

# Student Loans & Case Law Update

**Amy N. Tirre, Moderator**

*Law Offices of Amy N. Tirre, P.C.; Reno, Nev.*

**Natalie A. Eness**

*Educational Credit Management Corp.; Oakdale, Minn.*

**Hon. Stephen L. Johnson**

*U.S. Bankruptcy Court (N.D. Cal.); San Jose*

**Allan D. NewDelman**

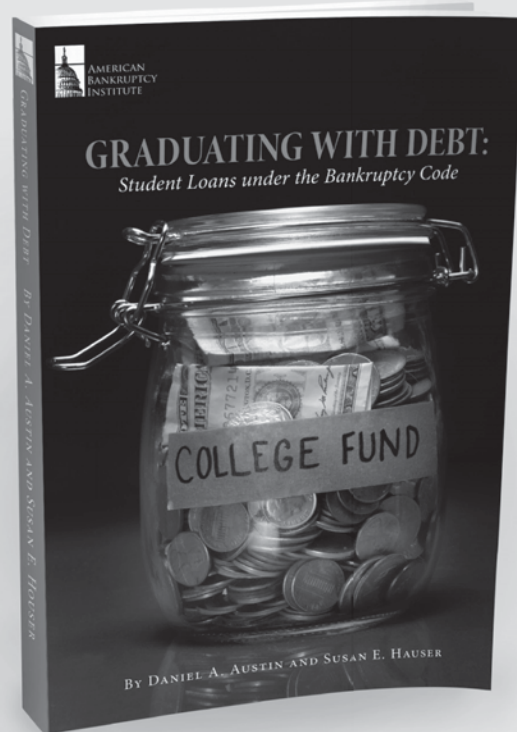
*Allan D. NewDelman; Phoenix*



# Graduating with Debt

## Student Loans under the Bankruptcy Code

Student loan debt in the U.S. exceeds \$1.1 trillion — more than any other type of consumer debt except for mortgage loans — while new education lending continues at an explosive pace. This book will enable bankruptcy and consumer credit professionals to assist clients in dealing with student loan debt. Written with both borrowers and creditors in mind, *Graduating with Debt: Student Loans under the Bankruptcy Code* introduces readers to the basics of student loan debt, including different types of loans and loan-forgiveness programs, delinquency and default, and administrative and nonjudicial remedies for borrowers having trouble repaying their loans. The book also includes extensive appendices replete with sample pleading and discovery forms.



By: Daniel A. Austin and Susan E. Hauser

**Member Price: \$60**

**Non-member Price: \$85**

Product #: 13\_011

**Order  
Your Copy  
Today!**



I. GENERAL OVERVIEW OF STUDENT LOANS

A. Higher Education Act of 1965: In 1965, Congress, in response to a perceived need for financial assistance to students in higher education, passed the Higher Education Act of 1965 (HEA). The purpose of the HEA is to “keep the college door open to all students of ability,” regardless of socioeconomic background. HEA has been reauthorized nine times since its initial enactment.

B. (There Were) Two Federal Student Loan Programs: HEA governs two federally-backed student loan programs: the Federal Family Education Loan Program (FFEL Program) and the William D. Direct Loan Program (Direct Loan Program). Under the Health Care and Education Reconciliation Act of 2010, Congress eliminated the FFEL Program, effective July 1, 2010. All federal loans originated after that date are made through the Direct Loan Program and no longer involve guaranty agencies and private lenders. Currently, the total debt at stake in the two federal student loan programs is an estimated 1.2 trillion dollars.

1. FFEL Program: Under the FFEL Program, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are guaranteed by guaranty agencies (state agencies or private non-profit corporations), which are ultimately reinsured by the United States Department of Education (ED).

2. The Direct Loan Program: Under the Direct Loan Program, ED makes loans directly from the federal treasury to student and parent borrowers.

C. Types of Federal Loans

1. HEA: Loans under the HEA include Perkins Loans, Stafford (subsidized and unsubsidized) Loans, PLUS Loans and Consolidation Loans. Grants include Pell Grants and Supplemental Education Opportunity Grants. The terms of Stafford, PLUS and Consolidation loans in both the FFEL Program and the Direct Loan Program are similar except that the Direct Loan Program offers a Public Service Loan Forgiveness program and one additional income-related payment option (the FFEL Program has one). See *infra* at II.F.; III.B.

2. Health and Human Services Loans: The United States Department of Health and Human Services (DHHS) also administered a student loan program, Health Education Access Loan program, (HEAL), for borrowers engaged in health related studies. This program is no longer active. Like FFEL Program loans, HEAL loans are also presumptively nondischargeable. Courts have construed the dischargeability standard of “unconscionability” for HEAL loans as being a “higher standard” than that of FFEL Program/Direct Loan loans, which require a showing of “undue hardship.” Even though HEAL loans are administered by DHHS, HEAL loans are eligible for consolidation along with FFEL Program loans in the Direct Loan program.

D. **Non-HEA Loans: Private Loans:** Private loan programs have also emerged on the scene to provide educational funds to students who have exhausted their federal loan limits or for other reasons. Private loans are not governed by HEA and are not eligible for the many administrative remedies discussed below and may not be consolidated under federally-backed consolidation programs. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), however, expressly included private loans in the presumption of nondischargeability under 11 U.S.C. § 523(a)(8).

## II. ADMINISTRATIVE REMEDIES

There are numerous administrative remedies for student loan borrowers to consider in lieu of seeking discharge under § 523(a)(8). Unlike relief under 11 U.S.C § 523(a)(8), borrowers may be entitled to administrative relief irrespective of whether they’ve filed bankruptcy. But these administrative options require administrative determinations and, thus, should not be the basis for claim objections or adversary proceedings in a bankruptcy context.<sup>1</sup>

### A. Total and Permanent Disability Discharge (TPD):

1. **Eligibility Criteria:** Borrowers may be eligible to have their federal student loan debt discharged because of a total and permanent disability.

a. **TPD application:** A medical doctor or doctor of osteopathy must certify that the borrower is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death; (ii) has lasted for a continuous period of not less than 60 months; or (iii) can be expected to last for a continuous period of not less than 60 months.

b. **Social security award letter:** As of July 1, 2013, borrowers who receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits may be able to use their Social Security Administration (SSA) award letter in support of their disability. Under the new regulations, an individual can submit their SSA notice of award for SSDI or SSI benefits stating that the individual’s next scheduled disability review will be within 5 to 7 years from the date of the individual’s most recent SSA disability determination. An individual who provides this documentation is not required to obtain a separate certification from a physician on the TPD discharge application, as was previously required. Borrowers may also submit a Benefits Planning Query (BPQY) that states the next review is within 5 to 7 years. The BPQY provides a summary of your SSA disability benefits, including the scheduled date for your next disability review. You can request a BPQY by contacting the SSA office that issued the award or by calling 800.772.1213.

---

<sup>1</sup> The discharge provisions described here are illustrative only of the administrative relief available under the HEA. For full detail of requirements necessary for relief, see 34 C.F.R. §§ 682.100 et seq., 685.100 et seq. These administrative options are available for both FFEL Program and Direct Loan Program loans unless otherwise noted.

- c. Veterans with service-connected disabilities: Veterans who have a 100% service-connected disability are immediately eligible for discharge of their federal student loan debt without further doctor certification. Veterans only have to submit documentation from the U.S. Department of Veterans Affairs (VA) showing that the VA has determined you are unemployable due to a service-connected disability (an individual unemployability determination) or that you have a service-connected disability that are 100% disabling. They need only provide their Veteran's Administration disability paperwork along with their TPD application. If approved, loan holders are instructed to return any loan payments received after the veteran's disability date (the date the VA determined the veteran was unemployable due to a service-connected disability), and the loans are immediately discharged.

ED has designated Nelnet as its disability servicer for all TPD applications submitted after July 1, 2013. Under this new TPD process, borrowers can seek a TPD discharge of all federally-backed loans by submitting a single TPD discharge application directly to ED/Nelnet rather than to their individual loan holders. Borrowers may initiate the TPD process by going to [www.disabilitydischarge.com](http://www.disabilitydischarge.com). Once informed of a TPD request, ED/Nelnet notify the loan holders and an automatic 120-day hold on collection activity begins.

For borrowers who verified their disabilities based on SSA documentation or physician certification, after the TPD request is approved, ED will monitor the account for three years post-discharge. During this three-year period, borrowers cannot earn more than 100% of the federal poverty guidelines for a family of two (in 2013 = \$15,510) and cannot obtain any new federal student loans. Typically, Nelnet (ED's Disability Servicer) will contact the borrower when the three-year mark is approaching to update the disability status and financial status to ensure that the borrower's discharge criteria have not changed.

B. Closed School Discharge: Borrowers whose school closed before they could complete the program of study may be eligible for discharge. The borrower must show they were enrolled at the time of closure or that they withdrew from the school not more than 90 days prior to the date the school closed and that they were unable to complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.

C. False Certification Discharge: A borrower's student loans can be discharged if: (1) a school falsely certified the student's eligibility for a federal student loan on the basis of ability to benefit from the education, (2) signed the borrower's name without authorization by the borrower on the loan application or promissory note, or (3) certified the eligibility of an individual for a loan as a result of the crime identity theft as defined in 34 C.F.R. 682.402(e)(14).

D. Death Discharge: If an individual borrower dies, or the student for whom a parent received a PLUS loan dies, the obligation of the borrower and any endorser to make any further payments on the loan is discharged."

E. Teacher Loan Forgiveness Program: Available to borrowers who took out loans

after October 1, 1998 to borrowers and have taught full-time for five consecutive years at a designated low-income school. Teachers who meet the requirements in 34 C.F.R. § 685.217 are eligible for forgiveness of up to \$17,500. Typically, this provision is for teachers in low-income areas and those who teach math or science at schools designated eligible by the U.S. Department of Education. (Direct Loan Program loans only).

F. Public Service Loan Forgiveness: Borrowers who are employed in the public service industry, including most local, state, federal, tribal nation, or § 501(c)(3) corporations and who make 120 qualifying payments under the IBR, ICR, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. The payments must have been made after Oct. 1, 2007. The first discharges under this program will not be granted until 2017. This is available only for Direct Loans. If borrowers, however, wish to take advantage of this program, they can consolidate their FFEL Program loans into the Direct Loan Program and become eligible. See also *infra* Section III.B.3.

G. September 11 Survivors Discharge: Survivors of or eligible victims of the September 11 attacks may request discharge of their student loan debt. (Direct Loan Program loans only).

I. Administrative Discharges Specific to Perkins Loans: In addition to the above-mentioned non-bankruptcy discharge options, borrowers may also request discharge or forgiveness of their Perkins Loans for the following reasons:

- full-time teacher in elementary school serving students from low-income families (up to 100%);
- full-time special education teacher (up to 100%);
- full-time qualified professional provider of early intervention services for the disabled (up to 100%);
- full-time teacher of math, science, foreign language, bilingual education, etc. in designated teacher shortage area (up to 100%);
- full-time employee of public or nonprofit child or family-services agency for high-risk children and families from low-income areas (up to 100%);
- full-time nurse or medical technician (up to 100%);
- full-time law enforcement or corrections officer (up to 100%);
- full-time staff member in education component of Head Start Program (up to 100%);
- VISTA or Peace Corps volunteer (up to 70%);
- Service in the U.S. Armed Forces (up to 50% in areas of hostilities or imminent danger);
- full-time teacher in designated educational service agency serving students from low-income families (up to 100%);
- full-time staff in prekindergarten or child care program licensed or

regulated by State (up to 100%);

- full-time firefighter (up to 100%);
- full-time faculty member at Tribal College or University (up to 100%);
- full-time speech pathologist with master's degree working in Title I-eligibility elementary or secondary school (up to 100%);
- librarian (master's degree) working in Title I-eligible elementary or secondary school or public library serving title-eligible schools (up to 100%);
- full-time attorney working in public or community defender organization (up to 100%).

**J. Additional nonbankruptcy relief:**

Loan Rehabilitation: Federal regulations allow borrowers who default on repayment of their loan a one-time opportunity to bring their loans out of a default status and repair the negative credit information reported to credit bureaus. Payment amounts are set at a reasonable rate and borrowers must make nine consecutive on-time payments over a 10-month period. Completing rehabilitation restores a borrower's loans to good standing and helps to repair credit. Entering a loan rehabilitation agreement has immediate effect on a borrower's defaulted loans: it stops collections activity and legal proceedings, prevents wage garnishment, and it may protect a borrower's state and federal tax refunds from IRS offsets.

Successfully completing a loan rehabilitation program restores loans to their pre-default status, it reestablishes eligibility for deferment, forbearance, alternative repayment options, title IV financial aid, resets loans to their original terms, interest rate, and repayment period, minus the 9-month rehabilitation period, and shows positive payment progress on a borrower's credit report, which may repair some of the damage done by default.

**III. FLEXIBLE, AFFORDABLE PAYMENT OPTIONS:  
INSIDE OR OUTSIDE OF BANKRUPTCY**

Both the FFEL Program and the Direct Loan Program have flexible, affordable payment options for borrowers who have financial hardship. These payment options are available whether or not the borrower has filed bankruptcy. Most courts will focus on the most affordable payment amount available to the borrower when analyzing an undue hardship discharge case.

A. Consolidation: Consolidation can benefit a defaulted borrower by helping them to regain eligibility for deferments, forbearances, and income-driven repayment options. It can also benefit a borrower if they want to take advantage of the Public Service Loan Forgiveness. Borrowers who have previously consolidated their loans in the FFEL Program may re-consolidate their loans (even if defaulted) into the Direct Loan Program but not vice-versa. Since July 1, 2010, consolidations are available only in the Direct Loan Program.

B. Income-Driven Payments: In addition to fixed, amortized extended payment

terms, there are two payments options that are based on a borrower's income and family size: the Income Based Repayment plan (IBR) (available in both the FFEL and Direct Loan Program) and the Income Contingent Repayment plan (ICR) (available only in the Direct Loan Program).

1. Income Based Repayment:

a. What loans are eligible for the IBR? All non-defaulted FFEL Program loans are eligible, except Parent PLUS loans or federal consolidation loans that contain underlying Parent PLUS loans. Defaulted student loans (unless they are defaulted FFEL Program loans and the borrower chooses to consolidate to take advantage of an income-driven payment plan), PLUS loans, or federal consolidation loans that contain underlying PLUS loans or a mix of Stafford loans and PLUS loans are not eligible for the IBR in either the FFEL Program or the Direct Loan Program. Stand-alone Perkins loans are also not eligible for the IBR. But a borrower may include a Perkins loan in a consolidation loan that will be IBR-eligible.

Borrowers who have defaulted FFEL Program loans may re-consolidate their defaulted loans into the Direct Loan Program and elect the IBR in the Direct Loan Program. (Re-consolidating removes the default because the borrower has a new loan). Borrowers also have a one-time opportunity to rehabilitate their loan to remove the default status and be eligible for the IBR in either the FFEL Program or the Direct Loan Program. See *supra* II.J.

b. IBR Eligibility: Borrowers who have IBR-eligible loans must demonstrate partial financial hardship (PFH). Borrowers can demonstrate PFH if the annual amount due on all eligible student loans under a 10-year repayment schedule is more than 15% of their adjusted gross income (AGI).

Ø Most borrowers whose total loan balance exceeds their annual earnings will satisfy the PFH requirement.

The IBR payment is calculated using the borrower's AGI and family size. If the borrower earns less than 150% of the poverty level for their family size, the IBR payment will be \$0. The required annual loan payment under the IBR is capped at 15% of earnings above 150% of the applicable poverty level. Because the monthly IBR payment is calculated as a percentage of the borrower's income, if the borrower's income drops, the monthly payment is reduced accordingly.

The IBR payment is recalculated annually based on household income. Married borrowers who file separate tax returns have their IBR payments based only on their own income, but still count each other and any dependents in the family size. Borrowers may contact their lender/servicer at any time if they experience a change in financial circumstances that could impact their required IBR payment. The IBR repayment period is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven.<sup>2</sup> But see *infra* III.B.3 (discussing

---

<sup>2</sup> Under the Internal Revenue Code, student loan debt forgiven at the end of the IBR (and ICR, discussed *infra*) term may constitute a taxable event. This is a nonissue in most cases because any forgiven debt is taxable only to the extent the borrower is solvent. See 26 U.S.C. § 108(a)(1)(B). It is unlikely that borrowers with large student loan debts forgiven will have assets that exceed the amount of

10-year repayment term for the Public Service Loan Forgiveness Program).

2. Income Contingent Repayment (ICR): Like the IBR, the ICR is recalculated annually and the payment amount is based on 20% of the difference between a borrower's AGI and 100% of the federal poverty level for the family size. If the AGI is below 100% of the poverty level for the borrower's family size, then the ICR payment is \$0. The ICR is the only income-driven payment option available to PLUS loan borrowers or to borrowers who have defaulted loans in the Direct Loan Program. The ICR is always based on household income regardless of whether a husband and wife file taxes jointly or separately. After 25 years, any balance that is remaining is forgiven by the Secretary of Education. See III.B.3 (10-year repayment term possible).

3. Public Service Loan Forgiveness: Borrowers who make 120 qualifying payments under the IBR, ICR, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribal nation, or § 501(c)(3) corporations. There is specific language in this regulation that exempts any forgiven debt from constituting a taxable event. (Direct Loan Program loans only).

C. Alternative Payment Arrangements: Borrowers who believe that none of the payment options are suitable may request an alternative repayment plan from the Secretary of Education. See 34 C.F.R. § 685.208(g).

D. Suspension of Payments: In addition to the different types of repayment plans, borrowers may seek deferment or forbearance. Deferment or forbearance may be granted for the specific bases stated in federal regulations, which include, but are not limited to, poor health, unemployment, economic hardship, federal student loan payments that are equal to or greater than 20% of monthly gross income, or other reasons acceptable to ED. 34 C.F.R. § 682.210; 682.211; 34 C.F.R. § 685.204; 685.205.

During a deferment period, no interest accrues on subsidized loans, but interest continues to accrue on unsubsidized loans. The borrower may pay the accruing interest on any unsubsidized loans or have it added to the principal when the deferment expires. Forbearance postpones or reduces the monthly repayment for a limited, specific period, during which interest on subsidized and unsubsidized loans continues to accrue. If the interest is not paid during the forbearance, per Federal Regulations, it is also capitalized (added to the loan principle) when the forbearance period ends.

#### IV. ADMINISTRATIVE REMEDIES v. § 523(a)(8): IS THERE COMMON GROUND?

A. Exhaustion of Administrative Remedies: In general, individuals must exhaust all administrative remedies available under a statute before resorting to judicial review. See, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S.41, 50-51 (1938). This rule both protects administrative authority and promotes judicial efficiency. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("Agencies, not the courts, ought to have primary responsibility for the programs that Congress  

---

debt forgiven.

has charged them to administer.”).

B. Interplay of Administrative Remedies and the Bankruptcy Code: There is tension in the courts regarding the significance that administrative remedies should play in a bankruptcy court’s judicial determination of student loan dischargeability matters. Some courts view administrative options as improperly usurping their judicial authority. See Terrence L. Michael & Janie M. Phelps, “Judges?!- - We Don’t Need No Stinking Judges!!!”: The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan, 38 Tex. Tech L. Rev. 73 (Fall 2005); see also *In re Todd*, 473 B.R. 676 (Bankr. Md. 2012) (noting that § 523(a)(8) “allows debtors to discharge their student loans upon a showing that repaying them would be an ‘undue hardship.’ There is no indication that Congress intended to supplant this unambiguous directive with the Ford Program and its existence should not be treated as an implicit repeal of § 523(a)(8)”).

Fundamental principles of statutory construction require courts to construe statutes harmoniously to avoid absurd results:

If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.

*Rector, etc. of Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892). It is unlikely that Congress intended administrative remedies to supplant legal remedies in 11 U.S.C. § 523(a)(8) or vice versa. The majority view is that administrative programs, especially the IBR and ICR, while not dispositive, must be considered as a significant component of the undue hardship analysis.

The following circuit-level cases have held that the IBR and ICR are an important consideration in the undue hardship analysis: *Educ. Credit Mgmt Corp. v. Jespersen* (*In re Jespersen*), 571 F.3d 775, 783 (8th Cir. 2009) (“When a debtor is eligible for the ICR, the court in determining undue hardship should be less concerned that future income may decline. The ICR formula adjusts for such declines, without regard to the unpaid student loan balance, which in most cases will avoid undue hardship”); *Educ. Credit Mgmt Corp. v. Mason* (*In re Mason*), 464 F.3d 878, 885 (9th Cir. 2006) (debtor failed good faith prong in part because of failing to pursue the alternative payment arrangements with sufficient diligence); *Educ. Credit Mgmt Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 396-397 (4th Cir. 2005) (failure to seek out loan consolidation options and income-driven repayments which make the debt less onerous is an important inquiry in good faith); *Tirch v. Pa. Higher Educ. Assistance Agency* (*In re Tirch*), 409 F.3d 677, 682 (6th Cir. 2005) (although not necessarily a per se indication of bad faith, failure to take advantage of the ICR is certainly probative of his intent to repay and is a “difficult, although not necessarily insurmountable burden” to overcome); *Alderete v. Educ. Credit Mgmt Corp.* (*In re Alderete*), 412 F.3d 1200, 1206 (10th Cir. 2005) (failing to consider alternative repayment options indicative of bad faith).

VII.

PRIVATE vs. FFELP/FORD LOANS

A. FFELP/Ford:

1. Federal taxpayer dollars are at stake. Government guaranteed (FFELP) or government is the actual loan holder (Ford).
2. Social policies predominate: Federal regulations prohibit any analysis of “credit-worthiness,” including: age, degree sought, income, length of the borrower’s educational program, attendance at a particular participating school, etc. See 20 U.S.C. § 1071(a)(2); 34 C.F.R. § 682.404(h).
3. Comprehensive regulations govern the programs.
  - a. Deferments (payment is deferred and government pays the interest on subsidized loans) and forbearances (payments are not required but interest accrues) are available.
  - b. Administrative remedies described above are available.
  - c. Alternative repayment plans are available, including Standard, Graduated, Extended, IBR and ICR.
  - d. A new program for borrowers who take out loans starting December 31, 2012 lowers the formula to 10% for a 20 year repayment period. “Pay as you Earn.” You must still have a partial financial hardship. You must be a new borrower as of Oct. 1, 2007, and received a disbursement of a Direct Loan on or after Oct. 1, 2011. This option is only available on Direct Loans.
  - e. Interest rates are set by regulations and Treasury note rates.
  - f. Limitations on borrowing, as follows:

**WESTERN CONSUMER BANKRUPTCY CONFERENCE 2014**

Year	Dependent Students (except students whose parents are unable to obtain PLUS Loans)	Independent Students (and dependent undergraduate students whose parents are unable to obtain PLUS Loans)
First-Year Undergraduate	\$5,500—No more than \$3,500 of this amount may be in subsidized loans.	\$9,500—No more than \$3,500 of this amount may be in subsidized loans.
Second-Year Undergraduate	\$6,500—No more than \$4,500 of this amount may be in subsidized loans.	\$10,500—No more than \$4,500 of this amount may be in subsidized loans.
Third-Year and Beyond Undergraduate	\$7,500 per year—No more than \$5,500 of this amount may be in subsidized loans.	\$12,500 per year—No more than \$5,500 of this amount may be in subsidized loans.
Graduate or Professional Degree Students	Not Applicable	\$20,500

Maximum Total Debt from Subsi- dized and Unsub- sidized Loans	\$31,000—No more than \$23,000 of this amount may be in subsidized loans.	\$57,500 for un- dergraduates— No more than \$23,000 of this amount may be in subsidized loans. \$138,500 for graduate or professional students—No more than \$65,500 of this amount may be in subsi- dized loans. The graduate debt limit includes all federal loans received for undergraduate study.
---	--	--

“Private Label” Loans

- Offer commercial rates of interest.
- Often require co-signers.
- Creditors are allowed to make decisions regarding who they loan to and how much.
- No taxpayer dollars at stake.
- Higher limits on total borrowing, as set by lenders.
- Administrative remedies described above not available.
- No comprehensive regulations cover the governance of private student loans.

VI.

PRACTICE TIPS

A. Who’s Got My Loans?

1. ED maintains a database called National Student Loan Data Systems (NSLDS). NSLDS

is a repository that contains information, including chain of custody, interest rate, loan type, loan status, etc., regarding every federal student loan a person has borrowed. Lenders, servicers, and guarantors have access to borrower NSLDS reports if they hold the loan. Borrowers may access their own NSLDS reports by going to [www.nsls.ed.gov](http://www.nsls.ed.gov). They must first obtain a PIN at [www.pin.ed.gov](http://www.pin.ed.gov).

2. Borrowers should name both the lender and the guarantor (if a FFEL Program loan) in their complaint. The guarantor has a separate right to notice because it has a contingent interest in the student loan debt, and therefore is a creditor in its own right. See *Alfes v. Educ. Credit Mgmt Corp.* (In re *Alfes*), 709 F.3d 631 (6th Cir. 2013).

**B. Additional Industry Resources:**

- National Student Loan Data System ([www.nsls.ed.gov](http://www.nsls.ed.gov))
- ED PIN website: ([www.pin.ed.gov](http://www.pin.ed.gov))
- Federal Student Aid (government website): (<http://studentaid.ed.gov>)
- Finaid (consumer financial aid website): ([www.finaid.org](http://www.finaid.org))
- Department of Education ([www.ed.gov](http://www.ed.gov))
- Department of Education Ombudsman Office ([www.ombudsman.ed.gov](http://www.ombudsman.ed.gov))
- William D. Ford Direct Loan Program ([www.loanconsolidation.ed.gov](http://www.loanconsolidation.ed.gov))
- Total and Permanent Disability (TPD) (<http://www.disabilitydischarge.com>)
- National Counsel of Higher Education Resources ([www.ncher.us](http://www.ncher.us))
- Educational Credit Management Corporation ([www.ecmc.org](http://www.ecmc.org))
- FFEL Forms: (<http://www.ecmc.org/topic/mainForms.html>)
- Direct Loan (Ford program) Forms: (<https://www.dl.ed.gov/borrower>)

**VII. CONTACT INFORMATION**

Natalie A. Eness  
Attorney  
Educational Credit Management Corp.  
1 Imation Place, Building 2  
Oakdale, MN55128  
[nreess@ecmc.org](mailto:nreess@ecmc.org)  
(651) 325-3636 (direct)

**ABI STUDENT LOAN AND  
CASE LAW UPDATE**

**ABI WESTERN CONSUMER  
BANKRUPTCY CONFERENCE**

**JANUARY 20, 2014**

**PRESENTERS**

Honorable Stephen L. Johnson, U.S. Bankruptcy Court

Natalie R. Eness, Esq., ECMC

Allan D. NewDelman, Esq.

Amy N. Tirre, Esq., Law Offices of Amy N. Tirre, P.C.

## GENERAL OVERVIEW OF STUDENT LOANS

**Higher Education Act of 1965:** In 1965, Congress, in response to a perceived need for financial assistance to students in higher education, passed the Higher Education Act of 1965 (HEA). The purpose of the HEA is to “keep the college door open to all students of ability,” regardless of socioeconomic background. HEA has been reauthorized nine times since its initial enactment.

## (There Were) Two Federal Student Loan Programs

### **FFEL Program**

Under the FFEL Program, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are guaranteed by guaranty agencies (state agencies or private non-profit corporations), which are ultimately reinsured by the United States Department of Education (ED).

### **The Direct Loan Program**

Under the Direct Loan Program, ED makes loans directly from the federal treasury to student and parent borrowers.

## Types of Loans

A. **HEA: FFELP and Direct Loans**

Loans under the HEA include Perkins Loans, Stafford (subsidized and unsubsidized) Loans, PLUS Loans and Consolidation Loans.

- 
- 
- 

B. **Health and Human Services Loans**

The United States Department of Health and Human Services (DHHS) also administered a student loan program, Health Education Access Loan program, (HEAL), for borrowers engaged in health related studies. This program is no longer active.

C. **Non-HEA Loans: Private Loans**

Private loan programs have also emerged on the scene to provide educational funds to students who have exhausted their federal loan limits or for other reasons. Private loans are not governed by HEA.

- 
- 
- 
- 

## ADMINISTRATIVE REMEDIES

- There are numerous administrative remedies for federal student loan borrowers to consider in lieu of seeking discharge under § 523(a)(8).
- Unlike relief under 11 U.S.C § 523(a)(8), borrowers may be entitled to administrative relief irrespective of whether they've filed bankruptcy.
- These administrative options require administrative determinations and, thus, should not be the basis for claim objections or adversary proceedings in a bankruptcy context.
- For full detail of requirements necessary for administrative relief, see 34 C.F.R. §§ 682.100 , 685.100

## **Total and Permanent Disability Discharge (TPD)**

### **Eligibility Criteria:**

Borrowers may be eligible to have their federal student loan debt discharged because of a total and permanent disability.

- a. TPD application**
- b. Social security award letter**
- c. Veterans with service-connected disabilities**

## **Additional Types of Discharge and Loan Forgiveness**

- ∅ Closed School Discharge**
- ∅ False Certification Discharge**
- ∅ Death Discharge**
- ∅ Teacher Loan Forgiveness Program**
- ∅ Public Service Loan Forgiveness**
- ∅ September 11 Survivors Discharge**
- ∅ Administrative Discharges Specific to Perkins Loans**
- ∅ Loan Rehabilitation**

**PAYMENT OPTIONS:  
INSIDE OR OUTSIDE OF BANKRUPTCY**

- ∅ **Consolidation**
- ∅ **Income-Driven Payments**
  - 
  - 
  -
- ∅ **Suspension of Payments**
  - 
  -

**ADMINISTRATIVE REMEDIES v. § 523(a)(8):  
IS THERE COMMON GROUND?**

**Exhaustion of Administrative Remedies**

In general, individuals must exhaust all administrative remedies available under a statute before resorting to judicial review. *Corp.*, 303 U.S.41, 50-51 (1938). This rule both protects administrative authority and promotes judicial efficiency.

**Interplay of Administrative Remedies and the  
Bankruptcy Code**

There is tension in the courts regarding the significance that administrative remedies should play in a bankruptcy court's judicial determination of student loan dischargeability matters. Some courts view administrative options as improperly usurping their judicial authority.

**Majority view:**

Administrative programs, while not dispositive, must be considered a significant component of the undue hardship analysis.

## New Cases in the Ninth Circuit

Hedlund v. Educational Resources Institute, Inc., 718 F.3d 848 (9<sup>th</sup> Cir. May 22, 2013)

Roth v. Educational Credit Mgmt. Corp., 490 F.3d 908 (9<sup>th</sup> Cir. BAP April 16, 2013)

Educational Credit Mgmt. Corp. v. Jorgensen, 479 F.3d 79 (9<sup>th</sup> Cir. BAP September 11, 2012)

Nichols v. Align Western States Learning Corp., Unpublished Decision (9<sup>th</sup> Cir. BAP July 9, 2013)

## Standard for Discharge

*Hedlund v. Educational Resources Inst., Inc.*, 718 F.3d 848 (9<sup>th</sup> Cir. 2013)

Student loan obligations are presumptively nondischargeable in bankruptcy absent a showing of “undue hardship.” 11 U.S.C. § 523(a)(8). To determine if a debtor has shown undue hardship, we follow the three-part test from Brunner. See *In re Pena*, 155 F.3d at 1111–12. Under Brunner,

the debtor must prove that: (1) he cannot maintain, based on current income and expenses, a “minimal” standard of living for himself and his dependents if required to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loans.

*Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 882 (9<sup>th</sup> Cir.2006).

## Burden of Proof

“[T]he burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted.”

*Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1087–88 (9th Cir.2001)

## Tips on How to Litigate a Student Loan Case

- What is your basis for claiming the discharge?
  - Age
  - Health-related issues of Debtor or Spouse
    - Physical obstacles
    - Mental issues
  - Earnings history
  - Quality of education program/Application to job market
  - Future earnings potential
  - Family obligations
    - Children
    - Parents
  - Size of debt obligation (partial discharge)
  - Prior efforts to repay (good faith)
  - School closings

## Non-Expert Sources of Discovery

- Non-expert discovery
  - Social Security has earnings records (there's a form on line to request information – Form 2238)
  - Social Security also has disability records (again, a form on line)
  - Employers may have employment files
  - Tax Returns (4506 – T Transcript Form)
  - Medical provider records
  - Psychological provider records
  - Records of job searches (lists of applications, lists or rejections)
  - Website searches (Monster/USAJobs)

## Sources of Discovery – Experts & Others

- Medical / Psychological Provider
- Vocational trainer or skills coach
- Work force analyst – usually work with State disability systems
- Social Security Medical Evaluator

## Discovery Methods

- Subpoenas to
  - Banks
  - Defendants (Education, ECMC, etc.)
    - They will have better records of payment than your client
- Releases to
  - Social Security
  - IRS
- Depositions
  - ECMC or Education – on amount of debt, interpreting the transcripts on NSLDS
  - Possibly, medical providers
  - Any expert the defendants retain
- Interrogos – Not much use
- Demand for documents – promissory notes, payment histories and any correspondence between your client and the defendants
- Admissions – may be useful to firm down payment histories, dates, and good faith effort to repay