



WEBINAR SERIES

Managing Student Loans in Bankruptcy

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The Gravity of Student Loan Debt:

- 1.34 Trillion Dollars in outstanding student loans.
- 42.4 Million Borrowers
- Default rate, 14%
- This problem is not going anywhere.
- 40% of outstanding student loan debt are not in repayment status.
- Absent changes the system, it will only get worse.



Major Causes of the Student Loan problem



The cost of higher education



Free flow of Federal Student Aid



Historic availability



Lack of Accountability by the Dept. Ed.



Entry of Private student loan lenders



Abuses by Student Loan Servicers



Private or Federal Student Loans.
How do you know which is which?
Factors Vital to Student Loan Analysis

National Student Loan Data System Report (Fed Only)

Federal Student Aid ID

Credit Report

Servicer letters

Collection Letters

Administrative Wage Garnishments

Keep in mind!

- Do not rely on servicer information: Same servicer could, and often do, service both Fed. and Private Loans.
- Loans typically are place “on hold” during bankruptcy.
- 0% Chapter 13 plan, 3-5 years. Look at the amount of Student Loan Debt.
- Private Lenders can call the loans due upon Discharge of borrower or co-borrower, even if current with payments.



Chapter 7 or 13

Exceptions to Discharge: 11 USC 523
(a)(8)

Must be brought by an Adversary
Proceeding.

Is the debt a Student Loan or is it
something else?



In a Chapter 13 Case, some jurisdictions require waiting for the Plan to near completion before bringing an Adversary Proceeding.

This is the exception. Bring it upon Confirmation.

Undue Hardship: The Brunner Test
Brunner v. New York State Higher Educ.
Servs. Corp., 831 F.2d 395 (2d Cir. 1987).



The Prongs of Brunner: Fact Specific



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1. A minimal standard of living cannot be maintained for the borrower and any dependents, based on current income and expenses.



- a) Total Household income considered
- b) Degree of financial hardship, sliding scale. Complete sense of hopelessness not required.
- c) IRS/Poverty level not determinative but certainly is a strong factor.
- d) Serious physical/mental illness:
- e) Expert testimony not required, but helpful.



2. Current financial conditions are likely to continue.
 - a. Current Issue: Poor Education/Trade School in conjunction with lack of marketable skills.
 - b. Market Abuse ITT and Corinthian collapse.
 - c. Age of the borrower
 - d. Any and all other relevant factors.
 - e. Be creative/Tell the story- Witnesses



3. Good faith effort to repay student loans. (The tough one?)

- a. Participation in any IDR is not required.

Application for and rejection of may be of some indication of Good Faith Attempt.

- b. Work History
- c. Lifestyle Choices/ Perpetual Student
- d. Professional Career Abandonment
- c. Maximizing opportunity/ Minimizing Expenses



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Is Brunner Eroding in the 9th Cir.?

Will other Jurisdictions follow/lead ?

Partial Discharge

Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168 (9th Cir. 2003)

Hedlund v. Educational Resources Institute, Inc. 718 F. 3d 848 - Court of Appeals, 9th Circuit 2013 In re Roth, 490 B.R. 908 - B.A.P., 9th Cir 2013

Concurring Opinion by Judge Pappas



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Totality of the Circumstances 8th Cir.

Long v. Educ. Credit Mgmt.
Corp. (In re Long), 322 F.3d
549 (8th Cir. 2003);

Walker v. Sallie Mae Servicing
Corp. (In re Walker), 650 F.3d
1227 (8th Cir. 2011).

- Is this a double edged sword?



1st Cir.

Murphy v. U.S. Dept. of Ed. 1st Cir. Court of Appeals
14-1691 (2015)

Nash v. Conn. Student Loan Found. (In re Nash), 446
F.3d 188 (1st Cir 2006).

Bronsdon v. Educ. Credit Mgmt. Corp. (In re
Bronsdon), 435 B.R. 791 (1st Cir. BAP 2010).

Holding. The strict application of Brunner takes the
Undue Hardship analysis too far.



Chapter 13

Addressing Private Student Loans:

Proof of Claim Objections to consider:

- a. Statute of Limitations.
- b. Standing of Claimant: The collateralization of Private Student Loans/National Collegiate Trust Assignments, etc.
- c. Lack of Documentation: 11 USC 501/FRBP 3001
- d. Obtain Promissory notes and Loan Disclosures

Claimant is required to prove claim/debtor association and the identity of the creditor



Chapter 7 or 13

Dischargeability Actions: Private Student Loans

11 USC 523 (a)(8)(A)(i) Educational Benefit
overpayment or loan by a governmental unit or non
profit institution

11 USC 523 (a)(8)(A)(ii) Educational Benefit,
scholarship or stipend

Specific Exceptions not encompassed in (a)(8), as
amended by BAPCPA

Bar Prep Course may not fit within the exception

In Re Campbell, Bankr. Court, ED New York 2016



Chapter 7 or 13

Dischargeability Actions: Private Student Loans

11 USC 523 (a)(8)(B) Specific Exception not encompassed in (a)(8),
Added by BAPCPA

Qualified Educational Loan in a Title IV School?:

- 1. What school did the borrower go to?
- 2. Was the school a Qualified Institution?
- 2. What kind of degree or certification was obtained?
- 3. What is the status of the school today?

4. Who was the original lender?

Chapter 7 or 13

Dischargeability Actions: Private Student Loans

11 USC 523(a)(8)(B)

In Re Nunez, 527 BR 410 (Bankr. Court D. Oregon 2015) (Non Qualified Flight School)

In re Decena, 549 BR 11 - Bankr. Court, ED New York 2016 (Non Qualified Foreign Med School)

In Re Dufrane, 2017 WL 1148172 (Bankr. C.D. Cal. 2017)

The US Dept. of Ed. maintains a data base of Accredited Postsecondary Institutions and Programs.

<https://ope.ed.gov/accreditation/Search.aspx>.



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Chapter 7 or 13

Dischargeability Actions: Private Student Loans

Once alleged in your Adversary Proceeding, the Burden of Proof Shifts to the creditor to show that the Exception to discharge applies, to include, showing proof of Title IV School eligibility and that the loan made was indeed a qualified student loan, and not some other kind of loan.

See *Roth v. Educ. Credit Mgmt. Corp. (In Re Roth)*, 490 B.R. 908 (B.A.P. 9th Cir., 2013; and

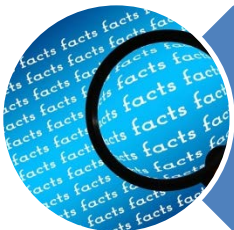
Lavy v. U.S. Dept. of Education 2008 WL 4964721, at *3. Bankr.W.D.Wash. Nov. 14, 2008.



Treatment of Federal Student Loans in a Chapter 13 Plan



Separate Classification 1322 (b)(1):
Because Loans are typically place “on
hold” during bankruptcy.



This is going to be both fact specific
and subject to the position of the
Chapter 13 Trustee.



Maybe worth the fight, or, consider doing
a Chapter 7 first to eliminate all other
unsecured debt, then followed by a
Chapter 13 to address the Student Loan
Debt. (Chapter 20)



Treatment of Federal Student Loans in a Chapter 13 Plan

The Unfair Discrimination Issue.

- Excluding Income Driven Repayment: Why is this so important? IDR Plan Continuation
- Continuous voluntary payments for Rehabilitation, 9 agreed upon payments in 10 months. (Chapter 13 Trustee Distribution Payments probably do not qualify.)
- Qualified Payments for Public Service Loan Forgiveness, 120 Qualified Monthly Payments (Possible Elimination)



Treatment of Federal Student Loans in a Chapter 13 Plan

Look to 11 USC
525(c)(1) Anti-
Discrimination to
support inclusion in
Federal Student
Loan Programs

Servicers handle
Bankruptcies
differently, so be
prepared to bring
the issue before the
Court.

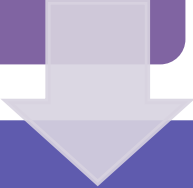
May require Motion
or Adversary
Proceeding to
accomplish special
provisions.

1322(b)(5) Curing
of Default and
Maintenance on
Long Term Debt

Special Provision
in your Plan, be
creative.

Conclusion


Conduct a complete Student Loan Analysis prior to filing and prior to Discharge



Raise these issues with the Court



Take the time to evaluate your client's global financial situation. Look past the discharge.



Go back and look at your discharged cases and reach out to your own clients to offer further assistance. A discharged Chapter 7 may be a Chapter 13 Student Loan Case.

Questions?

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