



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Consumer Practice Extravaganza

Student Loans

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Student Loans and Bankruptcy 523(a)(8)

Presented by:

Professor	Chief	Attorney
Jason	Judge	Joshua
Iuliano	Cecelia	Cohen
	Morris	



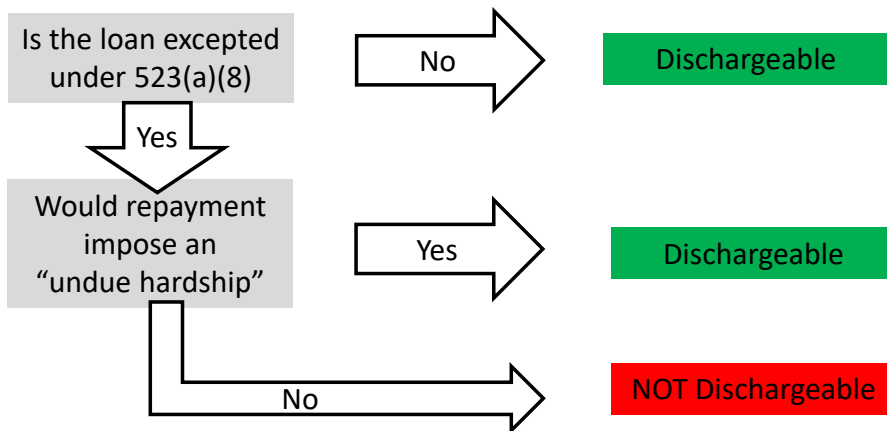
How Bad Is it?

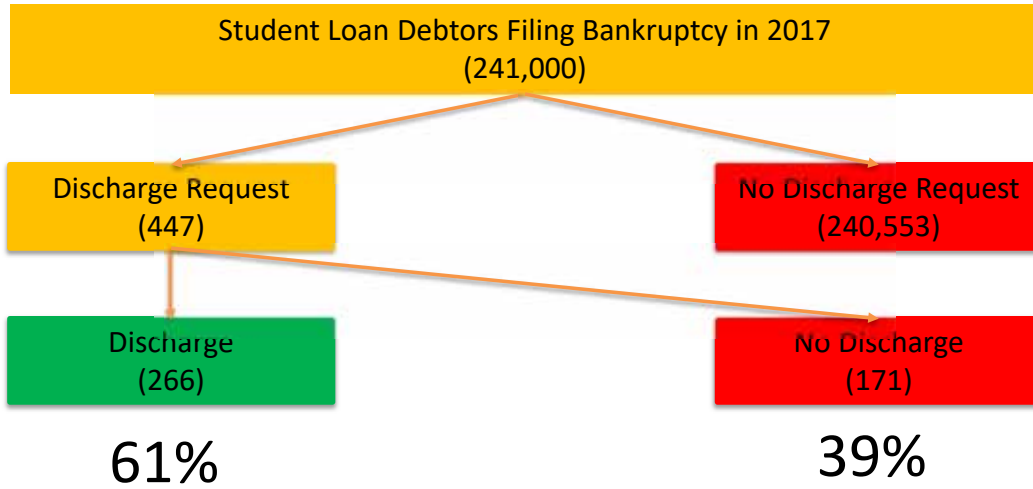
\$1,782,539,054,610

(\$1.8 TRILLION!)



Discharging Student Loan Debt





Federal v. Private

Federal	Private
<ul style="list-style-type: none"> • Originated, funded, or guaranteed by US Education Department (USED). • DL (Direct Loan) = originated by USED • FFEL (Federal Family Education Loan) = originated by bank, credit union, or guarantee agency • Studentaid.gov – send client here for info 	<ul style="list-style-type: none"> • No US Dept of Education involvement – ever. • Originated by bank or credit union • Information via credit reports



523(a)(8)(A)(i)

Gov't Loans	IDR Plans:
<ul style="list-style-type: none">• Federal• Stafford• PLUS• Perkins• Consolidation• HEAL• State	<ul style="list-style-type: none">• ICR – 20% (Use this for Parent PLUS)• IBR – 15% (Use this for FFEL)• PAYE – 10% (Date restricted)• New IBR – 10% (Date restricted)• REPAYE – 10% (Marriage penalty)



523(a)(8)(A)(i)

Gov't	Non-profit
	<ul style="list-style-type: none">• Funded by• Guaranteed by (?)

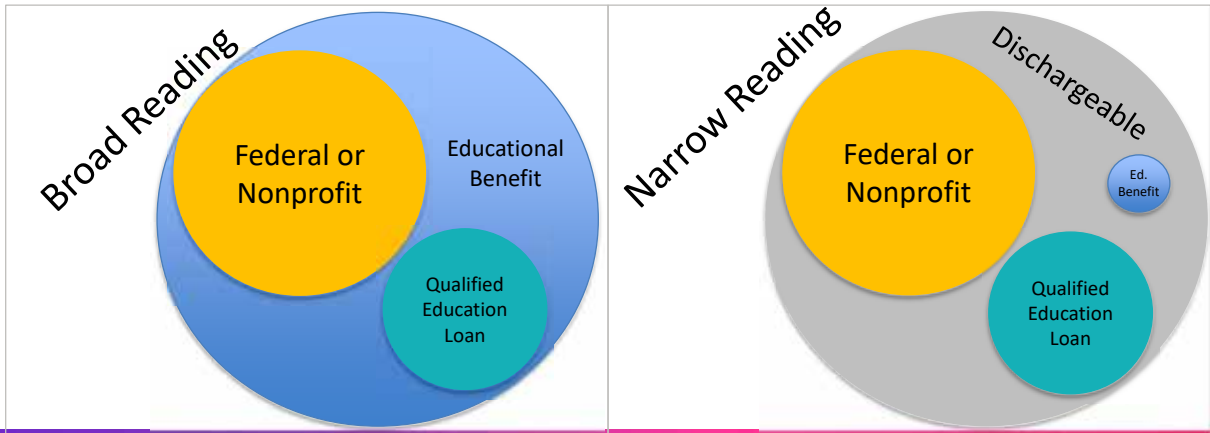


523(a)(8)(B)

<p>Qualified Education Loan References IRC 221(d) Also see Cost of Attendance (COA)</p>	<p>If you're attending school at least half-time, the COA is the estimate of tuition and fees, cost of room and board (or living expenses), cost of books, supplies, transportation, loan fees, and miscellaneous expenses (including a reasonable amount for the documented cost of a personal computer), allowance for childcare or other dependent care, costs related to a disability, and reasonable costs for eligible study-abroad programs.</p>
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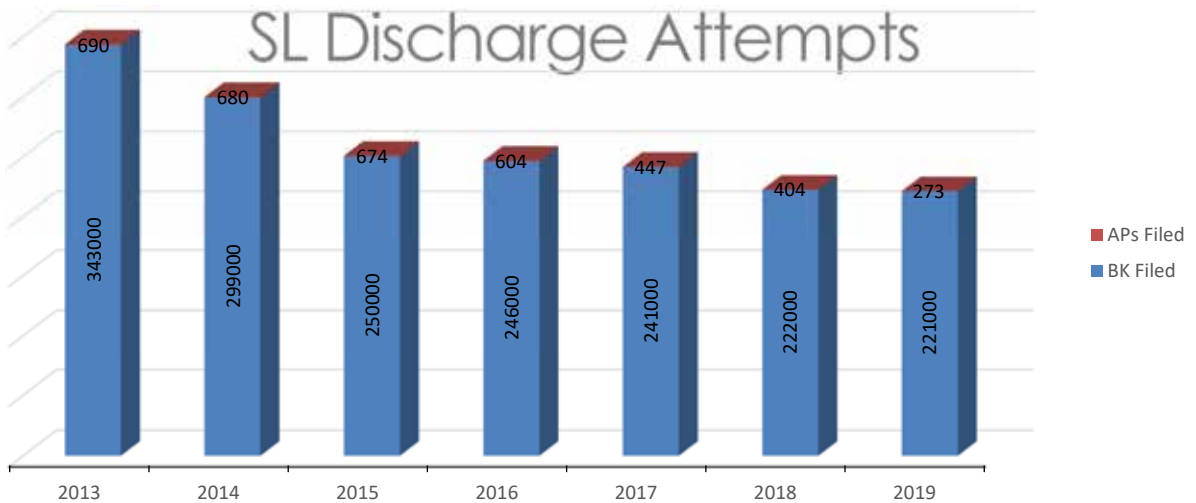
523(a)(8)(A)(ii)





Practical Difficulties

- Judicial Disparity
- Affordability
- Client Expectations





Practical Expectations

Federal Loans	Private Loans
<ul style="list-style-type: none">• Administrative Discharge• IDR• Settlement	<ul style="list-style-type: none">• Settlement – Creditor Games• Co-signer release

Of the 266 Discharges in 2017, 234 were via settlement!



AP Affordability

Lawyer Pricing	Debtor Paying
<ul style="list-style-type: none">• Hourly• Tiered fee• Flat fee	<ul style="list-style-type: none">• 3rd party (relative) pays• Monthly payment plan



Reforms

Institution -Focused	Litigant-Focused
<ul style="list-style-type: none">• Congress• Judiciary <p>Ignores the real problem</p>	<ul style="list-style-type: none">• Class Action• Education• Litigation Costs



Resources

<p>Professor Jason Iuliano</p> <p>www.jasoniuliano.com</p> <p>Jason.Iuliano@law.utah.edu</p>	<p>Attorney Joshua Cohen</p> <p>www.TheStudentLoanLawyer.com</p> <p>jcohen@thestudentloanlawyer.com</p>
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STUDENT LOANS IN BANKRUPTCY CHECKLIST

Student Loan Checklist¹

1. **Is it a federal or private student loan?**
 - a. Check the studentloan.gov, which provides comprehensive details of all federal loans: <https://studentaid.gov/>
 - b. If the loan is not on the Studentaid.gov list, it is a private loan.
 - i. Pull the debtor's credit report to get a list of private student loans.
2. **If federal, review non-bankruptcy discharge options**
 - a. Permanent and total disability (20 U.S.C. § 1087(a))
 - b. Public service cancellation (Pub. L. No. 110-84 (2007))
 - c. "School-related" discharges (20 U.S.C. § 1087(c)(1))
 - Closed school
 - False certification (ability to benefit, disqualifying status, forgery)
 - Unpaid refunds
3. **If federal loans, examine possible income driven repayment ("IDR") options.**
 - a. Income Based Repayment ("IBR"):
 - i. 15% formula if any loans obtained prior to July 1, 2014, with forgiveness after 25 years.
 - ii. 10% formula if first loan was obtained on or after July 1, 2014, with forgiveness after 20 years.
 - b. Pay As You Earn ("PAYE"):
 - i. 10% formula, forgiveness after 20 years.
 - ii. Eligible if no loan balance as of October 1, 2007 and obtains a new loan on or after October 1, 2011.
 - c. Revised Pay As You Earn ("REPAYE")
 - i. 10% formula
 - ii. Direct Loans only
 - iii. Forgiveness after 20 years (25 years if any loans are for graduate level studies).
 - d. Income Contingent Repayment ("ICR"):
 - i. 20% formula (100% Poverty Index) OR 12 year amortization
 - ii. Direct Loans only
 - iii. Forgiveness after 25 years
 - e. Details:
 - i. Formula:
AGI – 150% Poverty Index (for debtor's family size) – Discretionary Income
Discretionary Income x Formula % = Yearly Payment
Yearly Payment /12 = Monthly Payment.
 - ii. Application: <https://studentaid.gov/app/ibrInstructions.action>
4. **If private loans, first check if this is a "non-profit" loan or a true private loan:**
 - a. Review the promissory note. Is there any mention of a non-profit involved.
Hint: Any "private loan" originated before 2006 likely has a non-profit involved.

¹ Based on checklist created for the Hudson Valley Bankruptcy Bar Association, 13 Annual Presentation "The New Deal for Consumer Bankruptcy" September 30, 2016; by National Consumer Law Center and Austin C. Smith, Smith Law Group LLP – updated October 20, 2021.

STUDENT LOANS IN BANKRUPTCY CHECKLIST

5. **If true private loans, check the school the debtor attended to determine whether the loan is a qualified education loan:**
 - a. The Department of Education maintains a list of all Title IV accredited schools.
(<http://ifap.ed.gov/ifap/fedSchoolCodeList.jsp>).
 - b. If the school was not on the list in the year the loan was originated, it is not a qualified education loan and may be dischargeable.

6. **If the school is Title IV accredited, check the cost-of-attendance (“COA”) to determine whether the loan is a qualified education loan (i.e., was made within federal limits):**
 - a. The COA can be obtained either from the Department of Education
(<http://nces.ed.gov/ipeds/datacenter/>) or the school itself.
 - b. Add up all the loans the debtor borrowed during that calendar year, and compare to the COA to determine what, if any, portion of the loan was made in excess of federal limits. That excess may be dischargeable.

7. **If the loan is federal, “non-profit”, or a qualified private education loan, preform a preliminary Brunner analysis:**
 - a. Does the debtor’s monthly income minus expenses leave enough money for the student loan payments?
 - i. What are the elements of a minimal standard of living? (include health care, transportation, utilities, retirement savings, funds for emergencies)
 - ii. Can the debtor afford to pay for all these items for self and dependents on a regular basis (without borrowing from others, using credit cards)?
 - iii. If yes, does debtor have sufficient income left over to make the regularly scheduled payments due on loans (not income-based plan payments)?
 - b. Any additional factors make it likely this situation will persist?
 - i. Is it more likely than not that the debtor’s current financial circumstances will persist for the duration of the loan’s initial repayment term?
 - ii. Do mental/physical impairments limit household earnings?
 - iii. Does evidence show debtor reached point of wage/income stagnation?
 - c. Has the debtor made good faith efforts to repay the loans?
 - i. Is debtor seeking discharge shortly after payments became due (*Brunner* facts)?
 - ii. Has borrower made payments in past?
 - iii. If not, were there extended periods when debtor had ability to pay, but did not?
 - iv. Would having participated in long-term repayment plan likely have resulted in any meaningful reduction in loan balance?

8. **Is settlement an option?**
 - a. If Federal, is there a meaningful IDR that if the term were shortened makes sense?
 - b. If not Federal, is there an affordable payment that could repay some of the loan while debtor has income?

9. **Reasons to wait or proceed**
 - a. Age of debtor
 - b. Likelihood of financial improvements or stagnation
 - c. Likelihood of lawsuit and collection conduct

Comparison of IDR Plans

Plan	Term	Formula	DL	FFEL	Parent PLUS	Ignore Spouses' AGI ³
ICR	25	20%	Y	N	Y ²	Y
IBR	25	15%	Y	Y	N	Y
PAYE	20	10%	Y	N	N	Y
New IBR	20	10%	Y	N	N	Y
REPAYE	20/25 ¹	10%	Y	N	N	N

1: 20 for undergraduate loans, 25 if any graduate loans are included.

2: Only if Parent PLUS loan is part of a DL Consolidation

3: Through married filing separate status



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Faculty

Joshua R.I. Cohen is a practitioner at Cohen Consumer Law in West Dover, Vt., and is known as the Student Loan Lawyer™. He has been practicing law since 2008, defending and assisting consumers with student loan issues. Mr. Cohen created the Student Loan Law Workshop, an intensive seminar and comprehensive roadmap that gives other attorneys the ammunition they need to fight back and win for their clients. He is admitted to practice in Connecticut and Vermont, he is a member of the National Association of Consumer Advocates, the National Association of Consumer Bankruptcy Attorneys, and the American, Connecticut and Vermont Bar Associations. Mr. Cohen received his B.A. in psychology from Brandeis University in 1996, his M.B.A. from the University of Phoenix in 2002 and his J.D. from Quinnipiac University School of Law in 2007.

Dr. Jason Iuliano is an associate professor of law at the University of Utah S.J. Quinney College of Law in Salt Lake City and the COO of Lexria, a bankruptcy client form intake system. Previously, he was an assistant professor of law at Villanova University. Dr. Iuliano's research focuses on bankruptcy, student loan debt and consumer protection. He has also written on the federal courts and legal decision-making and has been published in more than a dozen journals, including the *University of Pennsylvania Law Review*, *Duke Law Journal*, *Michigan Law Review*, *Notre Dame Law Review*, *Vanderbilt Law Review* and *American Bankruptcy Law Journal*. In addition, his scholarship has been featured in numerous media outlets, such as *The New York Times*, the *Wall Street Journal*, *U.S. News & World Report*, *Bloomberg*, *Forbes* and the *Chicago Tribune*. Dr. Iuliano received his J.D. from Harvard Law School, where he was a co-founder and editor-in-chief of the *Harvard Business Law Review*, and his Ph.D. in politics from Princeton University.

Hon. Cecelia G. Morris is Chief U.S. Bankruptcy Judge for the Southern District of New York in Poughkeepsie, initially appointed on July 1, 2000, and named Chief Judge on March 1, 2012. Prior to her appointment to the bench, she served as an assistant district attorney in the Child Support Recovery Unit of the Spalding Judicial District Attorney's Office in Griffin, Ga. She also worked in private practice and served as clerk of court for the U.S. Bankruptcy Court for the Southern District of New York from 1988-2000, one of the first districts to implement the electronic filing of documents. Chief Judge Morris has led efforts by attorneys representing debtors and secured creditors to implement a model chapter 13 plan and order, and a detailed worksheet that requires disclosure of arrearages and other current mortgage information as part of a motion seeking relief from the automatic stay concerning residential real estate and cooperative apartments. She also collaborated with other judges and practitioners to develop loss-mitigation procedures for residential real estate, resulting in the adoption of a court-supervised program that is the first of its kind in the U.S. Chief Judge Morris serves as an editor of treatise on bankruptcy being developed by Bloomberg Law, and published an article describing the history and legal basis of the court's loss-mitigation program in the Spring 2011 edition of the *ABI Law Review*. She has also authored several articles on electronic filing, including a chapter on electronic case filing in *Collier on Bankruptcy*, and has published articles on loss-mitigation, mediation, the consumer credit counseling requirement in bankruptcy and cross-border insolvency cases under chapter 15 of the Bankruptcy Code. Chief Judge Morris has testified before Congress and served on the Bankruptcy Judges Advisory Board to the Administrative Office of the U.S. Courts. She teaches bankruptcy ethics at St. John's University's LL.M. in

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Bankruptcy program, and currently serves as a member of the Barry Zaretsky Roundtable Steering Committee at Brooklyn Law School, on the advisory board of the *ABI Law Review*, and as a member of the International Insolvency Institute, American College of Bankruptcy, National Conference of Bankruptcy Judges and the Global Restructuring Organization's Scientific Committee, headquartered in Modena, Italy. She is also a board member of Tina's Wish, which is dedicated to funding groundbreaking research for the early detection and prevention of ovarian cancer. Chief Judge Morris received the Annual Conrad B. Duberstein Memorial Award for Excellence and Compassion in the Bankruptcy Judiciary and the *New York Law Journal* Impact Award for pioneering the use of e-filing in federal court. She received her B.S. from West Texas State University and her J.D. from the John Marshall Law School.