notice provided before the first fully amortized payment becomes due, notice when borrowers become 30-and 60-days delinquent, and information on forbearance and deferment options. The act would also require excess payments to be used to reduce principal (rather than be applied to interest), provide greater options loan rehabilitation, and a restrict charge-offs and negative credit reporting for active service members. The act would also require lenders to notify borrowers when their loan is transferred among lenders or servicers, and describe alternate repayment options and alternatives to default.

2. *Protect Student Borrowers Act of 2013*[10]

This act would shift some of the risk of default to the institutions of higher education where the student borrowed the funds. The act would require institutions to

[8] H.R. 1330, 113th Cong. (as referred to the Committee on Education and the Workforce and the Committees on Financial Services and Ways and Means, Mar. 21, 2013).
[9] S. 1803, 113th Cong. (as referred to the Committee on Health, Education, Labor, and Pensions, Dec. 11, 2013).
[10] S. 1873, 113th Cong. (as referred to the Committee on Health, Education, Labor, and Pensions, Dec. 13, 2013).

repay a portion of the federal direct student loans based on a graduated schedule of student loan default rates.

3. *Responsible Student Loan Solutions Act*[11]

This act would limit the interest rate on subsidized loans to 6.8%, and 8.25% for unsubsidized loans. In addition, the act would cap the maximum amount of federal loans per student based upon college years completed.

IV. SENATOR WARREN INQUIRY REGARDING SALLIE MAE

In September 2013, Senator Elizabeth Warren (D-Mass.) sent a letter to the Department of Treasury and Department of Education asking for information regarding Sallie Mae and its treatment of student loan borrowers.[12] Specifically, Senator Warren asked about the following:

1. Whether Sallie Mae has violated the Service Members Civil Relief Act, the Equal Credit Opportunity Act, or other contractual provisions, and if so, will the Department terminate its contracts with Sallie Mae?
2. Has or will the Department fine Sallie Mae for any violations?
3. A request for details as to all investigations into Sallie Mae being conducted, or having been conducted over the past 10 years.

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[11] S. 909, 113th Cong. (as referred to the Committee on Health, Education, Labor, and Pensions, May 8, 2013).

[12] Letter from Senator Elizabeth Warren, U.S. Senate, to Jacob Lew, Secretary of the U.S. Department of Treasury, and Arne Duncan, Secretary of the U.S. Department of Education (Sep. 19, 2013) *available at* http://www.warren.senate.gov/files/documents/Letter%20from%20Elizabeth%20Warren%20to%20ED,%20Treasury%20-%209-19-2019.pdf.

In February 2014, Senator Warren made a similar inquiry to SLM Corporation, the parent company of Sallie Mae.[13] In light of requests to the Department of Education to step up its oversight of Sallie Mae, the Senator requested information as to what Sallie Mae is doing to help borrowers avoid going into default and information (including hard figures) as to what sort of assistance Sallie Mae is offering borrowers facing economic hardships. Sallie Mae has not yet responded to the Senator's inquiry.

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[13] Letter from Senator Elizabeth Warren, U.S. Senate, to John (Jack) F. Remondi, President and CEO of SLM Corporation (Feb. 25, 2014) *available at* http://www.warren.senate.gov/files/documents/2%2025%2014%20Letter%20to%20SLM.pdf.