



Student Loan Webinar
June 13, 2012

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Deanne Loonin
National Consumer Law Center
617-542-8010
(dloonin@nclc.org)
www.studentloanborrowerassistance.org



2 ConsiderChapter13.org

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Geoffrey Walsh
National Consumer Law Center
617-542-8010
(gwalsh@nclc.org)
www.studentloanborrowerassistance.org




3 ConsiderChapter13.org

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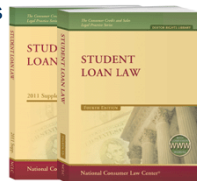



Laurie Williams
Chapter 13 Trustee
Wichita, KS

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NCLC Resources


- NCLC list serve
- SLBA web site (www.studentloanborrowerassistance.org)
- Manual and other publications
- Case consultations
- Policy advocacy



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Additional Resources

- ED Ombudsman (877-557-2575; www.ombudsman.ed.gov)
- Guaranty Agency Ombuds/customer service
- Project on Student Debt (www.projectonstudentdebt.org) and IBRinfo.org

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Importance of Student Loan Issues

- Education is a key ticket out of poverty.
- Education costs are rising, more students are borrowing to go to school.
- Private loans in particular are often pushed on students.
- Not all students benefit financially from higher education (for-profit school issues)
- Very difficult to escape student loan debt.

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Extraordinary Government Collection Powers

- Tax Refund Offset
- Administrative Wage Garnishment
- Federal Benefits Offset
- No statute of limitations



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Key Issues and Definitions

Types of Government Loans

Federal Family Education Loans (FFEL) come from private lending sources.—No more FFEL loans as of July 2010.

Direct Loans come from the U.S. Department of Education.

Both FFELs and Direct Loans can be any of the following types:

- Stafford Loans (formerly called Guaranteed Student Loans or GSLs)
- PLUS Loans (Parent and Grad)
- Consolidation Loans
- Perkins Loans

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Figuring Out the Type of Loan

- **Check out NSLDS (www.nsls.ed.gov)
PIN Number
- Federal loan promissory notes and applications will state the name of the federal loan program at the top of monthly bill and loan contract.

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Figuring Out Type of Loan



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- If a co-signer, probably private
- TILA Disclosures for private



Private Loans

Huge industry, even during tight economic times.
Remedies for private loans are different.
Need to review contract if possible. Negotiate with creditors.
Fewer Collection Powers.
Limited Bankruptcy Rights

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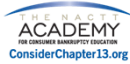


CHECKLIST for Federal Student Loans

Key Options—In order of most complete remedy

1. Cancellation
2. Deferment or other postponement
3. Modify repayment, including consolidation
4. Compromise or settlement
5. Challenge collection

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Cancellations

Outside of Bankruptcy

- School-Related
- Death and Disability
- Profession-related
(including public service cancellation)



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Disability

1. Must show total and permanent disability.
2. Separate process for certain veterans
3. Separate application for each loan type (this may change soon??)
4. Reinstatement period



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Public Service Forgiveness

- Only Direct Loans
- Must not be in default
- Must make 120 payments (10 years of payments) AFTER Oct. 1, 2007
- Payments must be made through eligible payment plans.
- Must be employed in a public service job at the time of the forgiveness and must have been employed in the job during the period in which borrower made each of the 120 payments.
- Forgiveness amount not taxable.

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Postponing Repayment

Deferments

A delay in repayment. Available deferments include:

- Student deferments for at least half-time study
- Graduate fellowship deferments
- Unemployment deferments (for up to three years)
- Economic hardship deferments (granted one year at a time for up to three years)
- Military deferments

See packets on SLBA web site.

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Postponing Repayment

Forbearances

- The government does not pay interest during the forbearance period.
- Borrowers should be able to get forbearance even if they are in default.
- Economic hardship forbearances available.
- Mandatory and discretionary forbearances.

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Modifying Repayment

Repayment Strategies Prior to Default

- Borrowers typically have a standard (10 year) repayment plan
- Borrowers can switch plans (more options prior to default)
 - Extended Repayment
 - Graduated Repayment
- Income-Based: ISRP, ICRP, IBR



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IBR-In Brief

Annual student loan payments (under a 10 year plan) must be greater than 15% of the difference between AGI and 150% of poverty.

(Note: change to 10% in 2014)

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IBR Forgiveness

- 25 years of payment required

(Note: Change to 20 years in 2014)



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Getting Out of Default Through Repayment

Consolidation vs. Rehab

Pros and Cons



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Rehabilitation

- Loan holders, collectors tend to push rehab.
- Borrowers are entitled to pay only what is reasonable and affordable for them.
- No minimum payment allowed, but probably more than 0.
- Problems with commission system.
- Documentation required for lower payments.

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Rehabilitation, cont.

- Borrowers must make nine timely payments during a period of 10 consecutive months.
- Requires resale of loan. Can be problems with finding buyers.

(Note one-time provision applies on or after 8/14/08)

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Consolidation

- DL is the only government game in town
Not only for defaults. Creates new Loan.

Self-help packet on SLBA web site

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Consolidation vs. Rehabilitation

Main benefit to Rehabilitation: More complete credit clean up (but not complete relief).
Ability to Raise Defenses is Clear.



Moderator, Laurie Williams

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Pros and Cons, cont.

Benefits to Consolidation:

- Faster
- Formula for ICR and IBR, no need to negotiate reasonable and affordable
- No market worries with consolidation.
Resale required for some rehabbed loans.

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Some Things are the Same

- Up to 18.5% collection fees
- Borrowers can select IBR/ICR
- One time deal



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Compromise and Settlement

- Department of Education has issued Standardized Compromise and Write-Off Procedures for use by guaranty agencies.
- Only certain types of borrowers qualify.
- Difficult to obtain information about write-offs.

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Challenging Collections

- Due process rights.
- Importance of fair debt laws.
- Abuses in student loan collection.



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SELECTED STUDENT LOAN & BANKRUPTCY ISSUES

Geoff Walsh
National Consumer Law Center
June 13, 2012



What's Covered by § 523(a)(8)?

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution;



What's Covered by § 523(a)(8)?

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend;
or



What's Covered by § 523(a)(8)?

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.



Scope of § 523(a)(8)

- Is it a loan?
 - Tuition payments
- Is it a loan for educational purposes?
 - Apprenticeship programs
 - Employer-sponsored plans
 - Higher Educational Act (HEA) loan funds used for non-scholarly pursuits



Scope of § 523(a)(8)

- Co-Signors
 - Mom & Dad, rich uncles and aunts, husbands and wives
- Consolidated Loans



Private Student Loans

- Code incorporates IRS definition
- Must be a "qualified education loan" eligible for tax exemption for interest payments, defined in 26 U.S.C. § 221(d)(1)
- "incurred by the taxpayer solely to pay for *qualified higher education expenses*" 26 U.S.C. § 221(d)(2)
- IRS defines "qualified higher education expenses" as "costs of attendance" under Higher Educ. Act, 20 U.S.C. § 1087f



Private Student Loans

- Private "mixed use" loans are dischargeable.
- To be nondischargeable, a revolving line of credit or credit card debt must be "solely to pay qualified education expenses." 26 C.F.R. § 1.221-1(c)(4) example 6.
- Burden of proof, *See In re Rogers*, 374 B.R. 510 (Bankr. E.D. N.Y. 2007)
- A mixed use loan that consolidates and pays off government-insured loans should be dischargeable

Refinanced Student Loan Scenarios

Three scenarios:

1. Guaranteed loan to guaranteed loan
2. Guaranteed loan to replacement private loan
3. Guaranteed loan to mixed use loan

Issue: the §523(a)(8) Discharge Standard

- What the Code says:
- Student loan debt non-dischargeable unless excepting the debt from discharge “would impose an undue hardship on the debtor and the debtor’s dependents” 11 U.S.C. § 523(a)(8)



The § 523(a)(8) Standard

- What *Brunner* says
- For discharge debtor must show:
 - Cannot maintain, based on current income and expenses, a “minimal” standing of living for the debtor and the debtor’s dependents if forced to repay the student loan; [present hardship]
 - 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 [future hardship]; and
 - The debtor has made good faith efforts to repay the loans [past hardship]

Brunner: Present Hardship

- Elements of the minimal standard of living:
Decent shelter and utilities; food and personal products; vehicles maintained, insured and tagged; health insurance, or ability to pay for medical and dental expenses when they arise; at least small amount of life insurance; and funds for recreation (e.g. TV, pet).
In re Ivory, 269 B.R. 890 (Bankr. N.D. Ala. 2001)

Brunner: Present Hardship

Other Issues:

Income from non-debtor spouse or partner

Throwing the dice:
cable, internet, pets,
private school, support
for non-dependents,
cigarettes, charitable
contributions, fun



Brunner: Future Hardship

- “Additional circumstances” must show it is more likely than not that current hardship will continue
- Continue for how long?
 - For original loan repayment period (not for 25 years, or until you die)
- How can you prove a “certainty of hopelessness”?
See *In re Nys*, 446 F. 3d 938 (9th Cir. 2009)
- Factors: age, children, earning capacity peaked

Brunner: Future Hardship

- Evidence of mental, physical impairments as “additional circumstances”
 - Treatment records
 - Treatises
 - Social Security determinations
 - Corroborating expert testimony not required, See *In re Mosley*, 494 F.3d 1320 (11th Cir. 2007)

Brunner: Past Hardship

- The “good faith” test
- Made up out of thin air
- Past career decisions: bad for ministers, musicians, public interest lawyers
- Income-Based Repayment Plans (IBR, ICRP, ICR)
 - Potential for \$0 monthly payment
 - Annual reviews
 - Potential for loan forgiveness at end of 25/20 year period

Brunner: Past Hardship

- Income Based Repayment Plans
 - Go well beyond original loan repayment period
 - Judicial repeal of fresh start
 - Negative amortization
 - Tax consequences, *But see In re Goodman*, 449 B.R. 287 (Bankr. N.D. Ohio 2011)
 - Not applicable to all student loans at all times:
 - Private loans
 - Parents’ PLUS loans
 - Loans in default (unless consolidated) or loans where judgment entered

Other Undue Hardship Standards

- Eighth Circuit (“totality of circumstances” test) considers:
 - (1) the debtor’s past, current, and reasonably reliable future financial resources;
 - (2) the debtor’s and the debtor’s dependents’ reasonable necessary living expenses
 - (3) any other relevant facts and circumstances
- First Circuit (pick your own standard):
 - *See In re Bronsdon*, 435 B.R. 791 (B.A.P. 1st Cir. 2010) refusing to adopt *Brunner*, instead asks “Can the debtor now, and in the foreseeable *near* future, maintain a reasonable minimal standard of living for the debtor and the debtor’s dependents and still afford to make payment on the debtor’s student loans?”

Partial Discharge

- May help borrowers with huge loan balances
- But is it consistent with court's role under § 523(a)(8)?
- Hardship standard met as to:
 - Portion of single loan
 - One or more of multiple loans



Issue: Separate Classification in Chapter 13

- Classifying student loan creditors separately from other unsecured creditors in chapter 13 plan.
- Why do this?
- Maximize payment toward non-dischargeable debt
- Avoid accrual of post-petition interest: In re Kielisch, 258 F.3d 315 (4th Cir. 2001)

Ch.13: Separate Classification

- 11 U.S.C. § 1322(b)(1) says:
- “. . . the [chapter 13] plan may . . . designate a class or classes of unsecured claims . . . , *but may not discriminate unfairly against any class so designated*”
- i.e., you can discriminate fairly



Variations

- Paying student loan outside the plan
 - *In re Potgieter*, 436 B.R. 739 (Bankr. M.D. Fla. 2010)
- Cure and maintain under section 1322(b)(5)
- Adjust payments after 36 months
- Different classification ok if co-signor
- Pay non-PDI income toward student loans

The Courts Weigh in

- Judicial Standards: allowable separate classifications
- *In re Leser*, 939 F.3d 669 (8th Cir. 1991)
- *In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001)
- *In re Crawford*, 324 F.3d 539 (7th Cir. 2003))



Chapter 13 plan issues

- You have to file an adversary proceeding: *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367 (2010)
- Timing of A.P. in chapter 13 case.
 - Should not have to wait to completion of plan. *In re Coleman*, 560 F.3d 1000 (9th Cir. 2009)

A.P and Student Loans

- Timing Considerations
- Will hardship evidence be stronger in future?
- Is it ever too late to reopen?
- Option to wait and raise as defense to collection action
- Allow non bankruptcy court to decide?
- Which Code version will apply?
- Pre-1998 cases – discharge based on passage of time

Reopening Case to Address Student Loan Discharge

No fee to reopen (11 USC sec. § 350(b) and Rule 4007(b))



- Reopen “for cause”
- Denial of a hardship discharge is generally made without prejudice

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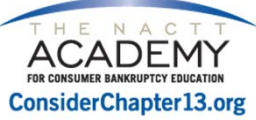
Statutory Non-Bankruptcy Student Loan Discharge Options

- Permanent and total disability (20 U.S.C. § 1087(a))
- Public service cancellation (Pub. L. No. 110-84 (2007))
- “School-related” discharges (20 U.S.C. § 1087(c)(1))
 - Closed school
 - False certification (ability to benefit, disqualifying status, forgery)
 - Unpaid refunds

Compare Bankruptcy and non-Bankruptcy Options

- Broad vs. narrow issue focus
- Not all loans covered by non-bankruptcy options
- Delays in non-bankruptcy discharge determinations
- Tax liability
- Cost of bankruptcy proceeding
- Fees shifting to debtor in bankruptcy?
- Neither proceeding should be preclusive

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