Student Loans in Chapter 13 Bankruptcy

Presented by N.A.C.B.A., the National Association of Consumer Bankruptcy Attorneys

Edward Boltz

James J. Haller

Outline of Presentation

- Defining student loans: narrowly or broadly.
- IDR's in Chapter 13.
- Cure of student Loan arrears in a Chapter 13 plan.
- Solutions outside of bankruptcy.

What is a non-dischargeable "student loan"

Statutory Bases

11 U.S. Code § 523

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(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; or

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

(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

Definition of “student loans” for dischargeability purposes

- Important terms interpreted by the Courts include
  - “Educational Benefit” and
  - “Educational Loan.”
- The majority position is to interpret these provisions broadly

Definition of “student loans” for dischargeability purposes

- NACBA encourages bankruptcy courts to reexamine the broad definitions that support non-dischargeability of student loans.
- Broad reading is contrary to the
  - General rule dischargeability exceptions should be narrowly construed
  - Contrary to principles of statutory interpretation
- See Iuliano, Jason, *Student Loan Bankruptcy and the Meaning of Educational Benefit* (March 13, 2018). American Bankruptcy Law Journal, 2019, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3139985

Bases for Narrow Interpretation Based on Canons of Statutory Interpretation

- Example:
- Section 523(a)(8)(A)(ii) makes non-dischargeable "an obligation to repay funds received as an educational benefit, scholarship, or stipend."
- Plain language
  - Courts adopting broad interpretation essentially replace "an obligation to repay funds received" with the word "loan." *See e.g.*, *In re Campbell*, 547 B.R. 49, 54 (Bankr. E.D.N.Y. 2016).
  - Doing so incorrectly broadens this to include any loan rather than if there were actual "funds received."

Bases for Narrow Interpretation Based on Canons of Statutory Interpretation

- Example:
- Section 523(a)(8)(A)(ii) makes non-dischargeable "an obligation to repay funds received as an educational benefit, scholarship, or stipend."
- Expressio unius est exclusio alterius
  - *See Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion")/
  - Section 523(a) uses the term "loan" six times in Section 523(a). It is not appropriate to then equate another provision of the statute with the term "loan." See *In re Christoff*, 527 B.R. 624 (9th Cir. B.A.P. 2015).

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- Example:
- Section 523(a)(8)(A)(ii) makes non-dischargeable "an obligation to repay funds received as an educational benefit, scholarship, or stipend."
- Canon against surplusage
  - Courts must "give effect, if possible, to every clause and word of a statute." *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 941 (2017).
  - Presumption against reading statutory terms or phrases in a manner that duplicates other terms or renders entire clauses superfluous.
  - Broad interpretation makes the three exceptions to discharge superfluous.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Income Driven Repayment Plans in Chapter 13
- Why?
- Previously the Department of Education, its Guaranty Agencies and Student Loan Servicers would place all student loans for Chapter 13 Debtors in administrative forbearance.
- This meant that no collection actions were taken, but interest continued to accrue.
- Accordingly, $100,000 of student loans at 8% interest will grow to $148,984.57 at the end of a 60-month Chapter 13 Plan.
- The "fresh start" becomes a "false start."

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- The Executive Office of the Chapter 13 Trustee has issued template language for IDRs in Chapter 13 Cases.
- See Anderson, Amanda L. and Redmiles, Mark A., Bankruptcy: *Recent Movement Toward Income-Driven Repayment Plans in Chapter 13*, 66 U.S. Attorneys' Bulletin, March 2018, pp. 53-71. Available at https://www.justice.gov/usao/page/file/1046201/download.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- The main features of the template:
  - Provide the debtor may not use the Chapter 13 plan to discharge all or part of the debtor's unpaid student loan (which is nondischargeable absent an undue hardship finding by the court);
  - Identify the student loan(s);
  - Confirm the debtor is not in default on Federal student loan debts;
  - Provide the debtor may continue in or apply to enroll in IDR;
  - Provide the amount of the debtor's monthly IDR plan payment and the day each payment is due;
  - Indicate the student loan(s) creditor class;
  - Indicate if IDR plan payment will be made through the Chapter 13 trustee's office or outside of the Chapter 13 plan by the debtor;
  - Explicitly provide that the debtor waives 362(a) stay violation and 362(d) causes of action against ED for its communication, administrative processing, and recertification of the debtor's IDR plan; and
  - Provide a process for debtor to exit the IDR plan voluntarily, and the consequences of a debtor's failure to pay the monthly IDR plan payment.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- IDR plans require separate classification for these student loans.
  - See *In re Engen*, 561 B.R. 523, 533 (Bankr. D. Kan. 2016) (citing Daniel A. Austin & Susan E. Hauser, Graduating with Debt: Student Loans under the Bankruptcy Code 69-70 (ABI, 2013).
  - *See also In re* Potgieter, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010) ("[T]he separate classification of the debtor's student loan obligations does not violate Section 1122.");
  - *In re* Coonce, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) (separate classification of student loan debt is permissible).

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Other bases to allow separate classification for student loans.
  - Co-Signer Protection
  - Above-median debtor pays student loan from discretionary income, i.e. Social Security or belt-tightening, earned in excess of PDI
  - Below-median debtor extends plan to five years
  - Pro Rated Distribution to Other General Unsecured Claims
  - Chapter 20

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Other bases to allow separate classification for student loans.
  - Make progress towards 20/25 year cancellation or 10 year PSLF.
  - Maximize payment toward non-dischargeable debt.
  - Avoid accrual of post-petition interest: *In re* Kielisch, 258 F.3d 315 (4^{th} Cir. 2001).

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment ("IDR") plan with the U. S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), without disqualification due to her bankruptcy.
  - ED shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan."
- This is meant to prevent the debtor from asserting the confirmation of the plan on its own enrolled the Debtor in an IDR or that the Debtor was given any special preference.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
  - Consolidation of several student loans may be necessary for enrollment in a specific IDR or if the debtor was in default on her student loans. The plan provides that this will be approved by separate motion.
- 11 USC 362(b)(16) provides that it is not a stay violation to determine the eligibility of a debtor to participate in student loan programs, including repayment plans.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- This provides that once the monthly payment under an IDR is determined, the debtor will notify the Chapter 13 Trustee, who would then have an opportunity to decide whether that requires a higher dividend to unsecured creditors and if the IDR should be made directly or by "conduit."

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- This provides a bit of a “carrot” for the Chapter 13 Trustee in consenting to the plan, in that the debtor will annually notify the Trustee of changes in the monthly IDR, which could result in a higher dividend to other unsecured creditors.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.
- The second greatest concern by Ed. appears to be that this plan is a devious attempt to trick student loan servicers into violating the automatic stay. The communications allowed are patterned on those with mortgage servicers, but stop short of allowing non-bankruptcy garnishment or other involuntary collection.

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.
- This is to allow for monitoring of the IDR payments if made directly by the debtor.
- It is important to remember that in regards to student loans, “delinquent” may not be the same as “default,which retuires that not payments have been made for more than 270 days. *See* 34 C.F.R. 685.102

Non-bankruptcy Discharge Solutions: Income Driven Repayment Plans in Chapter 13

- Additional Language for use in IDR chapter 13 plans
  - The Debtor’s attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR.
- This clearly is an important provision, allowing separate and additional compensation for services above and beyond standard representation of a debtor in a chapter 13 plan.

Non-bankruptcy Discharge Solutions:
Cure Defaults on Student Loan Through Bankrupty Plan

- 11 U.S.C. § 1322(b)(3) provides that "the plan may … provide for the curing or **waiving** of **any default**." (Emphasis added.)
- "Any default" should include student loan or even a default under a rehabilitation.
- "Curing", which generally means catching up on missed payments, must mean something different from "waiving", which implies forgiving of missed payments.

Non-bankruptcy Discharge Solutions: Cure Defaults on Student Loan Through Bankrupty Plan

- 11 U.S.C. § 1322(b)(5), which routinely is used to allow the cure and maintenance of mortgage payments, specifically allows the same treatment for “any unsecured claim … on which the last payment is due after the date on which the final payment under the plan is due”, which would include non-dischargeable student loans.
- Such a cure or waiver could avoid the assessment of collection costs of up to 18.5% of the outstanding principal and interest.

Non-bankruptcy Discharge Solutions: Other Alternatives

- There are a myriad of non-bankruptcy alternatives, particularly for federal loans.
- Major alternatives for Federal Loans
  - IDR Plans and Balance Based Plans
  - Disability Discharges
  - Public Service Loan Forgiveness
  - School-related Discharges
- Major alternatives for Private Loans
  - Will depend on the private lender
  - May have defense to claim such as statute of limitation

Non-bankruptcy Discharge Solutions: Other Alternatives

- Unlike government guaranteed loans, private student loans are subject to the applicable statute of limitations.
- This involves first a choice of law question, deciding between both what the student loan contract provides and also whether state law considers the Statute of Limitations to be substantive or procedural.
- Statutes of Limitations can vary wildly from as few as 2 years to as many as 15.

Non-bankruptcy Discharge Solutions: Other Alternatives: Private Student Loans & Statutes of Limitations

Tolling:

- Statutes of Limitation may or may not be tolled during bankruptcy:
- For Example:
  - Under Connecticut law, the Statute of Limitation appears to continue to run during bankruptcy.
  - Kentucky, however, the Statute of Limitations is completely tolled.
  - In North Carolina, the Statute of Limitations is tolled only “**When the commencement of an action is stayed** by injunction or statutory prohibition”.
    - This allows the possibility of proposing a plan that terminates the automatic stay to allow the **“commencement of an action” BUT NOT** the collection on such action. (At least absent further court order.)

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- The main features of the template:
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  - Explicitly provide that the debtor waives 362(a) stay violation and 362(d) causes of action against ED for its communication, administrative processing, and recertification of the debtor's IDR plan; and
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Non-bankruptcy Discharge Solutions:
Cure Defaults on Student Loan Through Bankrupty Plan

- 11 U.S.C. § 1322(b)(3) provides that "the plan may … provide for the curing or **waiving** of **any default**." (Emphasis added.)
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Non-bankruptcy Discharge Solutions: Other Alternatives

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- Major alternatives for Federal Loans
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  - School-related Discharges
- Major alternatives for Private Loans
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- This involves first a choice of law question, deciding between both what the student loan contract provides and also whether state law considers the Statute of Limitations to be substantive or procedural.
- Statutes of Limitations can vary wildly from as few as 2 years to as many as 15.

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Non-bankruptcy Discharge Solutions: Other Alternatives: Private Student Loans & Statutes of Limitations

Tolling:

- Statutes of Limitation may or may not be tolled during bankruptcy:
- For Example:
  - Under Connecticut law, the Statute of Limitation appears to continue to run during bankruptcy.
  - Kentucky, however, the Statute of Limitations is completely tolled.
  - In North Carolina, the Statute of Limitations is tolled only "**When the commencement of an action is stayed** by injunction or statutory prohibition".
    - This allows the possibility of proposing a plan that terminates the automatic stay to allow the **"commencement of an action" BUT NOT** the collection on such action. (At least absent further court order.)

Chapter 13 Plan Non-Standard Section Template for
Student Loan IDR Plans During Bankruptcy

For use by a debtor not in default on Federal student loans who wants to enroll in or remain in an IDR repayment plan while in a Chapter 13 bankruptcy plan.

Part 8 [or Insert Local Chapter 13 Plan Section Number] **Nonstandard Plan Provisions**

1) Student Loan Debt Non-Dischargeable
In accordance with 11 U.S.C. § 523(a)(8), this Chapter 13 plan of reorganization ("Chapter 13 Plan") cannot and does not provide for a discharge, in whole or in part, of the Debtor's federal student loan debt authorized pursuant to Title IV of the Higher Education Act of 1965, as amended ("Federal Student Loan(s)").

2) Identification of Federal Student Loan Debt

a) Only Federal Student Loans that are currently in an income-driven repayment ("IDR") plan, or which Debtor is eligible to repay under an IDR plan during the pendency of this Chapter 13 case, are listed in subsection (2)(b), below. Debtor could owe other student loan obligations. The special provisions contained in this ___ [Insert "Part 8" or Plan Section Number] of the Chapter 13 Plan only apply to the Federal Student Loans listed in subsection (2)(b), below.

b) As of [Insert date bankruptcy petition was filed], the Debtor's Federal Student Loan debt includes the following Title IV Student Loans:

Title IV Loan Holder	Date Loan Obtained	Type of Loan (Direct, FFEL, Subsidized, Unsubsidized)	Original Loan Amount

c) The Federal Student Loans identified in subsection (2)(b), above, are held by the United States Department of Education ("Education") and / or [insert here other Title IV Student Loan Holders if applicable], pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070, et seq. Hereinafter, Education and other Title IV Student Loan Holders are referred to individually and collectively as "Title IV Loan Holder."

3) Federal Student Loans not in Default
As of [Insert date bankruptcy petition was filed], the Debtor is not in default, as defined in 34 CFR 682.200(b) or 685.102, as applicable, on any Federal Student Loans listed in subsection (2)(b) of this Section.

4) Proof of Claim
The Debtor affirms that a timely proof of claim has been filed with the Bankruptcy Court for each Federal Student Loan listed in subsection (2)(b) of this Section. If a Title IV Loan Holder has not filed a proof of claim for a Federal Student Loan listed by the Debtor in subsection 2(b), the Debtor will file a proof of claim for that Federal Student Loan within fifteen (15) days in advance of the date scheduled for the §1324 confirmation hearing on this Chapter 13 Plan. Such proof of claim is subject to later amendment by the Title IV Loan Holder.

5) Continuation of Pre-Petition Federal Student Loan IDR Plan

a) During the course of this Chapter 13 bankruptcy case until its dismissal or closure, the Debtor may continue participating in the IDR plan in which the Debtor participated pre-petition and for which Debtor otherwise continues to be qualified as determined by the Title IV Loan Holder.

i) The Debtor's monthly IDR plan payment is, as of the date of Debtor's bankruptcy petition, $______________.

ii) The Debtor's monthly IDR plan payment is due to the Title IV Loan Holder on the [Insert day of the month] day of each month.

b) Debtor's Monthly Payments for Pre-Petition IDR Plan [use if Debtor will make IDR plan payment directly to Title IV Loan Holder]

i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

ii. Following confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section, outside of the Debtor's scheduled plan payments to the Chapter 13 Trustee.

ALTERNATIVE Subsection 5(b) [use if Debtor will make IDR plan payment through Chapter 13 Trustee's office]

b) Debtor's Monthly Payments for Pre-Petition IDR Plan

i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

ii. In order for the Chapter 13 Trustee to transfer timely the Debtor's first post-confirmation payment on the IDR plan, the Debtor must remit that IDR plan payment to the Chapter 13 Trustee *in advance* of the first post-confirmation payment due date, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of those funds to the Title IV Loan Holder.

iii. The Title IV Loan Holder will be paid through the Chapter 13 plan as a Class _____ Creditor.

iv. Following confirmation of this Chapter 13 Plan and in addition to the Debtor's scheduled Chapter 13 Plan payment to the Chapter 13 Trustee's office, the Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment. The Chapter 13 Trustee will transfer the IDR plan payment funds to the Title IV Loan Holder.

v. The Debtor must remit each post-confirmation IDR plan payment to the Chapter 13 Trustee *in advance of the IDR payment due date*, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of the IDR plan payment to the Title IV Loan Holder.

vi. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

vii. Upon request of the Chapter 13 Trustee, the Debtor will request the Title IV Loan Holder modify Debtor's monthly IDR plan payment due-date to accommodate the Chapter 13 Trustee's disbursement schedule.

viii. The Chapter 13 Trustee may request the Title IV Loan Holder establish an automated clearinghouse (ACH) account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

ALTERNATIVE Paragraph 5 (use if Debtor will apply to and enroll in an IDR plan during Debtor's Chapter 13 plan)

5) Initial Participation in an IDR Plan

a) During the course of this Chapter 13 bankruptcy case until its dismissal or closure, the Debtor may submit an application for participation in any IDR plan for which the Debtor is otherwise qualified to any Title IV Loan Holder pursuant to 34 CFR 685.208, 34 CFR 685.209, 34 CFR 685.221 or 34 CFR 682.215.

b) The Title IV Loan Holder is not required to place the Debtor in an IDR plan.

c) The Debtor will provide notice to the United States Bankruptcy Court for the _________ District of ___________ ("Bankruptcy Court") and the Chapter 13 Trustee of Debtor's application for participation in an IDR plan.

d) If the Debtor submits an application for participation in an IDR plan and the Title IV Loan Holder determines the Debtor is qualified under the standard terms for participation specified in 34 CFR 685.208, 34 CFR 685.209 34, CFR 685.221, or 34 CFR 682.215, the Title IV Loan Holder may place the Debtor in an IDR plan while this Chapter 13 case is open.

(i) If the Title IV Loan Holder places the Debtor in an IDR plan, it is expressly understood and agreed by the Debtor that the Debtor's monthly IDR plan payments will be due to the Title IV Loan Holder while this Chapter 13 case is open, and will continue to be due monthly for a set period of time that extends beyond the Bankruptcy Court's entry of a Chapter 13 discharge and / or an order closing this Chapter 13 case.

(ii) If the Title IV Loan Holder places the Debtor in an IDR plan, it is expressly understood and agreed by the Debtor that the Debtor's full IDR plan monthly payments must be received timely by the Title IV Loan Holder.

(e) Within thirty (30) days of Debtor's receipt of a notice that the Title IV Loan Holder has determined Debtor's qualification for participation in an IDR plan and calculated

Debtor's monthly IDR plan payment, the Debtor shall notify the Chapter 13 Trustee of the IDR participation and the amount of the IDR plan monthly payment. Debtor is responsible to file with the Bankruptcy Court a motion to modify the Chapter 13 Plan to permit monthly payment under the IDR plan, indicating whether the payments will be made directly by the Debtor or through the Chapter 13 Trustee's office, and adjusting the Chapter 13 plan dividends, if necessary.

(f) [Use for Direct IDR Payment to Title IV Loan Holder]
The Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder outside of the Debtor's scheduled plan payments to the Chapter 13 Trustee.

ALTERNATIVE SUBSECTION (f)
[Use for IDR Payments Inside the Chapter 13 Plan]

The Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment for the Chapter 13 Trustee to transfer to the Title IV Loan Holder.

In order for the Chapter 13 Trustee to transfer Debtor's monthly IDR plan payment to the Title IV Loan Holder timely, the Debtor must remit each IDR plan payment in full to the Chapter 13 Trustee *in advance of the IDR payment due date*, and in good funds (money order, bank check, TFS payment, or payroll deduction).

i. The Title IV Loan Holder will be paid through the Chapter 13 Plan as a Class _____ Creditor.

ii. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

iii. Upon the request of the Chapter 13 Trustee, the Debtor will request the Title IV Loan Holder modify Debtor's monthly IDR plan payment due date in order to accommodate the Chapter 13 Trustee's disbursement schedule.

iv. The Chapter 13 Trustee may request the Title IV Loan Holder establish an ACH account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

6) Waivers

a. Debtor expressly acknowledges and agrees that regarding an application for initial participation and/ or continuing participation in an IDR plan while this Chapter 13 case is open, Debtor waives application of the automatic stay provisions of 11 U.S.C. § 362(a) to all loan servicing, administrative actions, and communications concerning the IDR plan by the Title IV Loan Holder, including but not limited to: determination of qualification for enrollment in an IDR plan; loan servicing; transmittal to the Debtor of monthly loan statements reflecting account balances and payments due; transmittal to the Debtor of other loan and plan documents; transmittal of correspondence (paper and electronic) to the Debtor; requests for documents or information from the Debtor; telephonic and live communications with the Debtor concerning the IDR plan application, payments, or balances due; transmittal to the Debtor of IDR participation documentation; payment information; notices of late payment due and delinquency; default prevention activities; and other administrative communications and actions concerning the Debtor's IDR plan.

b. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) with regard to and in consideration of the benefits of enrollment and participation in an IDR plan.

7) Annual Certification of Income and Family Size

Pursuant to 34 CFR 685.209, 34 CFR 685.221, or 34 CFR 682.215, as applicable, the Debtor shall annually certify (or as otherwise required by the Title IV Loan Holder) the Debtor's income and family size, and shall notify the Chapter 13 Trustee of any adjustment (increase or decrease) to the Debtor's monthly IDR plan payment resulting from annual certification.

a. Debtor expressly acknowledges and agrees that while this Chapter 13 case is open, Debtor waives application of the automatic stay provisions of 11 U.S.C. § 362(a) to all loan servicing, administrative actions, communications, and determinations concerning the certification of income and family size taken or effected during and for the certification process by the Title IV Loan Holder, including but not limited to: administrative communications and actions from the Title IV Loan Holder for the purpose of initiating certification; requests for documentation from the Debtor; determination of qualification for participation; and any action or communication listed in subsection (6) above, which is incorporated herein by reference.

b. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) associated with the IDR plan certification process, in consideration of the voluntary participation of and benefits to the Debtor of continued participation in an IDR plan.

c. If Debtor's annual certification of income and family size for an IDR plan results in changes to the Debtor's required monthly IDR plan payment amount, the Debtor will notify the Chapter 13 Trustee within seven (7) days of Debtor's receipt of notice from the Title IV Loan Holder of the revised monthly IDR plan payment amount. Either the Debtor or the Chapter 13 Trustee may file an 11 U.S.C. §1329(a) motion to modify this Chapter 13 plan to reflect the Debtor's revised monthly IDR plan payment.

d. If the Debtor fails to satisfy the requirements for annual certification for continued participation in the IDR plan, the Title IV Loan Holder will recalculate the monthly repayment amount according to the requirements of the IDR program.

(i) Debtor expressly acknowledges and agrees that while this Chapter 13 case is open the Title IV Loan Holder's recalculation of the Debtor's repayment amount does not violate the automatic stay provisions of 11 U.S.C. § 362(a) as set forth in subsections (6) and (8) of this Section.

(ii) Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) with regard to the recalculation of Debtor's Federal Student Loan repayment obligation while this Chapter 13 bankruptcy case is open.

8) <u>Discontinuation of Participation in IDR</u>

a. If during the course of this Chapter 13 case the Debtor no longer desires to participate in the IDR plan and seeks administrative forbearance status on the Federal Student Loans identified in subsection (2)(b) of this Section, the Debtor must contact the Title IV Loan Holder in writing by letter to inform the Title IV Loan Holder of this decision.

b. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan, Debtor shall contact and inform the Title IV Loan Holder in writing by letter. Based on the Debtor's information, the Title IV Loan Holder will place the Federal Student Loan into an appropriate status, such as administrative forbearance, and will stay collection action until after this Chapter 13 case is closed.

c. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan without notice to the Title IV Loan Holder, Debtor will incur a delinquency and may default on the Federal Student Loan as defined in CFR 34 CFR 682.200(b) and 685.102.

i. Debtor expressly acknowledges and agrees that while this Chapter 13 case is open the Title IV Loan Holder’s administrative communication and actions on the defaulted debt, which are the routine administrative processes that occur upon delinquency and default on Federal Student Loans, do not violate the automatic stay provisions of 11 U.S.C. § 362(a) as set forth in subsections (6) and (8) of this Section.

ii. The Title IV Loan Holder’s administrative communication and actions do not include any form of active debt collection.

d. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of 11 U.S.C. § 362(a) with regard to the default status of Debtor’s Federal Student Loan based on Debtor’s non-payment while this Chapter 13 case is open, including communications with, correspondence to, or transmittal of statements to the Debtor, and telephonic and email contact with the Debtor, concerning and resulting from Debtor’s Federal Student Loan default.

9) Opportunity for Title IV Loan Holder to Cure

Debtor first shall give notice to the Title IV Loan Holder in writing by letter of any alleged action by the Title IV Loan Holder concerning the Federal Student Loans and IDR plan that is contrary to the provisions of this Section and or 11 U.S.C. § 362(a). Debtor shall not institute any action in the Bankruptcy Court against the Title IV Loan Holder under 11 U.S.C. § 362(a) and (d) until after the Title IV Loan Holder has been given a reasonable opportunity to review, and, if appropriate, correct such actions. Notices provided to the Title IV Loan Holder under this subsection must include a description or identification of the actions that Debtor alleges to be in violation of this Section of the Chapter 13 Plan and/or 11 U.S.C. § 362(a).

10) Notice

Any Notice required to be given to the Title IV Loan Holder under this Section must include the Debtors’ name(s), Debtor’s bankruptcy case number and Chapter 13 designation, and identification of the Federal Student Loans, and must be made in writing by letter to:

[Title IV Loan Holder Name]
c/o The United States Attorney’s Office
[_____DISTRICT of ______]
[Mailing Address]

STUDENT LOAN DEBT

These guidelines establish a procedure for compensation for counsel who provide services to debtors in addressing student loan debt in Chapter 13 cases before the undersigned.

A fee in the amounts set forth below (in addition to the no-look fees established in these Guidelines) shall be allowed for any of the following services upon request and permitted by court order:

1) **$1,500** - Contested confirmation hearings on a plan provision addressing student loan debt, including provisions to separately classify student loan debt under § 1322(b)(1), to provide for the curing or waiving of a default under § 1322(b)(3), to provide for the curing of a default and maintenance of payments under § 1322(b)(5), or to address student loan interest under § 1322(b)(10).

2) **$1,000** - In cases in which the student loan debt exceeds $15,000, plan confirmation providing for debtor(s)' enrollment in/maintenance of an Income Driven Repayment Plan (IDR) (which includes ICR, IBR, PAYE, or REPAYE, etc. versions) with the U.S. Department of Education and/or any student loan servicer/guarantor and which prohibit debtor(s)' disqualification due to bankruptcy. (An additional fee of **$200** per year is allowable for necessary reenrollments during the term of the case.)

3) **$1000** – Participation in court ordered mediation regarding student loan debt **in lieu of a contested hearing.**

The above stated fees may be approved by the Court upon oral motion at the confirmation hearing (or other contested hearing) or requested by the debtor(s) in the notification of settlement or proposed settlement order addressing student loan debt and approved by court text order.

To qualify for these fees: (1) for a contested hearing, the parties must file a (joint) statement of dispute, present testimony and other evidence, and/or, for issues of law only, file a separate memorandum of law, or (2) for a settlement before trial of a contested hearing, the settlement must occur after substantial preparation and readiness for trial. In the event of mediation, the fees may be authorized upon the mediator's submission of a mediation report indicating that Debtor(s)' attorney actively participated in the mediation.

As an alternative to these fees, an application seeking additional compensation may also be submitted for expedited consideration.

ordered by the court, **in addition to the aforementioned monies, the Debtor(s) must commit all tax refunds, beginning with tax year 2017 to the plan each year during the applicable plan period. Said refunds must immediately (upon receipt of) be turned over to the Chapter 13 Trustee, in a certified check or money order <u>(Debtor(s) should not sign their IRS Refund Check and send it to the Trustee. All money sent to the Trustee needs to be in the form of a certified check or money order)</u> made payable to Jon M. Waage, Chapter 13 Trustee, with complete information as to what tax year the refund represents and send to our payment address, at PO Box 260, Memphis TN 38101-0260. Additionally, the Debtor(s) must provide complete copies of all tax returns to the Trustee's office no later than April 15th of each year for the preceding year's taxes.**

31. The NONCONFORMING PROVISIONS of Debtors' Plan (paragraph 9) is hereby stricken. The Debtor(s) shall be permitted to pay her Federal Student Loan(s)/U.S. Department of Education Loans outside of the plan. Claim(s) 14-1 of Navient Solutions, LLC and Claim(s) 15-1 of Navient Solutions, LLC shall be allowed, however claimant shall not receive any distributions by the Chapter 13 Trustee under the confirmed plan. The Debtor(s) shall not be entitled to discharge in whole or in part of any student loans. The Debtor(s), is/are currently in an Income-Dependent Repayment Program ("IDRP"). The Debtor(s) shall continue to pay his/her Federal Student Loan(s)/U.S. Department of Education Loans pursuant to the IDRP separately and outside of the Plan without disqualification due to the bankruptcy. Federal Student Loan(s)/U.S. Department of Education Loans shall not place the student loans into a deferment or forbearance because of the filing of the Chapter 13 bankruptcy case. For so long as the student loans are paid outside of the plan, it shall not be a violation of 11 USC 362 or any other applicable law or regulation for Federal Student Loan(s)/U.S. Department of Education Loans to communicate directly with the Debtor by mail, telephone or email. In the event that a different IDRP is offered by Federal Student Loan(s)/U.S. Department of Education Loans**,** which offers more favorable repayment options, the Debtor(s) shall be permitted to seek participation in such IDRP without disqualification due to this bankruptcy and without further permission of the court. Debtor(s) may recertify under the applicable IDRP annually or as otherwise required and shall within thirty (30) days following a determination of his monthly payment due pursuant to such recertification file an amended budget to reflect such change. Federal Student Loan(s)/U.S. Department of Education Loans shall not be required to enroll Debtor(s) in any IDRP unless Debtor(s) otherwise qualifies for such IDRP.

Trustee Jon M. Waage is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

JMW/br

Separate Classification of Student Loan Debt

John Rao
National Consumer Law Center, Inc.

Overview of Separate Classification

Most payments made by consumer debtors in Chapter 13 cases are paid to secured creditors such as home mortgage and car loan lenders. Unsecured creditors, which would include student loan lenders, receive a pro rata share of the funds distributed under the plan for those unsecured creditors. Depending upon the amount of the debtor's nonexempt property and income left over after paying necessary living expenses, a consumer's plan may pay unsecured creditors at less than one-hundred percent of what they are owed, in some cases as low as zero to ten percent, without interest.

Absent a finding of undue hardship under section 523(a)(8), debtors remain obligated to pay upon completion of their Chapter 13 plan the amount owed on student loan debt that has not been paid under the plan. This includes any unpaid interest on the debt that has accrued during the plan.[1] Thus, it is often in the debtor's interest to pay off as much of the student loan debt in the Chapter 13 plan as is permissible.

For consumers who are current on their student loans at the time they file a Chapter 13 case, and wish to remain current, requiring them to pay their student loans pro rata with other unsecured claims almost always has the effect of forcing these consumers to default on such loans. This is because they would not be permitted to maintain the regular installment payment, which includes interest. It also causes other serious problems for debtors, such as loss of current status for the Department of Education's income driven repayment plans and loan forgiveness programs. Requiring nondischargeable student loans to be paid with other unsecured debts undermines the public policy of encouraging consumers to pay back the government debt, which is often stated as a reason why Congress made student loans nondischargeable.

One way to pay more on student loans than on other unsecured debts is to separately classify the student loans for payments at a higher percentage than other unsecured debts pursuant to 11 U.S.C. § 1322(b)(1). This section states, ". . . the [chapter 13] plan may . . . designate a class or classes of unsecured claims . . . , *but may not discriminate unfairly against any class so designated.*" Recent cases have been divided, both in the means of analysis and the result, as to whether students can separately classify student loans. Debtors are permitted to discriminate among similar classes of creditors in a plan. The issue is whether a separate classification for one creditor discriminates unfairly against other creditors within the same class.

Variety of Multi-Part Tests

The courts have developed a number of tests that purport to determine whether a

[1] If the student loan debt is nondischargeable, postpetition interest will not be discharged. *See In re* Kielisch, 258 F.3d 315 (4th Cir. 2001); *In re* Pardee, 218 B.R. 916 (B.A.P. 9th Cir. 1998), *aff'd*, 187 F.3d 648 (9th Cir. 1999); *In re* Jordan, 146 B.R. 31 (D. Colo. 1992).

discriminatory classification that favors one creditor is fair. These tend to be multi-factor tests that allow the courts considerable discretion. The test developed by the Eighth Circuit in *In re Leser*[2] has been applied by many courts. This four-part test considers whether:

(1) the discrimination has a rational basis;
(2) classification is necessary to debtor's rehabilitation under chapter 13;
(3) the discrimination is proposed in good faith; and
(4) there is meaningful payment to class discriminated against.

Noting that the *Leser* test has been criticized for "numerous shortcomings," the First Circuit B.A.P. in *In re Bentley*[3] adopted a test that considers whether:

(1) unsecured creditors shared equally in any dividend;
(2) subject debts were priority debts;
(3) debtors devoted the minimum or more than minimum to their plan;
(4) unsecured creditors shared in mandatory contribution on a pro rata basis; and
(5) debtor's interest in a "fresh start" trumped creditors' claim to a pro rata sharing.

While not rejecting a five-part test that had previously been used, one court recently concluded that one of the factors, the difference between what the creditors discriminated against will receive under the plan versus the amount they would receive if there was no separate classification, has been "unduly emphasized in prior cases."[4] The court found that while this factor may be considered, it should not be controlling. The court therefore adopted a "streamlined test" that considers:

(1) is there a good faith, rational basis for the separate classification;
(2) is the separate classification necessary to the debtor's rehabilitation under Chapter 13; and
(3) is there a meaningful payment to the discriminated class.[5]

Another court recently noted that there are at least nine different tests used, which the court described as follows: Strict Approach, Flexible Approach, Balance Approach, Reasonableness Approach, Bright Line Approach, Percentage of Repayment Approach, Interest of Debtor Approach, Multifactor Approach and the Bentley Baseline Test.[6] The court ultimately concluded that "none of the tests should stand as a rigid barrier to confirmation of the Debtors Plan."[7] After reviewing many of the multi-pronged tests, one court of appeals rejected them in favor of a recommendation that courts simply use their best judgment on a case-by-case basis

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[2] 939 F.3d 669 (8th Cir. 1991).
[3] 266 B.R. 229 (B.A.P. 1st Cir. 2001). *See also In re* Salazar, 543 B.R. 669 (Bankr. D.Kan. 2015) (adopting the *Bentley* test for determining whether a plan discriminates unfairly).
[4] *In re* Belton, 2016 WL 7011570, at *7 (Bankr. D.S.C. Oct. 13, 2016).
[5] *Id.* at *7.
[6] *In re* Engen, 561 B.R. 523 (Bankr. D. Kan. 2016).
[7] *Id*. at 538.

when reviewing unfair discrimination claims in chapter 13.[8] Ultimately many courts view the totality of circumstances in making the fairness determination.

Application the Fairness Requirement in Section 1322(b)(1)

Courts have found that the following arguments support the debtor's separate classification of student loan debt:

- Debtor would lose discharge under Public Loan Forgiveness program and discrimination advances the public policy objective of paying off student loan debts;[9]

- Discrimination is not unfair when there is no harm to the unsecured creditors;[10]

- There is a reasonable basis for the discrimination and/or a less discriminatory approach would leave the debtor or creditors worse off;[11]

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[8] *In re* Crawford, 324 F.3d 539 (7th Cir. 2003); *see also In re* Osorio, 522 B.R. 70, 77 (Bankr. D. N.J. 2014) (the competing unfair discrimination tests come down to case-by-case evaluations in which no single factor controls); *In re* Knowles, 501 B.R. 409, 415 (Bankr. D. Kan. 2013) (courts have "wide discretion" in determining whether proposed discrimination in favor of student loan creditor is unfair).

[9] *In re* Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012) (separate classification and higher payment rate for student loan debt not unfairly discriminate because it allowed debtor to participate in the Public Loan Forgiveness program and gave her the chance to write off approximately $50,000 of student loan debt; such discrimination advanced the goal of a fresh start for the debtor and the public policy objective of payment of student loan debts; cost of this discrimination to unsecured creditors was 5%, or a total of only $5,000).

[10] *In re* Potgieter, 436 B.R. 739 (Bankr. M.D. Fla. 2010) (chapter 13 plan that separately classified student loan obligation and proposed to pay it at the contract rate outside of the plan did not unfairly discriminate because the plan provided for full repayment of all general unsecured claims; the student loan obligation was non-dischargeable such that the debt would be fully repaid at some point; and the debtor had the right, under § 1322(b)(4), "to provide for payments on any unsecured claim to be made concurrently with payments on any secured claim").

[11] *In re* Belton, 2016 WL 7011570, at *7 (Bankr. D.S.C. Oct. 13, 2016) ("Debtor testified that she cannot obtain either a state or federal job as a paralegal or administrative assistant while her student loans are in default because as a paralegal, this default status is perceived by employers to impact her reliability in the handling of funds"); *In re* Mason, 456 B.R. 245 (Bankr. N.D. W. Va. 2011) (separate classification to allow student loan creditor to receive a higher percentage payment than other unsecured creditors may be allowed if the debtor can articulate a non-arbitrary reason why the discrimination is necessary and demonstrate that a less discriminatory approach is not advisable); *In re* Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (separate classification for long-term student loan debt to allow for cure and maintenance not unfairly discriminatory when such classification reduced payments to other unsecured creditors by 21% and 26% because failure to maintain payments on student loan debts would leave debtors in a much worse position than they were in prior to filing); *In re* Kalfayan, 415 B.R. 907 (Bankr. S.D.

- Payment of student loans, ahead of other unsecured debt, is not unfair discrimination;[12]

- Funds used are in excess of projected disposable income;[13]

- Discrimination is not unfair so long as unsecured creditors receive at least as much as they would in a Chapter 7 proceeding.[14]

Fla. 2009) (separate classification not unfairly discriminatory because it benefited the very creditors who were being discriminated against; debtor risked losing her optometry license, under state law, if she fell behind on her student loan payments which would jeopardize her ability to pay other unsecured creditors); *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007) (direct payments to student loan creditors in accordance with contract terms is not unfair discrimination because general unsecured creditors would realize only an additional .2% dividend in the absence of such discrimination while debtors would otherwise suffer accrual of interest and penalties and may face the consequences of default upon completion of the chapter 13 plan); *In re* Freshly, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (discrimination not unfair where separate classification of student loan from other unsecured debt was necessary for the debtor's rehabilitation under chapter 13, i.e. it would allow him to return to university and earn a degree and in light of the public policy goal of insuring repayment of student loans; plan proposed to full pay student loan debt of $2,258.00 while paying 1% of $5,314.53 of remaining unsecured debt).

[12] *In re* Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992) (debtor's plan, which proposed concurrent payment of student loans and a secured claim, to be followed by full payment of the remaining unsecured claims did not unfairly discriminate under the test set forth in Matter of Tucker because the plan provided for full repayment of all unsecured claims; the student loan obligations were non-dischargeable; and the debtor had a right to under § 1322(b)(4) to propose this repayment structure).

[13] *In re* Kindle, 580 B.R. 443, 451 (Bankr. D.S.C. 2017) ("Debtors are voluntarily contributing their discretionary income (the difference between their means test disposable income and their Schedule J disposable income) to increase the amount paid to those creditors."); *In re* Stull, 2013 WL 1279069 (Bankr. D. Kan. Mar. 27, 2013) (above-median debtor's chapter 13 plan to separately classify and pay a non-dischargeable obligation from income earned in excess of the projected disposable income committed to pay unsecured debt does not unfairly discriminate; plan in this case ultimately rejected because it proposed to pay interest on the student loan, which is prohibited by § 1322(b)(10) absent provision to pay all allowed claims in full).

[14] *In re* Kindle, 580 B.R. 443, 451 (Bankr. D.S.C. 2017) ("Interest on Debtors' student loans equals nearly $200.00 per month. If Debtors are not allowed to continue making regular payments on their student loans, interest will continue to accrue at this significant rate."); *In re* Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993) (plan that proposed to pay nondischargeable student loan debt in full while only paying 29% dividend to other unsecured creditors did not unfairly discriminate because creditors would otherwise receive little or no payment under a chapter 7 filing); *In re* Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991) ("chapter 13 plan may provide for a greater percentage payment to an educational lender than to other unsecured creditors, but not by reducing the payments to those other creditors to a level below what they

The following arguments support the view that separate classification of student loan debt is not permitted:

- Nondischargeability, by itself, does not justify discrimination;[15]

- Student loans co-signed by parents for children do not fall into the consumer debt exception and thus must meet the unfair discrimination requirement;[16]

- Fresh start and/or public policy in favor payment of student loans is not reasonable justification for discrimination;[17]

- Avoiding harm to the debtor is not a reasonable basis for discrimination;[18]

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would get in a Chapter 7 liquidation of the debtor's assets"; plan that proposed to pay student loan debts in full but only 15% of other unsecured debts approved).

[15] *In re* Groves, 39 F.3d 212 (8th Cir. 1994) (nondischargeability of student loans does not, by itself, justify "substantial" discrimination against general unsecured debt; additionally, a debtor's interest in a fresh start does not justify separately classifying student loans for the sole purpose of paying those debts in a manner that prejudices other unsecured claims); *In re* Sperna, 173 B.R. 654 (B.A.P. 9th Cir. 1994) (nondischargeability, on its own, is not a reasonable basis for preferential treatment of student loans and does not demonstrate that such discrimination is necessary; at issue were two chapter 13 plans that proposed to pay student loans in full while paying other unsecured debt lesser amounts, i.e. 1.4% and 12.21%); McCullough v. Brown, 162 B.R. 506 (N.D. Ill. 1993)(chapter 13 plans that proposed to pay nondischargeable student loans in full and other unsecured claims between 10% and 20% could not be confirmed on the basis of nondischargeability; court holds that for a plan to pass the unfair discrimination test "debtor must place something material onto the scales to show a correlative benefit to the other unsecured creditors").

[16] *In re* Santana, 480 B.R. 222 (Bankr. D.P.R. 2012) (limiting the application of the § 1322(b)(1) consumer debt exception to co-signed debt acquired for the benefit of the debtor rather than a co-signer, court holds that a student loan co-signed by debtor father for his son did not fall within the exception because students loans generally benefit the co-signer and not the debtor).

[17] *In re* Birts, 2012 WL 3150384 at 4 (E.D. Va. Aug. 1, 2012) (debtor's status as a single mother with three children, her generic interest in a "fresh start" and a strong public policy in favor of the federal student loan program were insufficient to justify discrimination in favor of the nondischargeable student loan debt); *In re* Bentley, 266 B.R. 229 (B.A.P. 1st Cir. 2001) (chapter 13 plan to pay debtors' student loan debt in full but a 3.6% dividend to other unsecured creditors was unfair discrimination; debtors' interest in a fresh start did not justify discrimination in a plan that proposed to pay only the minimum required into the plan, i.e. projected disposable income over three years).

[18] *In re* Kubeczko, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012) (fact that separate classification and payment of the student loan would have prevented debtor's default on student loans and the accrual of substantial interest was not enough to justify the discrimination); *In re* Knecht, 410 B.R. 650 (Bankr. D. Mont. 2009) (debtor's sole basis for the discrimination was not knowing if he would live or work long enough to repay his student loan debt because of health

- Discrimination is unfair in the absence of proof that it is necessary or reasonable.[19]

Curing and Maintaining Long-Term Student Loan Debt

Another way to pay more on the student loan than on other unsecured debts is to provide in the plan that the debtor will maintain direct ongoing monthly payments to a student loan creditor under section 1322(b)(5). This section permits the chapter 13 debtor to "cure a default and maintain payments on long term debts on which the final payment is due after the final payment of the plan." A number of courts have permitted chapter 13 debtors to direct ongoing monthly payments to a student loan creditor under section 1322(b)(5).[20]

However, many courts refuse to give effect to section 1322(b)(5) as a distinct Code provision and have required debtors proposing to pay ongoing student loan payments directly from current income to satisfy the unfair discrimination test under section 1322(b)(1).[21] If the

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issues but he failed to link his health issues to his life span or his ability to earn a respectable wage after completion of the plan).

[19] *In re* Thibodeau, 248 B.R. 699 (Bankr. D. Mass. 2000) (debtor failed, under Leser test, to demonstrate that plan to separately classify and fully pay student loan arrearages, maintain student loan payments outside of plan and pay a 27% dividend on other general unsecured claims, while devoting less than the full amount of debtor's net disposable income to payments under the plan, did not unfairly discriminate); *In re* Gonzalez, 206 B.R. 239 (Bankr. S.D. Fla. 1997) (chapter 13 plan that proposed to pay student loan debt in full and a 6% dividend to unsecured creditors could not be confirmed because debtor's offered no proof of the discrimination being "fair" or "necessary"); *In re* Renteria, 2012 WL 1439104 (Bankr. D. Colo. Apr. 26, 2012) (below median income debtors' chapter 13 plan to separately classify student loans to allow for 64% repayment of those claims over 60 month period versus a 1% repayment of all other unsecured claims constituted unfair discrimination).

[20] *In re* Johnson, 446 B.R. 921 (Bankr. E.D. Wis. 2011); *In re* Machado, 378 B.R. 14, 17 (Bankr. D. Mass. 2007) (in providing for cure and maintenance of payments, chapter 13 plan can allow for current payments to be paid by debtor directly to creditor, while only payments to cure prebankruptcy arrearage need be paid through trustee and subject to trustee's commission); *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007) (debtor may pay general unsecured creditors a 1% dividend through plan payments while making regularly scheduled student loan payments directly to student loan creditor pursuant to 11 U.S.C. § 1322(b)(5)); *In re* Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007); *In re* Williams, 253 B.R. 220, 227–28 (Bankr. W.D. Tenn. 2000); *In re* Chandler, 210 B.R. 898 (Bankr. D.N.H. 1997); *In re* Sullivan, 195 B.R. 649, 658 (Bankr. W.D. Tex. 1996); *In re* Cox, 186 B.R. 744, 746–47 (Bankr. N.D. Fla. 1995); *In re* Benner, 156 B.R. 631, 634 (Bankr. D. Minn. 1993) (using cure and maintain provisions of § 1322(b)(5) is a form of separate classification that meets the fairness standard of § 1322(b)(1)); *In re* Christophe, 151 B.R. 475 (Bankr. N.D. Ill. 1993); *In re* Saulter, 133 B.R. 148 (Bankr. W.D. Mo. 1991).

[21] *In re* Jordahl, 539 B.R. 567 (B.A.P. 8th Cir. 2015); *In re* Labib-Kiyarash, 271 B.R. 189 (B.A.P. 9th Cir. 2001) (use of section 1322(b)(5) is subject to debtor showing that classification is fair under section 1322(b)(1)); *In re* Boscaccy, 442 B.R. 501 (Bankr. D. Miss. 2010); *In re*

court does not find that this separate classification will fairly discriminate and therefore requires the debtor to make pro-rata distributions rather than ongoing contractual payments to student loan creditors, a debtor who is current on student loan payments when the bankruptcy is filed will be thrown into default. This undermines the goal of paying back the government debt to help the federal treasury (which was one of the other purposes of the nondischargeability provision and its extension). It also causes various other consequences to the debtor, such as loss of current status for administrative repayment and loan forgiveness programs.[22]

Can the Debtor Pay Interest Due on Student Loans?

Another obstacle in using section 1322(b)(5) to maintain ongoing student loan payments during the plan is a provision added to the Code by the 2005 amendments. Section 1322(b)(10) states that if a chapter 13 plan provides for the payment of ongoing postpetition interest on a nondischargeable debt, the interest "may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims."[23] In other words, the debtor would have to propose to pay all unsecured creditors' claims in full during the chapter 13 case if the debtor wanted to continue making student loan payments that include interest. Some courts have accepted this broad view of section 1322(b)(10).[24] Other courts take the view that section 1322(b)(5) is a specific provision that can be read consistently with the more general language of section 1322(b)(10), thereby permitting the contractual maintenance payments required by section 1322(b)(5) to include interest.[25]

Harding, 423 B.R. 568 (Bankr. S.D. Fla. 2010); *In re* Kruse, 406 B.R. 833 (Bankr. N.D. Iowa 2009); *In re* Pora, 353 B.R. 247 (Bankr. N.D. Cal. 2006).

[22] *E.g*, *In re* Pracht, 464 B.R. 486, 490 (Bankr. M.D. Ga. 2012) (if school teacher was not permitted to make ongoing student loan payments during her chapter 13 plan, she would be in default and no longer eligible for approximately $50,000 in loan forgiveness under the Public Service Loan Forgiveness program).

[23] 11 U.S.C. § 1322(b)(10).

[24] *In re* Jordahl, 539 B.R. 567 (B.A.P. 8th Cir. 2015); *In re* Stull, 489 B.R. 217, 223/-/24 (Bankr. D. Kan. 2013) (§ 1322(b)(10) prohibits payment of interest on nondischargeable student loan claim in chapter 13 unless all unsecured claims paid in full); *In re* Precise, 501 B.R. 67, 72 (Bankr. E.D. Pa. 2013) (agreeing with *Stull* in dicta); *In re* Kubeczko, 2012 WL 2685115 *7 (Bankr. D. Colo. July 6, 2012)(in enacting § 1322(b)(10) Congress intended broad restriction on cure and maintenance of payments under § 1322(b)(5) for unsecured debts); *In re* Edmonds, 444 B.R. 898 (Bankr. E.D. Wis. 2010).

[25] *In re* Brown, 500 B.R. 255, 266 (Bankr. S.D. Ga. 2013) (§ 1322(b)(5) specifically applies to a cure in chapter 13 and is not subject to the limits on payment of post-petition interest found in § 1322(b)(10)); *In re* Webb, 370 B.R. 418, 422 (Bankr. N.D. Ga. 2007) (§ 1322(b)(5) is a specific provision applicable to cure of a default in a long term debt and is not controlled by the more general terms of § 1322(b)(10)); *In re* Freeman, 2006 WL 6589023 (Bankr. N.D. Ga. 2006) (§ 1322(b)(10) not applicable when debtor implementing cure and maintain provision of § 1322(b)(5)). *See also In re* Williams, 253 B.R. 220, 227 (Bankr. W.D. Tenn. 2000) (pre-BAPCPA decision, "The maintenance of ongoing payments necessarily involves the payment of post-petition interest.").

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Federal Student Loan Debt in Bankruptcy: Recent Movement Towards Income-Driven Repayment Plans in Chapter 13

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I. Introduction

Student loan debt is generally nondischargeable. If an individual with student loan debt files for relief under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, at the end of the bankruptcy case the debtor is still personally liable for any balance due on the student loan debt. Some debtors find that at the end of five years of Chapter 13 plan payments, they owe more in student loan debt than when they started because interest continues to accrue.

Recently, some Chapter 13 debtors have proposed to repay their student loan debts during their Chapter 13 plans through Income-Driven Repayment (IDR) plans offered by the United States Department of Education (ED). The Executive Office for United States Attorneys (EOUSA), in consultation with ED, developed a template that describes the responsibilities of debtors who wish to repay student loans through an IDR plan during a Chapter 13 plan, and that protects ED from claims in these cases that its IDR loan servicing activities violate the automatic stay. This article will first provide data on student loan debt in the United States and discuss the history of dischargeability of student loans in bankruptcy proceedings. Next, the types of student loans and student loan repayment plans available from ED are reviewed. Lastly, to explain the need for the template and how it works in Chapter 13, a discussion of the challenges of addressing student loan debt in Chapter 13 cases, a description of the template and some thoughts on the benefits of using the template are provided.

The template has been reviewed by ED, EOUSA, the National Association of Chapter 13 Trustees, Assistant United States Attorneys (AUSAs) who handle bankruptcy cases, and bankruptcy judges, who provided input and suggested revisions. The template is not in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Official Bankruptcy Forms. It is not nationally adopted, mandated, or required. Developed in response to efforts by the debtors' bar to include student loan plan payments in Chapter 13 plans, the template provides the minimum requirements and terms necessary to facilitate the debtor's participation in an IDR plan during Chapter 13. Use of the template could expedite consent and approval of a Chapter 13 plan that includes IDR provisions. There is no guarantee that bankruptcy judges, the Chapter 13 bankruptcy trustee, or other unsecured creditors in a case will accept the template language. However, earlier versions of this template have been successfully included in Chapter 13 plans and agreed orders. Using the template will assist Chapter 13 debtors with management of their nondischargeable student loan debt, and will benefit the United States as payments on the student loans will be made, and not deferred, in individual Chapter 13 cases.

II. Federal Student Loan Data

In his introductory letter to the *Federal Student Aid Annual Report FY 2015*, the Chief Operating Officer of Federal Student Aid states:

> Federal Student Aid witnessed a number of significant organizational milestones in FY 2015. The federal student loan portfolio grew to more than $1.2 trillion, representing an increase of over 7 percent compared to FY 2014. In total, Federal Student Aid delivered over $128 billion in aid to almost 12 million students at over 6,100 schools this past fiscal year.[1]

According to the Federal Reserve Bank of New York, "[s]tudent loan debt is the only form of consumer debt that has grown since the peak of consumer debt in 2008. Balances of student loans have eclipsed both auto loans and credit cards, making student loan debt the largest form of consumer debt outside of mortgages."[2] In fiscal year (FY) 2016, there were 19.2 million Federal Student aid applications processed by ED, and 13.2 million postsecondary student aid recipients received $125.7 billion in federal student aid.[3] At the close of FY 2016, 42.3 million student loan borrowers had outstanding student loan debt in excess of $1.29 trillion.[4] The debt continues to increase. At the end of the fourth quarter of FY 2017, 42.6 million student loan borrowers had outstanding student loan debt totaling over $1.36 trillion.[5]

The use of IDR plans to repay student loan debt is growing. In an introduction to the *Federal Student Aid Annual Report FY 2016,* the Chief Operating Officer of Federal Student Aid states*:*

> [W]e have continued expanding our push to enroll borrowers who would benefit most from income-driven repayment, or IDR, plans . . . This past spring's announcement that IDR growth will see enrollment of 2 million borrowers between April, 2016, and April, 2017, helped us become even more focused on meeting that goal. I am pleased to say we are on target, which will mean nearly 7 million borrowers will be in IDR plans by next April.[6]

A nondischargeable student loan debt is almost assured to be too large for a debtor to repay in the five year span of a Chapter 13 plan. Further, a student loan debtor is not required by the Bankruptcy Code to accelerate their loan payments and pay the student loan debt in full during the course of a Chapter 13 case. Student loan debtors in bankruptcy may pay that debt according to the terms of their original loan, such as a ten-year standard repayment plan. However, once in Chapter 13, the debtor's Chapter 13 plan

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[1] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2015*, Washington, D.C., 2015. ("Federal Student Aid, a principal office of the United States Department of Education, is required by legislation to produce an *Annual Report*, which details Federal Student Aid's financial and program performance. The *Federal Student Aid Annual Report FY 2015* is a comprehensive document that provides an analysis of Federal Student Aid's financial and program performance results for Fiscal Year 2015.").
[2] *Student Loan Debt by Age Group*, FED. RESERVE BANK OF NEW YORK (Mar. 29, 2013).
[3] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016.
[4] The Department of Education's Federal Student Aid Office provides statistics by student loan type, including dollars outstanding and number of loan recipients. *See* https://studentaid.ed.gov/sa/about/data-center/student/portfolio.
[5] *Id.*
[6] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016.

payments or plan percentage might be too low to fulfill the standard plan monthly payment amount. If the debtor's confirmed Chapter 13 plan provides for less than the full monthly payment on the Federal student loan, then due to partial payments the student loan will soon be in default. Additionally, the nondischargeable debt will continue to grow due to interest. The bankruptcy community should encourage Chapter 13 debtors to pay down their student loan debt while their bankruptcy cases proceed. By addressing student loan debt in an IDR plan during the Chapter 13 plan, the debtor will not face later the setback of an undischarged student loan debt with accrued interest in default status.

III. The History of Student Loan Dischargeability in Bankruptcy Proceedings

The United States Constitution provides, "[t]he Congress shall have the power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . ."[7] From the Constitution's effective date in 1789 until 1800, only state insolvency laws existed. From 1800 until 1898, Congress enacted temporary Federal bankruptcy laws in response to specific financial and economic crises. Once each crisis passed, the Federal law was repealed, and creditors and debtors were dependent again upon state insolvency laws. The three temporary Federal bankruptcy laws were:

- The Bankruptcy Act of 1800 that provided involuntary bankruptcy proceedings applicable to merchants only;
- The Bankruptcy Act of 1841 that provided voluntary bankruptcy proceedings for individuals; and
- The Bankruptcy Act of 1867 that provided both voluntary and involuntary proceedings and applied to individuals and merchants.

The first permanent Federal bankruptcy law in the United States was enacted by Congress as the Bankruptcy Act of 1898, commonly known as the Nelson Act, later amended by the United States Bankruptcy Act of 1938—the Chandler Act. The Chandler Act (aka the Bankruptcy Act) provided for both voluntary and involuntary proceedings for a corporation, partnership, or an individual.

Section 17 of the Chandler Act provided: "Debts Not Affected By A Discharge—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part. . ." The Chandler Act excepted from discharge: debts incurred for tax levied by the United States; liabilities for obtaining money or property by false pretenses or representation; willful and malicious injuries; alimony or for maintenance and support of a wife or child; debts not scheduled; debts created by fraud, embezzlement, misappropriation, or defalcation; three months wages due to employees; money of an employee received or retained by the employer to secure the employees' faithful performance under an employment contract.[8]

Private student loans were not excepted from discharge under the Act. At this time, bankruptcy proceedings were available as liquidation [think today's Chapter 7] or through a court approved plan [akin to Chapter 11]. A wage-earners repayment plan like today's Chapter 13 proceedings did not exist.

Federal student loans first became available in 1958. In the late 1960s to early 1970s, student loan balances and discharge in bankruptcy were under scrutiny. News reports and anecdotes indicated that students completing college and graduate school would immediately file bankruptcy proceedings to shed all of their student loan debt, and then proceed on to lucrative careers. In 1970, Congress authorized the formation of a *Commission on the Bankruptcy Laws of the United States*. Following public hearings,

[7] U.S. CONST. ART I, § 8 cl. 4.
[8] Pub. L. No. 75-696, 52 Stat. 851 (1938).

testimony, and research, the Commission produced its *Report to Congress* on July 30, 1973.[9] As is true today, at the time of the Commissions' 1973 Report, the Federal government ". . . [was] by far the largest higher education student loan financing system in the country . . ." [10] The 1973 Report states the Commission heard testimony and received communications and information "to the effect that easy availability of discharge from education loans threatens the survival of existing educational loan programs."[11] At public hearings, concern was expressed by representatives of the National Council of Higher Education Loan Programs and the New Jersey Board of Higher Education about anticipated student loan defaults and bankruptcies.[12] Although the Commission was not aware of evidence suggesting significant problems with student loan discharge, it advised that the use of bankruptcy to avoid payment of student loans without "any real attempt to repay the loan . . . discredit[s] the system and cause[s] disrespect for the law and those charged with its administration."[13] The Commission stated:

> . . . examples of the abuse of the discharge in the case of educational loans have . . . come to the Commission's attention. Some individuals have financed their education and upon graduation have filed petitions under the Bankruptcy Act and obtained a discharge without any attempt to repay the educational loan and without the presence of any extenuating circumstances, such as illness. The Commission is of the opinion that not only is this reprehensible but that it poses a threat to the continuance of educational loan programs. The Commission, therefore, recommends that, in the absence of hardship, educational loans be nondischargeable unless the first payment falls due more than five years prior to the petition.[14]

Part II of the 1973 Report contains proposed statutory language to effect the Commission's recommendations. The proposed definition of educational debt was "any debt to a nonprofit educational institution for expenses of post-secondary education or a debt for a loan made, guaranteed, or funded by the United States, a state, or a subdivision thereof or by a nonprofit educational or charitable organization for such expenses. . . " And, for the first time in United States history, a dischargeability exception concerning student loans was proposed:

> . . . any educational debt if the first payment of any installment thereof was due on a date less than five years prior to the date of the petition and if its payments from future income or other wealth will not impose an undue hardship in the debtor and his dependents . . .[15]

Concerned over high student loan losses, Congress enacted statutory provisions—outside of the Bankruptcy Act—to protect Federal investments. This was the first legislated restriction on discharge of student loan debt in the United States. In 1976, Congress enacted section 1087-3 of Title 20, United States Code, providing that for bankruptcy petitions filed on or after September 30, 1977, guaranteed student loan program loans that were in repayment status less than five years could be discharged if the court determined undue hardship and a general discharge order was entered. Enacting the 1973 Report recommendations, this measure was intended to prevent students from graduating with a higher degree and then immediately entering bankruptcy to shed their student loan debt. However, it provided an exception for cases in which the court determined repayment for loans in repayment status

[9] House Doc. No. 93-137 Part I, II (September 6, 1973) (hereinafter 1973 Report). The Commission's recommendations formed the basis for discussion and debate in Congress, and the foundation for the next bankruptcy legislation—the 1978 Bankruptcy Reform Act.
[10] 1973 Report, Part I, fn 4, at 178-79.
[11] 1973 Report, Part I, at 11.
[12] 1973 Report Part I, fn 4, at 178.
[13] 1973 Report, Part I, at 170.
[14] 1973 Report, Part 1, p. 176-77.
[15] 1973 Report, Part II, pp. 3, 136.

less than five years would cause undue hardship. Loans in repayment status for five years or more and national direct student loans/Perkins Loans still could be discharged by a general bankruptcy discharge order.

Soon thereafter, the Bankruptcy Code[16] made significant changes to the bankruptcy laws in the United States based upon the Commission's 1973 Report. In addition to eliminating the necessity to "prove" debts, eliminating the requirement of insolvency to file bankruptcy, creating Bankruptcy Courts, creating bankruptcy judgeships, and generally modernizing the U.S. bankruptcy system, the legislative measure created Chapter 13 proceedings for individual debtors—the Chapter 13 wage earners plan. Restrictions on the discharge of student loans appeared in section 523(a)(8):

> (a) A discharge under section 727, 1141, or 1328 of this title does not discharge an individual debtor from any debt . . .
>
> > (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless—
> >
> > > (A) such loan first became due before five years before the date of the filing of the petition; or
> > >
> > > (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . .[17]

This restriction on the discharge of student loan debts in the Bankruptcy Code reflected the Higher Education Act's 1976 provisions that absent a finding of undue hardship, student loans could not be discharged within the first five years after they became due. A student loan debt in repayment status for five years or more still could be discharged under the Bankruptcy Code.

In 1990, the five year period was extended. Section 3621(1) of Pub. L. No. 101-647[18] amended section 523(a)(8) of title 11, United States Code, by adding that "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 or for an obligation to repay funds received as an educational benefit, scholarship or stipend" and by extending subparagraph (A) from five years to seven years "exclusive of any applicable suspension of the repayment period." This reflected the legislative intent that after a seven year repayment period had expired, the public policy concerns over potential abuse of the student loan system and risks to the system's financial stability are outweighed by the public policy to provide debtors with a fresh start. The seven-year period began to run on the date the first installment payment on a student loan became due.

In 1998, Congress amended the Bankruptcy Code and deleted section 523(a)(8)(A), leaving "undue hardship" as the sole basis for discharging an educational loan or benefit. The elimination of the seven-year rule applied to all bankruptcy cases commenced after October 7, 1998. In 2005, Congress expanded nondischargeability to include private student loans.

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[16] Pub. L. No. 95-598, 92 Stat. 2549 (1978).
[17] 11 U.S.C. § 523(a)(8) (2012) (amended 2016).
[18] Pub. L. No. 101-647, 104 Stat. 4789 (1990).

IV. Nondischargeability and Undue Hardship Discharge Today

Section 523(a)(8) of the Bankruptcy Code excepts from discharge:

(A) (i) an education 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; or

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

(B) any other educational loan that is a qualified education loan.[19]

Student loan debt is presumptively nondischargeable. The Bankruptcy Code permits a court to discharge student loan debt only upon a finding that payment of the debt will cause undue hardship to the debtor and debtor's dependents. A debtor seeking discharge of student loan debt must affirmatively seek an exception to nondischargeability by filing a complaint to determine dischargeability.[20]

A complaint to determine dischargeability of student loan debt may be filed at any time. A closed bankruptcy case can be reopened to file the complaint.[21] No-asset Chapter 7 cases are processed somewhat quickly. The debtor may file a complaint to determine dischargeability of student loan debt at any time before or after a Chapter 7 discharge is entered in the case. If the Chapter 7 case is closed, the debtor may file a motion to reopen for the purpose of filing a complaint to determine dischargeability.

But what about debtors in Chapter 13 repayment plans, which can last up to sixty months before a discharge is entered? Some courts hold that a Chapter 13 debtor cannot file a complaint to determine dischargeability of student loan debt at the beginning of the Chapter 13 case, but must wait until they are closer to the issuance of a discharge.[22]

Once the adversary proceeding complaint to determine dischargeability is filed, the initial burden is on the student loan lender to establish the existence of the debt.[23] Once the debt is established, the burden shifts to the debtor to prove undue hardship. Nine Federal Judicial Circuits[24] use the *Brunner* test, first articulated in *Brunner v. New York Higher Education Services Corp*.[25] The *Brunner* test uses a three prong assessment to evaluate whether the debtor has proven undue hardship warranting discharge of their student loan debt:

- 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 student loans;
- That this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
- That the debtor has made good faith efforts to repay the loans.

The Eighth Circuit rejects the *Brunner* test, and instead relies upon a *totality of the circumstances* test to determine whether the debtor would face undue hardship absent a discharge of student loans.

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19 § 523(a)(8).
20 FED. R. BANKR. P. 4007.
21 FED. R. BANKR. P. 4007(b).
22 *See* Wheeler v. ECMC, 555 B.R. 464 (Bankr. M.D. Pa 2016).
23 *In re* Rumer, 469 B.R. 553 (Bankr. M.D. Pa 2012).
24 The *Brunner* test is used in the 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th, and 11th Circuits.
25 Brunner v. New York Higher Education Services Corp, 831 F.2d 395 (2nd Cir. 1987).

Under the *totality of the circumstances* test, courts in the Eighth Circuit[26] assess:

- The debtor's past, present, and reasonably reliable future financial resources;
- A calculation of the debtor's reasonable necessary living expenses; and
- Any other relevant facts and circumstances surrounding the case.

The First Circuit has not explicitly adopted either the *Brunner* test or the *totality of the circumstances* test to determine whether a debtor has established undue hardship and eligibility for discharge of student loan debt. As described by the First Circuit Bankruptcy Appellate Panel, "[a]lthough the First Circuit acknowledged the two approaches in *Nash,*[27] it declined to adopt formally a particular test for determining undue hardship, and it remains an undecided issue in this circuit."[28] Bankruptcy and District Courts within the First Circuit apply either test and hybrid variations.[29]

V. Federal Student Loan Programs

An important first step for an AUSA when handling a bankruptcy case involving student loans is to determine the type of loans involved, and whether each loan is financed by ED, another Federal agency, or by a non-Federal organization. ED finances a number of student loan programs that involve a variety of lenders and guarantors. Rules for discharge of loans made by other Federal agencies may differ from those governing discharge of Department of Education financed loans. Appendix 2 provides a description of each type of ED-financed Federal student loan. Most bankruptcy cases involve loans made under the following three Federal student loan programs: the Federal Family Educational Loan Program (FFELP); the William D. Ford Federal Direct Loan Program (Direct Loans); and the Federal Perkins Loan Program (Perkins Loans).

VI. Loan Servicers and Loan Holders

A loan holder is the entity that holds the loan promissory note and has the right to collect from the borrower. ED is the legal holder of all Direct Loans. FFELP loans, on the other hand, may be held by a lender, guaranty agency, or ED—if defaulted or sold. Perkins Loans may be held by the school that made the loan or by ED.

ED and many lenders, guarantors, and schools contract with loan servicers. Servicers are the primary point of contact for borrowers related to their student loans. A loan servicer is a company that collects payments, responds to customer service inquiries, and performs other administrative tasks associated with maintaining a Federal student loan on behalf of a loan holder. Servicers are the primary point of contact for borrowers related to their student loans. ED currently uses nine loan servicers. Most loans are serviced by one of the following four: Nelnet, Navient, FedLoan Servicing, or Great Lakes. The other servicers are Cornerstone, MOHELA, Granite State, HESC/Edfinancial, and OSLA servicing.

VII. Repayment of Student Loans

Borrowers in repayment status—not in default—have several repayment options depending on the type of loans and when the loans were obtained. Repayment plans include:

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[26] Hurst v. Southern Arkansas University, 553 B.R. 133 (B.A.P. 8th Cir. 2016); Fern v. Fedloan Servicing et al, (*In re* Fern) Case No. 14-00168, 2016 WL 3564376 (Bankr. N.D. Iowa 2016).
[27] *In re* Nash, 446 F. 3d 188, 190 (1st Cir. 2006).
[28] *In re* Bronsdon, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).
[29] *See In re* Blanchard, 2014 WL 4071119 (Bankr. D. N.H. August 14, 2014); Ayele v. Educational Credit Management Corp., 490 B.R. 460 (D. Mass. 2013).

Standard—Under a Standard repayment plan, payments are fixed and made for up to ten years (between ten and thirty years for consolidated loans). Monthly payments may be slightly higher than payments made under other plans, but this often results in the loan being paid in the shortest time;

Extended—A borrower may extend repayment over a longer period of time, up to twenty-five years, and make lower payments than under a Standard plan. This plan results in the borrower repaying a larger amount to pay off the loan;

Graduated—Under a graduated plan, monthly payments start low and increase every two years, for up to ten years (between ten and thirty years for consolidated loans);

Income-Sensitive—Income-sensitive plans are available to low income borrowers who have FFELP Loans (Direct Loans are not eligible). Monthly payments increase or decrease based on annual income and are made for a maximum period of ten years; or

Income-Driven—Under an IDR plan, the monthly loan payment is a percentage of discretionary income. After twenty to twenty-five years, unpaid balances are forgiven.[30]

VIII. Income-Driven Repayment Plan

The first IDR plan, the Income Contingent Repayment Plan, was authorized by Congress in the 1990s. Generally, the monthly payment amount under an IDR plan is a percentage of the individual's *discretionary income*. The percentage differs depending on the type of IDR plan. Under all four IDR plans, any remaining loan balance is forgiven if the Federal student loans are not fully repaid at the end of the repayment period. Whether the individual will have a balance to be forgiven at the end of the repayment period depends on a number of factors, such as how quickly the individual's income rises and the individual's income relative to debt. Because of these factors, an individual might fully repay the loan before the end of the repayment period; in such a case, there would be no amount remaining due to be forgiven.

Only borrowers who are *not in default* on their Federal student loans can apply to enroll in an IDR plan. IDR Plans require application by the borrower, approval by ED, and annual recertification by the student loan borrower. The student loan borrower's monthly payments can be adjusted up or down by ED based upon the annual recertification data.

If the borrower is making payments under an IDR plan and simultaneously working toward loan forgiveness under the Public Service Loan Forgiveness (PSLF) Program, the borrower may qualify for forgiveness of any remaining loan balance after making ten years of qualifying payments, instead of twenty or twenty-five years. Qualifying payments for the PSLF Program include payments made under any of the IDR plans.

Due to borrower outreach initiatives, approximately four million Direct Loan borrowers were enrolled in IDR plans at the close of FY 2015,[31] a fifty percent increase over FY 2014 enrollments.[32] By the close of FY 2015, loan servicers were enrolling several thousands of borrowers in IDR plans daily.[33] IDR enrollments continued to increase in 2016; ED reported 6.5 million borrowers enrolled in IDR plans as of December 31, 2016.[34] The different IDR plans are:

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[30] Perkins loans are not repayable under IDR plans, but a borrower may consolidate those loans into a Direct Consolidation Loan, which would be eligible.

[31] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2015*, Washington, D.C., 2015.

[32] *Id.*

[33] *Id.*

[34] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016, p. ii.

REPAYE: Any borrower with eligible Federal student loans can make payments under this plan. Payment is generally ten percent of discretionary income, over a term of twenty years if all loans being repaid under the plan were received for undergraduate study, or twenty-five years if any loans being repaid under the plan were received for graduate or professional study.

PAYE and Income-Based Repayment (IBR): Each of these plans has an eligibility requirement. To qualify, the payment, which is based on income and family size, must be less than what the individual would pay under the Standard Repayment Plan with a ten-year repayment period.

If the amount the individual would have to pay under the PAYE or IBR plan was more than what the individual would have to pay under the ten year Standard Repayment Plan, the individual would not benefit from having the monthly payment amount based on income, so the individual does not qualify. Generally, individuals meet this requirement if their Federal student loan debt is higher than their annual discretionary income or represents a significant portion of their annual income.

In addition, to qualify for the PAYE Plan, an individual must also be a new borrower as of Oct. 1, 2007, and must have received a *disbursement* of a Direct Loan on or after Oct. 1, 2011. An individual is a new borrower if the individual had no outstanding balance on a Direct Loan or FFELP loan when the individual received a Direct Loan or FFELP loan on or after Oct. 1, 2007.

PAYE: Payment is generally ten percent of discretionary income, but never more than the ten-year Standard Repayment Plan amount, over a twenty year term.

IBR: Payment is generally ten percent of discretionary income for a *new borrower* on or after July 1, 2014, but never more than the ten-year Standard Repayment Plan amount, or fifteen percent of discretionary income for an individual who is not a new borrower on or after July 1, 2014, but never more than the ten-year Standard Repayment Plan amount. The repayment term is twenty years for a new borrower on or after July 1, 2014, and twenty-five years for an individual who is not a new borrower on or after July 1, 2014.

Income Contingent Repayment (ICR): Any borrower with a Direct Loan can make payments under this plan. This plan is the only available income driven repayment option for parent *PLUS loan* borrowers. Although PLUS loans made to parents cannot be repaid under any of the income driven repayment plans (including the ICR Plan), parent borrowers may consolidate their Direct PLUS Loans or Federal PLUS Loans into a *Direct Consolidation Loan* and then repay the new consolidation loan under the ICR Plan (though not under any other income-driven plan). Payment is twenty percent of discretionary income or what the individual would pay on a repayment plan with a fixed payment over the course of twelve years, adjusted according to the individual's income, over a twenty-five year term.

Details on each plan can be found at https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven. Table 1, below, provides a comparison of the various repayment plans using the same fact scenario assuming $30,000 in Federal student loan debt and income that increases over time, starting with an income of $25,000.

TABLE 1[35]

Repayment Plan	Initial Payment	Final Payment	Time in Repayment	Total Paid	Loan Forgiveness
Standard	$666	$666	10 years	$79,935	N/A
Graduated	$381	$1,143	10 years	$85,272	N/A
Extended-Fixed	$387	$387	25 years	$115,974	N/A
Extended-Graduated	$300	$582	25 years	$126,173	N/A
REPAYE	$185	$612	25 years	$131,444	$0
PAYE & IBR (new borrowers)	$185	$612	20 years	$97,705	$41,814
IBR (not new borrowers)	$277	$666	18 years, 3 months	$107,905	$0
ICR	$469	$588	13 years, 9 months	$89,468	$0

Comparison of Repayment Plans for Undergraduate Loan Debt in Direct Unsubsidized Loans*

*Loan debt does not include any consolidation loans.

IX. Hurdles and Obstacles for Chapter 13 Debtors With Student Loan Debt

Generally, when a debtor is not in default on student loans and files a petition for relief under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, ED and the student loan servicer will put the debtor's Federal student loans into *administrative forbearance* status to comply with the bankruptcy automatic stay in section 362 of title 11. ED suspends collection and communication activity until the bankruptcy case is dismissed or a discharge is entered. Nondischargeable student loans continue to accrue interest after the debtor files a bankruptcy petition.

Because ED is an unsecured nonpriority creditor, it might receive small sums monthly under the terms of a Chapter 13 plan. While the loan is in forbearance status, ED posts and applies payments it receives but, because of the automatic stay, does not send the debtor billing statements or other communications. If the debtor's Chapter 13 plan payments to ED are not sufficient to pay the debtor's monthly student loan payment in full, the loan may go into default status; due to administrative forbearance, the debtor will not receive notice of the underpayment, balance due, or status change.

At the end of the bankruptcy case, the debtor continues to owe the balance due on the nondischargeable student loan debt. The outstanding accrued interest is capitalized (added to the principal balance), which can significantly increase a borrower's balance and result in higher monthly student loan payments *after* the bankruptcy case ends. If the student loan went into default status during the Chapter 13 case, ED can initiate collection activity against the student loan borrower at the conclusion of the bankruptcy case, including garnishment, Treasury Offset Program, and other measures. After five years of bankruptcy plan payments, the debtor is still in debt and faces collection action.

As Chapter 13 cases last between three to five years,[36] some debtors seek to continue to repay their student loans under their ED repayment plan[37] during the Chapter 13 case. A Chapter 13 plan may

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[35] *Federal Student Aid: Income Driven Plans*, U.S. DEPT. OF ED. (last visited February 27, 2018).
[36] 11 U.S.C. § 1322(d) (2012) (amended 2016).
[37] *See supra* Repayment of Student Loans.

separately classify claims, and must provide the same treatment for all claims within a class.[38] For example, a Chapter 13 plan can have a class consisting of the secured mortgage lender, a class of secured automobile note holders, a class of priority tax debts, and a class of general unsecured creditors (credit cards, doctors' bills etc.). "The plan may designate a class or classes of unsecured claims . . . but may not discriminate unfairly against any class designated."[39] To put a substantially similar type of claim into a different class to treat it better or worse than the other similar claims is claims discrimination. There must be a valid reason to classify and treat seemingly similar claims differently.

If student loan debt is included in the class of general unsecured creditors, the proposed percentage to be paid to the student loan holder might be less than the amount of the debtor's monthly student loan plan payment. For example, if the debtor owes $150,000 in student loan debt, and under the Chapter 13 plan the class of general unsecured creditors will receive ten percent of their claims, the student loan would be paid $15,000 through the plan over the course of sixty months—$250 per month. That monthly payment amount might be *well below* the amount the debtor was paying under the Standard student loan repayment plan. By only paying the unsecured creditor percentage provided in the Chapter 13 plan towards the nondischargeable Federal student loan, the debtor will underpay the Federal student loan for three to five years. The deficit will grow each month the debtor is in bankruptcy, and interest will accrue to be capitalized later.

If, however, the Chapter 13 plan classifies unsecured student loan debt separately from general unsecured debt, and the plan proposes that student loan debt receives the full monthly student loan repayment plan amount (at a higher percentage of repayment than to other unsecured creditors), the Chapter 13 trustee or a general unsecured creditor could object to plan confirmation, or the court could reject the Chapter 13 plan as proposed based on unfair discrimination within the unsecured debt class.[40] Recently, some bankruptcy courts now permit nondischargeable student loan debt to be classified separately from other general unsecured creditors.[41] When a bankruptcy court confirms a Chapter 13 plan in which the debtor separately classifies unsecured student loan debt to be paid at a rate that satisfies an ED repayment plan, the Chapter 13 debtor will make substantial and actual progress towards the repayment of that nondischargeable debt during the course of the bankruptcy case. For debtors enrolled in an IDR plan, the time spent making IDR payments while in bankruptcy also applies towards the total time required to attain student loan forgiveness under the IDR plan.

X. Chapter 13 Plan Template for IDR in Chapter 13 Cases

In response to Chapter 13 debtors who have proposed to repay their student loan debts through IDR plans during their Chapter 13 bankruptcy cases, EOUSA has developed template language for use in

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38 § 1322(a)(3), (b)(1).

39 § 1322(b).

40 McCullough v. Brown (In *re* Brown), 162 B.R. 506 (D. N.D. Ill. 1993) (reversing judgment, holding that debtors' plans, which provided for full payment of their student loans and payments of only 10 percent to other unsecured creditors, "discriminated unfairly" against the other unsecured creditors in violation of the Bankruptcy Code).

41 *In re* Engen, 561 B.R. 523 (Bankr. D. Kan. 2016) (separate classification of a student loan debt in a Chapter 13 plan did not discriminate unfairly or violate 11 U.S.C. § 1322(b)(1)). *See also In re* Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (Debtor may separately classify student loan debt under cure-and-maintenance provisions); *In re* Johnson, 446 B.R. 921 (Bankr. E.D. Wis. 2011) (holding that student loans could be separately classified as long-term debts); *In re* Williams, 253 B.R. 220 (Bankr. W.D. Tenn. 2000) (the court allowed student loan arrearages to be paid in full through the plan as long as the student loan was treated as a long term debt under § 1325(b)(5)); *In re* Chandler, 210 B.R. 898 (Bankr. D. N.H. 1997) (the court held separate treatment of student loans was permitted as long as there was no "unfair" discrimination); *In re* Cox, 186 B.R. 744 (Bankr. N.D. Fla. 1995) (§ 1322(b)(5) specifically sanctions separate classification long term debts); *In re* Benner, 156 B.R. 631 (Bankr. D. Minn. 1993) (the court held § 1322(b)(5) authorizes separate treatment of long term debts, and any resulting discrimination is not "unfair").

a Chapter 13 repayment plan. This is not part of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Official Bankruptcy Forms. It is only suggested language that may be considered to accommodate an IDR plan during Chapter 13 bankruptcy. The template is designed as an insert into the section of a Chapter 13 plan for “non-standard plan provisions,” or alternatively, to be used as the basis for an agreed order separate from, but referenced in, the Chapter 13 plan. Only student loan borrowers who are not in default are eligible to apply for the IDR repayment plan. Student loan borrowers who are in default will not be able to use a proposed Chapter 13 plan to gain entry into an IDR plan. The main features of the template:

- Provide the debtor may not use the Chapter 13 plan to discharge all or part of the debtor’s unpaid student loan (which is nondischargeable absent an undue hardship finding by the court);
- Identify the student loan(s);
- Confirm the debtor is not in default on Federal student loan debts;
- Provide the debtor may continue in or apply to enroll in IDR;
- Provide the amount of the debtor’s monthly IDR plan payment and the day each payment is due;
- Indicate the student loan(s) creditor class;
- Indicate if IDR plan payment will be made through the Chapter 13 trustee’s office or outside of the Chapter 13 plan by the debtor;
- Explicitly provide that the debtor waives 362(a) stay violation and 362(d) causes of action against ED for its communication, administrative processing, and recertification of the debtor’s IDR plan; and
- Provide a process for debtor to exit the IDR plan voluntarily, and the consequences of a debtor’s failure to pay the monthly IDR plan payment.

XI. How the Template Contemplates the Initiation or Continuation of an IDR plan While the Debtor is in Chapter 13

The template contemplates that the debtor will make monthly IDR plan payments during the life of the Chapter 13 plan, either through the Chapter 13 trustee’s office or outside of the Chapter 13 plan. Separate claim classification is warranted because unlike dischargeable general unsecured debts, the unsecured student loan debt will not be discharged at the conclusion of the Chapter 13 case. As one Bankruptcy Court noted:

> Failing to allow separate classification and favorable treatment of student loans leads to a disharmonious outcome under the Code in which student loans are special enough not to discharge unless the rigorous undue hardship test is met, but not sufficiently special to separately classify. Separate classification is proper under the Code and student loans “can be classified separately from other types of Schedule F nonpriority unsecured debt.[42]

[42] *In re* Engen, 561 B.R. at 533 (citing Daniel A. Austin & Susan E. Hauser, Graduating with Debt: Student Loans under the Bankruptcy Code 69-70 (ABI, 2013). *See also In re* Potgieter, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010) (“[T]he separate classification of the debtor's student loan obligations does not violate Section 1122.”); *In re* Coonce, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) (separate classification of student loan debt is permissible).

Under this reasoning, to create separate classes of unsecured debt based on this substantial distinction is not discriminatory against other fully dischargeable unsecured debt classes. “Debtors with student loan obligations face a quagmire. Without separate classification, debtors may face a higher debt burden after bankruptcy than before. This Court respectfully disagrees with other courts' holdings that without more, nondischargeability of student loans is an insufficient reason for discriminating in favor of Student Loan Claims.”[43]

By classifying the student loan debt separately, the debtor will be able to make IDR plan payments during the Chapter 13 plan at a different percentage than is paid to general unsecured creditors. By making IDR plan payments during the life of the Chapter 13 plan, the debtor receives credit from ED for the three to five years of IDR plan payments. Without the ability to enter into or remain in an IDR plan, the debtors would most likely spend that time in student loan administrative forbearance status with interest continuing to accrue, and would emerge from bankruptcy with a larger student loan principal balance at the conclusion of their Chapter 13 plan then at the start. And they would emerge from bankruptcy in default on the loan.

It is important, however, that routine loan servicing not be considered in violation of the automatic stay as ED processes the debtor’s IDR plan enrollment, requests recertification documentation, and attends to administrative matters relating to the IDR plan. Therefore, the template Chapter 13 plan language includes a waiver by the debtor of the automatic stay concerning ED and the IDR plan administrative actions. Without this waiver, ED is unlikely to agree to a Chapter 13 plan that contemplates initiation or continuation of an IDR repayment plan.

The Chapter 13 trustee may request assurances in the plan that the IDR plan payment will be remitted timely by the debtor, that delayed or missed IDR plan payments will not affect the Chapter 13 trustee’s remittance to other creditors in the case, and that the Chapter 13 trustee’s office will not be liable to fund any missed IDR plan payments. The trustee’s participation as a pass-through entity for debtor’s IDR plan payments is as a courtesy to the debtor, with the mutual goal that the debtor with nondischargeable student loan debt will be in a better financial position at the conclusion of the bankruptcy case.

A draft of the template language has been successfully used in several jurisdictions, both as an insert to the ‘special provisions’ section of the national Chapter 13 plan form and as a separate agreed order. The Northern and Southern Districts of Ohio, districts in North Carolina, and the Northern District of New York have experimented with the template language permitting an IDR plan to proceed simultaneously with a Chapter 13 plan.

XII. Conclusion

Students in the United States have amassed a staggering amount of higher education loan debt. Congress has determined as a matter of public policy that students who borrow funds to finance their education should repay those loans, absent undue hardship. EOUSA, in consultation with ED, the National Association of Chapter 13 Trustees, and Bankruptcy Judges, has devised template Chapter 13

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[43] *In re* Engen, 561 B.R. at 541.

plan language that may be considered to accommodate an IDR payment plan during Chapter 13 bankruptcy. This method can help honest debtors with student loans work their way toward resolution of all their debts and a fresh start.

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Appendix 1: Federal Student Aid Portfolio Summary

Data Source: National Student Loan Data System (NSLDS)

Includes outstanding principal and interest balances									
		Direct Loans		**Federal Family Education Loans (FFEL)**		**Perkins Loans**		**Total**[1]	
Federal Fiscal Year[2]		**Dollars Outstanding (in billions)**	**Recipients**[3] **(in millions)**	**Dollars Outstanding (in billions)**	**Recipients (in millions)**	**Dollars Outstanding (in billions)**	**Recipients (in millions)**	**Dollars Outstanding (in billions)**	**Unduplicated Recipients (in millions)**
2007		$106.8	7.0	$401.9	22.6	$8.2	2.8	$516.0	28.3
2008		$122.5	7.7	$446.5	23.7	$8.5	2.9	$577.0	29.9
2009		$154.9	9.2	$493.3	25.0	$8.7	3.0	$657.0	32.1
2010		$224.5	14.4	$516.7	25.1	$8.4	2.9	$749.8	34.3
2011		$350.1	19.4	$489.8	23.8	$8.3	2.9	$848.2	36.5
2012		$488.3	22.8	$451.7	22.4	$8.2	2.9	$948.2	38.3
FY 13	**Q1**	$508.7	23.4	$444.9	22.1	$8.2	3.0	$961.9	38.7
	Q2	$553.0	24.1	$437.0	21.6	$8.3	3.0	$998.6	38.9
	Q3	$569.2	24.3	$429.5	21.2	$8.2	2.9	$1,006.8	38.7
	Q4	$609.1	25.6	$423.0	20.9	$8.1	2.9	$1,040.2	39.6
FY 14	**Q1**	$626.5	26.2	$417.1	20.6	$8.2	3.0	$1,051.8	40.0
	Q2	$669.0	26.5	$409.7	20.2	$8.3	3.0	$1,087.0	40.0
	Q3	$685.7	26.7	$402.5	19.8	$8.2	2.9	$1,096.5	39.9

	Q4	$726.6	27.9	$395.0	19.4	$8.2	2.9	$1,129.8	40.7
FY 15	**Q1**	$744.3	28.5	$387.6	19.1	$8.2	3.0	$1,140.1	41.1
	Q2	$787.0	28.7	$379.1	18.6	$8.3	2.9	$1,174.4	41.0
	Q3	$803.1	28.8	$370.9	18.2	$8.2	2.9	$1,182.1	40.8
	Q4	$840.7	29.9	$363.6	17.9	$8.1	2.8	$1,212.4	41.6
FY 16	**Q1**	$854.8	30.3	$357.3	17.5	$8.1	2.9	$1,220.3	41.8
	Q2	$896.6	30.5	$350.2	17.2	$8.2	2.8	$1,254.9	41.7
	Q3	$911.6	30.5	$342.6	16.8	$8.0	2.7	$1,262.2	41.5
	Q4	$949.1	31.5	$335.2	16.4	$7.9	2.7	$1,292.2	42.3
FY 17	**Q1**	$963.5	31.9	328.3	16.1	$7.9	2.7	$1,299.7	42.4
	Q2	$1,003.3	32.1	$320.5	15.7	$7.9	2.6	$1,331.7	42.3
	Q3	$1,017.0	32.0	$312.6	15.2	$7.8	2.6	$1,337.4	42.0
	Q4	$1,053.5	33.0	$305.8	14.9	$7.6	2.5	$1,366.9	42.6

Notes:

[1] Totals may not equal the sum of Direct Loans, FFEL, and Perkins Loans due to rounding and the timing of the data runs.

[2] Data is run at the end of the corresponding Federal fiscal year or at the end of each quarter listed by Federal fiscal year. Each Federal fiscal year begins October 1 and ends September 30. Q1 ends 12/31, Q2 ends 3/31, Q3 ends 6/30, and Q4 ends 9/30.

[3] Recipient is the student that benefits from the Federal student loan. In most cases, the recipient is the borrower, but in parent PLUS loans, the parent is the borrower and their child is the recipient.

Appendix 2: Federal Student Loan Programs

A. Federal Family Education Loan Program (FFELP) (formerly Guaranteed Student Loan Program) (Title IV-B of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. §§1071 et. seq.)) (Regulations at 34 C.F.R. Part 682)

As of July 1, 2010, no new FFELP loans may be made, pursuant to the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, 3/30/2010). All Federal Stafford, PLUS, and Consolidation Loans first disbursed on or after July 1, 2010, are made under the Federal Direct Loan Program. Nevertheless, FFELP loans continue to be serviced according to the terms and conditions of the FFELP and the borrowers' promissory notes. ED purchased some outstanding FFELP loans under authority granted by Ensuring Continued Access to Student Loans Act during the credit crisis of 2008. FFELP loans continue to comprise a significant percentage of the outstanding student loans.

In the FFELP, ED acts primarily as reinsurer of student loans. Different types of guaranteed loans are described here. The promissory note, ED, and the guarantor's computer records identify the type of loan.

Under the FFELP, loans made by banks or other lending institutions were guaranteed by state or non-profit guarantors and reinsured by ED. 20 U.S.C. §1078(c). At least one guaranty agency operated in every state; several guaranty agencies, such as United Student Aid Funds, operated in numerous States. Most FFELP loans were made by few large banks with nationwide lending programs. A variety of financial institutions comprised a very active secondary market in FFELP loans, including banks, State and non-profit student loan "Authorities," and the Federally-chartered Student Loan Marketing Association ("Sallie Mae" or SLMA, now known as Navient).

If a debtor defaults, files a bankruptcy petition, dies, or becomes disabled, the guaranty agency reimburses the holder of the loan, takes assignment of the loan, and promptly claims reimbursement from ED under its reinsurance agreement. Although ED pays reinsurance promptly to the guaranty agency, the guarantor retains the loan and must then use "due diligence" in collecting the loan, remitting most of its recoveries to ED. 34 C.F.R. 682.4101(b)(4). ED can demand assignment of reinsured loans from guarantors, and has taken assignment of a large number of these loans.

FFELP loans include the following:

1. Federal Stafford Loans: The basic FFELP student loan (the type you are most likely to have used to finance your own education) was called a "GSL" and is now called a Stafford Loan. Interest that accrues on Stafford Loans may be subsidized by ED during in-school, grace, and deferment periods for borrowers who qualify under a need-based assessment process, 20 U.S.C. § 1078(a); a borrower who does not meet the needs test may receive an "Unsubsidized Stafford Loan," 20 U.S.C. § 1078-8, on which interest accruing during these periods is typically capitalized. Unsubsidized Stafford Loans replace the Supplemental Loans for Students.

2. Supplemental Loans for Students (SLS): Under the SLS Program, banks and other financial institutions made loans to independent undergraduate students and to graduate and professional students. 20 U.S.C. § 1078-1 (1991). The authority for SLS Loans ended July 1, 1994. A similar program, the Auxiliary Loans to Assist Students (ALAS) Program, which provided loans to students and parents, was authorized under 20 U.S.C. § 1078-2 (1986) from 1980 to 1986, when it was replaced by SLS and PLUS. Many SLS and ALAS loans remain outstanding.

3. Federal PLUS Loans: PLUS loans were made by banks and other financial institutions to parents of dependent students. 20 U.S.C. § 1078-2. Unlike Stafford and SLS loans, repayment must begin on PLUS loans promptly after disbursement. PLUS loans are also available to graduate students. The loans are commonly called Parent PLUS or Graduate PLUS to distinguish which type of borrower is incurring the loan.

4. Federal Consolidation Loans under the Consolidation Loan Program: Lenders made loans to borrowers to pay off ("consolidate") outstanding student loans. 20 U.S.C. § 1078-3. Consolidation Loans have longer repayment terms that, depending on the amount borrowed, may extend for up to 30 years.

B. William D. Ford Federal Direct Loan Program (Title IV-D of the HEA (20 U.S.C. § 1087a et seq.), regulations at 34 C.F.R. Part 685).

Under the Direct Loan Program, ED makes loans directly to borrowers, who repay the loans to ED. Direct Loan Program loans generally mirror the FFELP program loans: ED makes -

1. Federal Direct Stafford Loans;
2. Federal Direct PLUS Loans;
3. Federal Direct Unsubsidized Stafford Loans; and
4. Federal Direct Consolidation Loans.

Direct Loans generally have the same terms as their FFELP counterparts. Unlike their FFELP counterparts, ED makes the loans with Federal funds, which are serviced by ED directly or by contract servicers, and no financial institution or guarantor is involved. The vast majority of all Federal student loans made after July 1, 2010, are Direct Loans

C. Federal Perkins Loan Program (formerly known as the National Direct Student Loan Program or the National Defense Student Loan Program) (Title IV-E of the HEA (20 U.S.C. 1087aa-1087hh)) (Regulations found in 34 C.F.R. Part 674).

Some schools continue to make Perkins Loans. Federal funds partially capitalize a loan fund from which colleges make student loans under the Perkins Loan Program (formerly known as the National Direct Student Loan Program, which was in turn the successor to the National

Defense Student Loan Program), authorized under Title IV, Part E of the HEA. 20 U.S.C. §§ 1087aa - 1087hh. Regulations are found in 34 C.F.R. Part 674.

D. Federal Insured Student Loan Program (FISLP)

ED has in the past directly guaranteed student loans, under FISLP. 20 U.S.C. §§1077, 1079, 1080. Some FISLP loans remain outstanding.