AMERICAN BANKRUPTCY INSTITUTE

2020 Consumer Bankruptcy Forum

Student Loans, Reexamined

Presented by NACBA

Edward C. Boltz
Law Offices of John T. Orcutt, PC | Durham, N.C.

James J. Haller
Haller Law Group | Mundelein, Ill.

CONCURRENT SESSION

2020

Outline of Today's Presentation

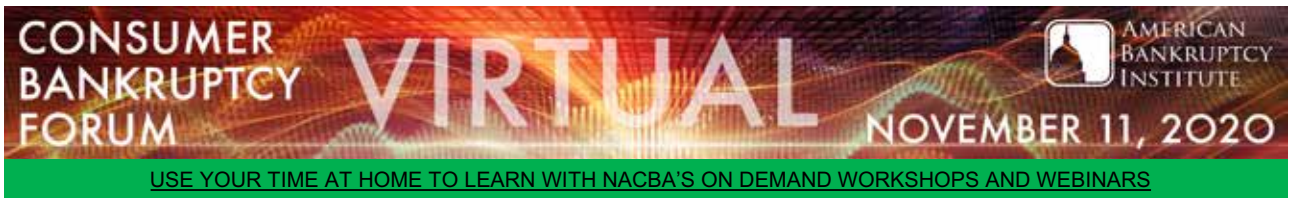
- Brief primer on Student Loan Discharge basics.
- Representing a Debtor in a Discharge Case.
- Non-bankruptcy Discharge Options.
- Impact of CARES Act on student loans.

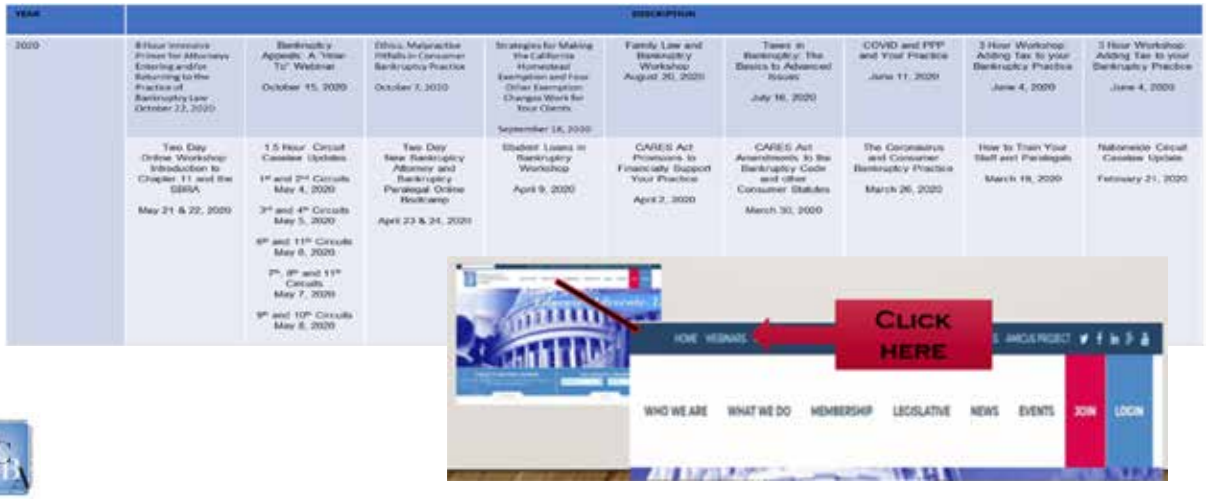
2

Join NACBA!

- NACBA is active promoting change at the state and national levels.
  - NACBA members were directly involved in the California amendments.
  - NACBA members were also directly involved in the recent amendments to the Bankruptcy Code.
- NACBA and NCBRC are directly involved in supporting appeals before the U.S. Supreme Court and lower federal courts.
- NACBA produces dozens of educational programs every year.
- Go to NACBA.org and click Membership.

3





4

STUDENT LOAN DISCHARGE IN BANKRUPTCY COURT
A PRIMER

Excerpt from NACBA's Student Loans in Bankruptcy Workshop held April 9, 2020
To access go to: https://www.nacba.org/events/webinars/

5

Section 523(a)(8)

- A discharge under section 727, 1141, 1192 [1] 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;

6

What is a non-dischargeable "student loan"

Statutory Bases

11 U.S.C. § 523(a)(8) protects three types of educational debts:

- (A)(i) an educational . . . loan made, insured or guaranteed by a governmental unit or made under any program funded in whole or in part by a nonprofit institution (*i.e.,* federal, state, and school loans);
- (A)(ii) obligation to repay funds received as an educational benefit, scholarship, or stipend *(i.e*. defaulted conditional educational grants);
- (B) any other educational loan that is a qualified education loan (*i.e.*, some private loans)

7

Student Loan Dischargeability Myths

- IF it's a federal loan it's only non-dischargeable absent "undue hardship."
- If the promissory note says it's a qualified education loan, or guaranteed by a non-profit, or otherwise non-dischargeable, means it is true.

8

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

- "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or part by a governmental unit or a nonprofit institution.
- Legislative history demonstrates that this subsection was never meant to extend to commercial loan programs. See In re Taratuska, 324 B.R. 24 (Bankr. D. Mass. 2007) (reversed).
- The first clause refers to loans made under the Guaranteed Student Loan program, wherein the government guaranteed, insured, or made loans through a private bank.
- The second clause refers to the National Direct Student Loan program, wherein the loan was actually made by the "nonprofit institution"(i.e., the school) but "funded" through a revolving trust funded in part by the federal government. See REP. 96-230, 2, 1979 U.S.C.C.A.N. 936, 937

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

- Unfortunately, there is a lot of law saying that a private loan guaranteed by a corporate nonprofit meets the requirements. *See In re O'Brien*, 419 F.3d 104 (2nd Cir. 2005).
- Until private lenders got protection for their private loans in BAPCPA, most private lenders contracted with nonprofits to collaborate on their loans programs in a variety of ways to sneak into this provision of the Code.
- Litigation is ongoing to correct this perceived misinterpretation.
- Until then, your best course is to test the evidence. Lenders often rely on boilerplate statements in the promissory note to prove the loan is non- dischargeable because it was guaranteed by a nonprofit. Challenge that conclusion. *See In re Clouser,* 2016 WL 5864493 (Bankr. D. Ore. 2016).

Lenders raising the non-profit issue under Section 523(a)(8)(A)(i)

- This nonprofit issue is mostly associated with the National Collegiate Student Loan Trusts.
- Less often (but occasionally) you will see it with Wells Fargo.
- Not an issue with Navient or Sallie Mae (at least post 2005).

523(a)(8)(A)(ii)

- "(A)(ii) obligation to repay funds received as an educational benefit, scholarship, or stipend";
- Important terms interpreted by the Courts include
  - "Educational Benefit" and
  - "Educational Loan."
- The majority position is to interpret these provisions broadly

523(a)(8)(A)(ii)

- 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

13

523(a)(8)(A)(ii)

- 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."

14

523(a)(8)(A)(ii)

- "(A)(ii) obligation to repay funds received as an educational benefit, scholarship, or stipend";
- Section 523(a)(8)(A)(ii) is not a "catch-all" to except from discharge any debt incurred for educational purposes.
  - *In re McDaniel*, 2018 WL 4620632 (Bank. D. Co. 2018); *In re Dufrane*, 566 B.R. 28, 37 (Bkrtcy.C.D.Cal., 2017); *In re Kashikar*, 567 B.R. 160, 167 (9th Cir.BAP 2017); *In re Essangui*, 2017 WL 4358755, at *10 (Bkrtcy.D.Md., 2017); *In re Nunez*, 527 B.R. 410, 415 (Bkrtcy.D.Or., 2015); *In re Schultz*, 2016 WL 8808073, at *1 (Bkrtcy.D.Minn., 2016); *In re Meyer*, 2016 WL 3251622, at *2 (Bkrtcy.N.D.Ohio, 2016; *In Matter of Swenson*, 2016 WL 4480719, at *3 (Bkrtcy.W.D.Wis., 2016); *In re Campbell*, 547 B.R. 49, 61 (Bkrtcy.E.D.N.Y., 2016); In re Shorts, 209 B.R. 818, 819 (Bkrtcy.D.R.I.,1997).

15

523(a)(8)(A)(ii)

- Bases for Narrow Interpretation Based on Canons of Statutory Interpretation:
- 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).

16

523(a)(8)(A)(ii)

- Bases for Narrow Interpretation Based on Canons of Statutory Interpretation:
- 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.

17

523(a)(8)(A)(ii)

- "An obligation to repay funds received as an educational benefit, scholarship, or stipend" in section 523(a)(8)(A)(ii) refers to a conditional educational grant.
  - **It does not cover loans**.
- The educational *benefit* is an actual sum of money, not a description of the purpose of a loan.

18

523(a)(8)(B)

- "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;"
- Qualified education loan is defined in IRC 221(d) as any debt incurred *solely* to pay qualified higher education expenses made to an *eligible student.*
- Qualified higher education expenses are defined in 11 U.S.C. § 1087*ll* as "cost-of-attendance" at Title IV accredited schools.
- "Cost-of-attendance" is set by the school, and includes tuition, fees, room, board and books.

19

523(a)(8)(B)

- Loans NOT qualified:
  - Loans made to students at ineligible institutions (*i.e.,* non-Title IV accredited schools).
  - Private loans to students at unaccredited institutions, including:
    - Unaccredited for-profit colleges and trade schools;
    - High school loans;
    - Bar exam loans;
    - Medical residency loans.
  - Cross reference the debtor's school with the Department of Education's list of Title IV accredited schools.

20

523(a)(8)(B)

- Loans NOT qualified:
  - Loans made for ineligible expenses (*i.e.,* expenses above and beyond the published "Cost of Attendance").
  - Determine the "cost-of-attendance" through the school's website or the Department of Education's database.
  - Add up the total amount of money the debtor borrowed for that academic year.
  - If the amount borrowed exceeds the "cost-of-attendance," the excess debt should be dischargeable.
  - Where part of a debt is used to cover qualified education expenses and part is not, the debt is a mixed-use loan, and therefore, not a qualified education loan. *See* IRS, 26 C.F.R. 1, REG-116826-97.

21

523(a)(8)(B)

- Loans NOT qualified:
  - Loans made to ineligible students.
  - Who is an eligible student per 20 U.S.C. § 1091?
    - U.S. Citizen or eligible non-citizen;
    - Be enrolled at least half-time in an eligible degree or certificate program.

22

523(a)(8)(B)

- Major Source of Non-Qualified Loans:
  - Direct-to-Consumer ("DTC") loans are issued directly to the borrower without any school certification of student eligibility.
  - Between 2005 and 2008, lenders issued $75 billion in private student loans.
  - Between 2005 and 2008, 24% of private loans were DTC.
  - DTC lending decreased after 2008, but is on the rise again.

23

"UNDUE HARDSHIP"

- If the debt qualifies under Section 523(a)(8)(A) & (B), would "excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents…"

24

STANDARDS OF "UNDUE HARDSHIP"

- Most circuit courts of appeals have adopted a definition of undue hardship that employs a three-part test, known as the *Brunner* test. Under this test, undue hardship exists if:
  - The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the loans;
  - Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
  - The debtor has made good faith efforts to repay the loans.
  - See *Brunner v. New York State Higher Educ. Services*, 831 F.2d 395 (2d Cir. 1987).

25

STANDARDS OF "UNDUE HARDSHIP"

- Circuit courts adopting the *Brunner* standard:
- *Tetzlaff v. Educ. Credit Mgmt. Corp*., 794 F.3d 756 (7th Cir. 2015), cert. denied, 2016 WL 100390 (Jan. 11, 2016); *In re Frushour*, 433 F.3d 393 (4th Cir. 2005); *In re Oyler*, 397 F.3d 382 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 352 F.3d 1302 (10th Cir. 2004) (test does not require certainty of hopelessness for second prong; good faith prong should not allow imposition of court's values on debtor's life choices); *In re Cox*, 338 F.3d 1238 (11th Cir. 2003); *In re P*ena, 155 F.3d 1108 (9th Cir. 1998); *In re Faish*, 72 F.3d 298 (3d Cir. 1995); *Cheesman v. Tennessee Student Assistance Corp.*, 25 F.3d 356 (6th Cir. 1994); *Brunner v. New York State Higher Educ. Services*, 831 F.2d 395 (2d Cir. 1987).

26

STANDARDS OF "UNDUE HARDSHIP"

- The *Brunner* standard was adopted when student loans were automatically dischargeable after five years.
- It was meant to determine that the hardship was so great that the debtor could not wait those five years.
- The time is ripe for that test to be reexamined

27

STANDARDS OF "UNDUE HARDSHIP"

- The *Brunner* standard is being reexamined.
  - See *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg*), No. 18-35379 (CGM) (Bankr. S.D.N.Y. Jan. 7, 2020). (In materials.)

28

STANDARDS OF "UNDUE HARDSHIP"

- Other circuits have adopted a "totality of the circumstances" test.
- It does not necessarily conflict with the three-part *Brunner* test.
- Expands upon the scope of factors a court may consider.
- Under this test, the court may consider nonpecuniary effects of the loan, including the effect on the debtor's mental health

29

STANDARDS OF "UNDUE HARDSHIP"

- Other circuits have adopted a "totality of the circumstances" test.
- See *Long v. Educ. Credit Mgmt. Corp*., 322 F.3d 549 (8th Cir. 2003); *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon),* 435 B.R. 791 (B.A.P. 1st Cir. 2010) (adopting totality test; "undue hardship" prong of Brunner test lacks textual foundation); *In re Kopf*, 245 B.R. 731 (Bankr. D. Me. 2000).
- The Court of Appeals for the First Circuit allows the bankruptcy courts to develop their own standards for "undue hardship" without doctrinal adherence to either the *Brunner* or "totality of the circumstances" standards. *In re Nash*, 446 F.3d 188 (1st Cir. 2006).

30

REPRESENTING DEBTORS IN STUDENT LOAN HARDSHIP DISCHARGE CASES

BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

- **Get the following information first:**
  - The type of student loans and when they were made;
  - The outstanding balance for each loan and the monthly payment amount;
  - The total amount of any payments made on the loans;
  - Whether the loans are in default status;
  - Whether the client has received an administrative discharge of the student loan;
  - Whether any collection proceedings have been initiated (i.e., administrative wage garnishment, income tax refund intercept, court action); and
  - Whether the client has ever applied for or participated in any income-driven repayment plans, and if so, the status of those plans.

BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

- **Where to get student loan information:**
- **The National Student Loan Data System (NSLDS)**
  - The NSLDS site displays information on the type of loan or grant (*e.g*, Stafford Subsidized, Federal Perkins),
  - loan amount,
  - loan disbursements,
  - outstanding principal balance,
  - outstanding interest balance, and
  - the loan status (*e.g*., defaulted, in repayment).
- The NSLDS provides information only on federal student loans, and there is no similar system or database for private student loans. Clients may attempt to obtain information about private student loans directly from the servicer of the loan.
- **See NACBA Student Loans in Bankruptcy Workshop for detailed discussion of the nine steps to follow to get information from NSLDS.**

33

BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

- **Check the Department of Education's "Repayment Estimator."**
  - Many courts consider the availability of IDR plans in determining under hardship.
  - Debtors can determine eligibility at the Federal Student Aid website, www.studentaid.gov..
  - The "Repayment Estimator" is available at: https://studentaid.ed.gov/sa/repay-loans.

34

BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

- **Determine the type of Federal Student Loan**
  - Federal student loans are made by the government, with terms and conditions that are set by law, and include many benefits (such as fixed interest rates and income-driven repayment plans) not typically offered with private loans.
  - The office of Federal Student Aid Data Center reports that for Q1 of 2019 $1.1633 trillion remained outstanding in federal loans for 34.5 million borrowers (https://studentaid.ed.gov/sa/about/data-center/student/portfolio)
    - $113 billion is owed by 3,431,300 borrowers in California
- Types of Federal student loans
- See the **NACBA Student Loans in Bankruptcy Workshop** for detailed discussion the different types of federal student loans including:
  - Direct Loans
  - Perkins Loans
  - Direct PLUS Loans
    - Grad PLUS Loans
  - Parent Plus Loans
  - Federal Family Education Loan Program (FFEL) Loans
  - Consolidated Loans

BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

- **Private Loans**
  - Not eligible for DOE administrative discharge or IDR plans.
  - Subject to state statutes of limitation.
  - Usually co-signed by parents.
  - Made by a lender such as a bank, credit union, state agency, or a school, and have terms and conditions that are set by the lender.

BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

- **Apply Debtor's Situation to the Standards Described Above**
  - **Which provision of Section 523(a)(8) applies to each loan?**
  - **If the loan is included in Section 523(a)(8) can the debtor meet the "undue hardship" or "totality of the circumstances" test.**

PROCEDURE

- File a complaint to determine whether the student loan is dischargeable.
  - See Fed.R.Bankr.P. 7001(6).
- Can be filed at any time.
  - See 11 U.S.C. § 350(b); Fed. R. Bankr. P. 4007(b); *In re* Smith, 442 B.R. 550, 557 (Bankr. S.D. Tex. 2010)(there is no deadline for seeking a determination of dischargeability under § 523(a)(8)), *aff'd*, 2011 WL 4625397 (S.D. Tex. Sept. 30, 2011); Thurman v. United Student Aid Funds, Inc., 2012 WL 993412 (W.D. Wash. Mar. 21, 2012) (same); *In re* Watkins, 461 B.R. 57, 59 (W.D. Mo. 2011)(Fed. R. Bankr. P. 4007 gives a bankruptcy court jurisdiction to decide a student loan dischargeability proceeding "at any time").

PROCEDURE

- Name the proper defendants
  - Use the NSLDS system for federal loans.
  - Private loans
    - Check state lawsuits
    - Many assigned to National Collegiate Student Loan Trust or TERI Loan Holdings.

39

PROCEDURE

- Protect your client's privacy
  - Debtor may fear information disclosed will affect future employment or credit.
  - Bankruptcy Rule 9037 incorporates basic protections.
  - 9037(d) a party can request a protective order.
  - Section 107(b)(2) provides that a party in interest may request that the bankruptcy court protect a person with respect to a scandalous or defamatory matter contained in a paper filed in a case.

40

PROCEDURE

- Serving the adversary
  - See Bankruptcy Rule 7004(b)
  - See NACBA Student Loans in Bankruptcy Workshop for detailed discussion of service under Rule 7004 including
    - Service on corporations.
    - How to determine if the lender is an insured depository institution (which requires special service under Rule 7004(h).
    - Can you serve registered agents?
    - How to find who and where to serve.
    - Serving an agency of the United States.

41

DISCOVERY

- Request discovery from Defendants
  - Loan information
    - E.g. each outstanding loan to state (and to produce related documents): the type of loan; the loan disbursement date and the amounts disbursed; the recipient of the loan proceeds; the identity of original lender, any guaranty agency, current holder of the loan, and current servicer; and the current status of the loan. As to the terms of the loan obligations, defendants should be asked to state and produce documents for each outstanding loan: the amount owing as of the date of filing of the adversary complaint; an itemization of the amount owing as between principal, interest, and fees or other charges; the contractual interest rate and the amount of per diem interest; and the monthly payment amount under the standard repayment plan.
  - Good Faith
    - E.g. amount and date of all voluntary and involuntary payments.
  - Authentication of Documents

42

Trial

- Prepare evidence and witnesses to demonstrate each element of proof
  - Based on your jurisdiction
    - *Brunner*
    - Totality of the circumstances
  - Loan information
    - E.g. each outstanding loan to state (and to produce related documents): the type of loan; the loan disbursement date and the amounts disbursed; the recipient of the loan proceeds; the identity of original lender, any guaranty agency, current holder of the loan, and current servicer; and the current status of the loan. As to the terms of the loan obligations, defendants should be asked to state and produce documents for each outstanding loan: the amount owing as of the date of filing of the adversary complaint; an itemization of the amount owing as between principal, interest, and fees or other charges; the contractual interest rate and the amount of per diem interest; and the monthly payment amount under the standard repayment plan.
  - Good Faith
    - E.g. amount and date of all voluntary and involuntary payments.
  - Authentication of Documents

Burdens

- It is the creditor's burden to prove that an educational debt is encompassed by 11 U.S.C. § 523(a)(8). *See In re Renshaw*, 222 F.3d 82, 86 (2nd Cir. 2000).
- Where a debt is not so encompassed, the educational debt is automatically discharged by operation of law. *See Meyer v. Xerox Educational Services (In re Meyer)*, 2016 WL 3251662 (Bankr. N.D. Ohio 2016)
- Thus, debtor is not seeking discharge of these non-qualified loans, but rather declaratory relief that the debts were discharged upon entry of order.

NON-BANKRUPTCY DISCHARGE CHAPTER 13 SOLUTIONS

45

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.”

46

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.

47

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.

48

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).

49

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

50

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 (4th Cir. 2001).

51

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.

52

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.

53

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."

54

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.

55

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

56

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.

57

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.

58

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.

CARES Act Provisions Concerning Student Loans

Excerpt from NACBA's CARES Act Amendments to the Bankruptcy Code and other Consumer Statutes
held March 30, 2020
To access go to: https://www.nacba.org/events/webinars/

- **The federal government has already waived two months of payments and interest for many federal student loan borrowers. Is there a bigger break now with the new bill?**
- Yes. Until Sept. 30, there will be automatic payment suspensions for any student loan held by the federal government. It is hard to contact many of the loan servicers right now, so check your account online in the coming weeks. Once you are logged in, look for the current amount due. There, you should be able to see if the servicer has reset its billing systems so that you are showing no payment due.

61

- **How do I know if my loan is eligible?**
- If you've borrowed money from the federal government — a so-called direct loan — in the past 10 years, you're definitely eligible. According to the Institute for College Access & Success, 90 percent of loans (in dollar terms) will be eligible.
- Older Federal Family Educational Loans (F.F.E.L.) that the U.S. Department of Education does not own would not be eligible, nor would Perkins loans, loans from state agencies, or loans from private lenders like Discover, Sallie Mae and Wells Fargo. The holders of all those kinds of loans may be offering their own assistance programs.
- Within a few weeks of the bill becoming law, you are supposed to receive notice indicating what has happened with your federal loans. You can choose to keep paying down your principal if you want. Then, after Aug. 1, you should get multiple notices letting you know about the cessation of the suspension period and that you may be eligible to enroll in an income-driven repayment plan.

62

- **Will my loan servicer charge me interest during the six-month period?**
- The bill says that interest "shall not accrue" on the loan during the suspension period.
- At the end of the suspension, keep a close eye on what your loan servicer does (or does not do) to put you back into your previous repayment mode. Servicer errors are common.

63

- **Will the six-month suspension cost me money, since I'm trying to qualify for the public service loan forgiveness program by making 120 monthly payments?**
- No. The legislation says that your payment count will still go up by one payment each month during the six-month suspension, even though you will not actually be making any payments. This is true for all forgiveness or loan-rehabilitation programs.

64

- **Is wage garnishment that resulted from being behind on my loan payments suspended during this six-month period?**
- Yes. So is the seizure of tax refunds, the reduction of any other federal benefit payments and other involuntary collection efforts.

65

- **Are there changes to the rules if my employer repays some of my student loans?**
- Yes. Some employers do this as an employee benefit. Between the date the bill is signed and the end of 2020, they can offer up to $5,250 of assistance without that money counting as part of the employee's income. If the employer pays tuition for classes an employee is taking, that money will also count toward the $5,250.

66

- **If my income tax refunds are currently being garnished because of a student loan default, would this payment be garnished as well?**
- No. In fact, the bill temporarily suspends nearly all efforts to garnish tax refunds to repay debts, including those to the I.R.S. itself. But this waiver may not apply to people who are behind on child support.

- **Would there be damage to my credit report if I took advantage of any virus-related payment relief, including the student loan suspension?**
- No. There is not supposed to be, at least.
- The bill states that during the period beginning on Jan. 31 and continuing 120 days after the cessation of the national emergency declaration, lenders and others should mark your credit file as current, even if you avail yourself of payment modifications.
- If you had black marks in your file before the virus hit, those will remain unless you fix the issues during the emergency period.

Join NACBA!

- NACBA is active promoting change at the state and national levels.
  - NACBA members were directly involved in the California amendments.
  - NACBA members were also directly involved in the recent amendments to the Bankruptcy Code.
- NACBA and NCBRC are directly involved in supporting appeals before the U.S. Supreme Court and lower federal courts.
- NACBA produces dozens of educational programs every year.
- Go to NACBA.org and click Membership.

69

Student Loans and Bankruptcy

Presented by

Edward Boltz, Vice President, NACBA
Jim Haller, Education Director, NACBA
on behalf of
The National Association of Consumer Bankruptcy Attorneys (NACBA)

1) Outline of Today's Presentation
   a) Brief primer on Student Loan Discharge basics.
   b) Representing a Debtor in a Discharge Case.
   c) Non-bankruptcy Discharge Options.
   d) Impact of CARES Act on student loans.
2) **STUDENT LOAN DISCHARGE IN BANKRUPTCY COURT**
   A PRIMER
   a) Excerpt from NACBA's Student Loans in Bankruptcy Workshop held April 9, 2020
      To access go to: https://www.nacba.org/events/webinars/
   b) Section 523(a)(8)
      i) A discharge under section 727, 1141, 1192 [1] 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—…"
      ii) (A)
      iii) **(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
      iv) **(ii)**an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
      v) **(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;

   c) What is a non-dischargeable "student loan"
      i) Statutory Bases
      (1) 11 U.S.C. § 523(a)(8) protects three types of educational debts:
      ii) (A)(i) an educational . . . loan made, insured or guaranteed by a governmental unit or made under any program funded in whole or in part by a nonprofit institution (*i.e.,* federal, state, and school loans);
      iii) (A)(ii) obligation to repay funds received as an educational benefit, scholarship, or stipend *(i.e*. defaulted conditional educational grants);
      iv) (B) any other educational loan that is a qualified education loan (*i.e.*, some private loans)

d) Student Loan Dischargeability Myths
   i) IF it's a federal loan it's only non-dischargeable absent "undue hardship."
   ii) If the promissory note says it's a qualified education loan, or guaranteed by a non-profit, or otherwise non-dischargeable, means it is true.
   iii) Section 523(a)(8)(A)(i)
      (1) "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or part by a governmental unit or a nonprofit institution.
e) Legislative history demonstrates that this subsection was never meant to extend to commercial loan programs. See In re Taratuska, 324 B.R. 24 (Bankr. D. Mass. 2007) (reversed).
   i) The first clause refers to loans made under the Guaranteed Student Loan program, wherein the government guaranteed, insured, or made loans through a private bank.
   ii) The second clause refers to the National Direct Student Loan program, wherein the loan was actually made by the "nonprofit institution"(i.e., the school) but "funded" through a revolving trust funded in part by the federal government. See REP. 96-230, 2, 1979 U.S.C.C.A.N. 936, 937
f) Section 523(a)(8)(A)(i)
   i) Unfortunately, there is a lot of law saying that a private loan guaranteed by a corporate nonprofit meets the requirements. *See In re O'Brien*, 419 F.3d 104 (2nd Cir. 2005).
   ii) Until private lenders got protection for their private loans in BAPCPA, most private lenders contracted with nonprofits to collaborate on their loans programs in a variety of ways to sneak into this provision of the Code.
   iii) Litigation is ongoing to correct this perceived misinterpretation.
   iv) Until then, your best course is to test the evidence. Lenders often rely on boilerplate statements in the promissory note to prove the loan is non- dischargeable because it was guaranteed by a nonprofit. Challenge that conclusion. *See In re Clouser,* 2016 WL 5864493 (Bankr. D. Ore. 2016).

g) Lenders raising the non-profit issue under Section 523(a)(8)(A)(i)
   i) This nonprofit issue is mostly associated with the National Collegiate Student Loan Trusts.
   ii) Less often (but occasionally) you will see it with Wells Fargo.
   iii) Not an issue with Navient or Sallie Mae (at least post 2005).
h) 523(a)(8)(A)(ii)
   i) "(A)(ii) obligation to repay funds received as an educational benefit, scholarship, or stipend";
   ii) Important terms interpreted by the Courts include
   iii) "Educational Benefit" and
   iv) "Educational Loan."
   v) The majority position is to interpret these provisions broadly

i) 523(a)(8)(A)(ii)
   i) NACBA encourages bankruptcy courts to reexamine the broad definitions that support non-dischargeability of student loans.
   ii) Broad reading is contrary to the
j) General rule dischargeability exceptions should be narrowly construed
   i) Contrary to principles of statutory interpretation
   ii) 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

k) 523(a)(8)(A)(ii)
   i) Plain language
   ii) 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).
   iii) Doing so incorrectly broadens this to include any loan rather than if there were actual "funds received."

l) 523(a)(8)(A)(ii)
   i) "(A)(ii) obligation to repay funds received as an educational benefit, scholarship, or stipend";
m) Section 523(a)(8)(A)(ii) is not a "catch-all" to except from discharge any debt incurred for educational purposes.
   i) *In re McDaniel*, 2018 WL 4620632 (Bank. D. Co. 2018); *In re Dufrane*, 566 B.R. 28, 37 (Bkrtcy.C.D.Cal., 2017); *In re Kashikar*, 567 B.R. 160, 167 (9th Cir.BAP 2017); *In re Essangui*, 2017 WL 4358755, at *10 (Bkrtcy.D.Md., 2017); *In re Nunez*, 527 B.R. 410, 415 (Bkrtcy.D.Or., 2015); *In re Schultz*, 2016 WL 8808073, at *1 (Bkrtcy.D.Minn., 2016); *In re Meyer*, 2016 WL 3251622, at *2 (Bkrtcy.N.D.Ohio, 2016; *In Matter of Swenson*, 2016 WL 4480719, at *3 (Bkrtcy.W.D.Wis., 2016); *In re Campbell*, 547 B.R. 49, 61 (Bkrtcy.E.D.N.Y., 2016); In re Shorts, 209 B.R. 818, 819 (Bkrtcy.D.R.I.,1997).

   ii) 523(a)(8)(A)(ii)
   iii) Bases for Narrow Interpretation Based on Canons of Statutory Interpretation:
   iv) Expressio unius est exclusio alterius
      (1) *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")/
      (2) 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).

n) 523(a)(8)(A)(ii)
   i) Bases for Narrow Interpretation Based on Canons of Statutory Interpretation:
   ii) Canon against surplusage
      (1) 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).
      (2) Presumption against reading statutory terms or phrases in a manner that duplicates other terms or renders entire clauses superfluous.
      (3) Broad interpretation makes the three exceptions to discharge superfluous.

o) 523(a)(8)(A)(ii)
   i) "An obligation to repay funds received as an educational benefit, scholarship, or stipend" in section 523(a)(8)(A)(ii) refers to a conditional educational grant.
   ii) **It does not cover loans**.
   iii) The educational *benefit* is an actual sum of money, not a description of the purpose of a loan.

p) 523(a)(8)(B)
   i) "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;"
   ii) Qualified education loan is defined in IRC 221(d) as any debt incurred *solely* to pay qualified higher education expenses made to an *eligible student.*
   iii) Qualified higher education expenses are defined in 11 U.S.C. § 1087*ll* as "cost-of-attendance" at Title IV accredited schools.
   iv) "Cost-of-attendance" is set by the school, and includes tuition, fees, room, board and books.

q) 523(a)(8)(B)
   i) Loans NOT qualified:
      (1) Loans made to students at ineligible institutions (*i.e.,* non-Title IV accredited schools).
      (2) Private loans to students at unaccredited institutions, including:
      (3) Unaccredited for-profit colleges and trade schools;
      (4) High school loans;
      (5) Bar exam loans;
      (6) Medical residency loans.
   ii) Cross reference the debtor's school with the Department of Education's list of Title IV accredited schools.

r) 523(a)(8)(B)
   i) Loans NOT qualified:

ii) Loans made for ineligible expenses (*i.e.,* expenses above and beyond the published "Cost of Attendance").
iii) Determine the "cost-of-attendance" through the school's website or the Department of Education's database.
iv) Add up the total amount of money the debtor borrowed for that academic year.
v) If the amount borrowed exceeds the "cost-of-attendance," the excess debt should be dischargeable.
vi) Where part of a debt is used to cover qualified education expenses and part is not, the debt is a mixed-use loan, and therefore, not a qualified education loan. *See* IRS, 26 C.F.R. 1, REG-116826-97.

s) 523(a)(8)(B)
i) Loans NOT qualified:
(1) Loans made to ineligible students.
(a) Who is an eligible student per 20 U.S.C. § 1091?
(i) U.S. Citizen or eligible non-citizen;
(ii) Be enrolled at least half-time in an eligible degree or certificate program.

t) 523(a)(8)(B)
i) Major Source of Non-Qualified Loans:
(1) Direct-to-Consumer ("DTC") loans are issued directly to the borrower without any school certification of student eligibility.
(a) Between 2005 and 2008, lenders issued $75 billion in private student loans.
(b) Between 2005 and 2008, 24% of private loans were DTC.
(c) DTC lending decreased after 2008, but is on the rise again.

u) "UNDUE HARDSHIP"
i) If the debt qualifies under Section 523(a)(8)(A) & (B), would "excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents…"

v) STANDARDS OF "UNDUE HARDSHIP"
i) Most circuit courts of appeals have adopted a definition of undue hardship that employs a three-part test, known as the *Brunner* test. Under this test, undue hardship exists if:
ii) The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the loans;
iii) Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
iv) The debtor has made good faith efforts to repay the loans.
(1) See *Brunner v. New York State Higher Educ. Services*, 831 F.2d 395 (2d Cir. 1987).

w) STANDARDS OF "UNDUE HARDSHIP"
i) Circuit courts adopting the *Brunner* standard:

(1) *Tetzlaff v. Educ. Credit Mgmt. Corp*., 794 F.3d 756 (7th Cir. 2015), cert. denied, 2016 WL 100390 (Jan. 11, 2016); *In re Frushour*, 433 F.3d 393 (4th Cir. 2005); *In re Oyler*, 397 F.3d 382 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 352 F.3d 1302 (10th Cir. 2004) (test does not require certainty of hopelessness for second prong; good faith prong should not allow imposition of court's values on debtor's life choices); *In re Cox*, 338 F.3d 1238 (11th Cir. 2003); *In re P*ena, 155 F.3d 1108 (9th Cir. 1998); *In re Faish*, 72 F.3d 298 (3d Cir. 1995); *Cheesman v. Tennessee Student Assistance Corp.*, 25 F.3d 356 (6th Cir. 1994); *Brunner v. New York State Higher Educ. Services*, 831 F.2d 395 (2d Cir. 1987).

ii) STANDARDS OF "UNDUE HARDSHIP"

(1) The *Brunner* standard was adopted when student loans were automatically dischargeable after five years.

(2) It was meant to determine that the hardship was so great that the debtor could not wait those five years.

(3) The time is ripe for that test to be reexamined

(4) The *Brunner* standard is being reexamined.

(a) See *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg*), No. 18-35379 (CGM) (Bankr. S.D.N.Y. Jan. 7, 2020). (In materials.)

x) Other circuits have adopted a "totality of the circumstances" test.

i) It does not necessarily conflict with the three-part *Brunner* test.

ii) Expands upon the scope of factors a court may consider.

iii) Under this test, the court may consider nonpecuniary effects of the loan, including the effect on the debtor's mental health

iv) Other circuits have adopted a "totality of the circumstances" test.

(1) See *Long v. Educ. Credit Mgmt. Corp*., 322 F.3d 549 (8th Cir. 2003); *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon),* 435 B.R. 791 (B.A.P. 1st Cir. 2010) (adopting totality test; "undue hardship" prong of Brunner test lacks textual foundation); *In re Kopf*, 245 B.R. 731 (Bankr. D. Me. 2000).

(2) The Court of Appeals for the First Circuit allows the bankruptcy courts to develop their own standards for "undue hardship" without doctrinal adherence to either the *Brunner* or "totality of the circumstances" standards. *In re Nash*, 446 F.3d 188 (1st Cir. 2006).

3) REPRESENTING DEBTORS IN STUDENT LOAN HARDSHIP DISCHARGE CASES

a) BEFORE ADVISING THE CLIENT ABOUT DISCHARGEABILITY UNDER SECTION 523(a)(8)

i) Get the following information first:

(1) The type of student loans and when they were made;

(2) The outstanding balance for each loan and the monthly payment amount;

(3) The total amount of any payments made on the loans;

(4) Whether the loans are in default status;

(5) Whether the client has received an administrative discharge of the student loan;

(6) Whether any collection proceedings have been initiated (i.e., administrative wage garnishment, income tax refund intercept, court action); and

(7) Whether the client has ever applied for or participated in any income-driven repayment plans, and if so, the status of those plans.

ii) Where to get student loan information:

(1) The National Student Loan Data System (NSLDS)

(a) The NSLDS site displays information on the type of loan or grant (*e.g*, Stafford Subsidized, Federal Perkins),
(b) loan amount,
(c) loan disbursements,
(d) outstanding principal balance,
(e) outstanding interest balance, and
(f) the loan status (*e.g*., defaulted, in repayment).
(g) The NSLDS provides information only on federal student loans, and there is no similar system or database for private student loans. Clients may attempt to obtain information about private student loans directly from the servicer of the loan.

(2) See NACBA Student Loans in Bankruptcy Workshop for detailed discussion of the nine steps to follow to get information from NSLDS.

iii) Check the Department of Education's "Repayment Estimator."

(1) Many courts consider the availability of IDR plans in determining under hardship.
(2) Debtors can determine eligibility at the Federal Student Aid website, www.studentaid.gov..
(3) The "Repayment Estimator" is available at: https://studentaid.ed.gov/sa/repay-loans.

iv) Determine the type of Federal Student Loan

(1) Federal student loans are made by the government, with terms and conditions that are set by law, and include many benefits (such as fixed interest rates and income-driven repayment plans) not typically offered with private loans.
(2) The office of Federal Student Aid Data Center reports that for Q1 of 2019 $1.1633 trillion remained outstanding in federal loans for 34.5 million borrowers (https://studentaid.ed.gov/sa/about/data-center/student/portfolio)
(3) $113 billion is owed by 3,431,300 borrowers in California
(4) Types of Federal student loans
(5) See the **NACBA Student Loans in Bankruptcy Workshop** for detailed discussion the different types of federal student loans including:
(a) Direct Loans
(b) Perkins Loans
(c) Direct PLUS Loans
(d) Grad PLUS Loans
(e) Parent Plus Loans
(f) Federal Family Education Loan Program (FFEL) Loans
(g) Consolidated Loans

v) Private Loans

(1) Not eligible for DOE administrative discharge or IDR plans.
(2) Subject to state statutes of limitation.
(3) Usually co-signed by parents.
(4) Made by a lender such as a bank, credit union, state agency, or a school, and have terms and conditions that are set by the lender.

vi) Apply Debtor's Situation to the Standards Described Above

(1) Which provision of Section 523(a)(8) applies to each loan?
(2) **If the loan is included in Section 523(a)(8) can the debtor meet the "undue hardship" or "totality of the circumstances" test.**

vii) PROCEDURE

(1) File a complaint to determine whether the student loan is dischargeable.
  (a) See Fed.R.Bankr.P. 7001(6).
  (b) Can be filed at any time.
  (c) See 11 U.S.C. § 350(b); Fed. R. Bankr. P. 4007(b); *In re* Smith, 442 B.R. 550, 557 (Bankr. S.D. Tex. 2010)(there is no deadline for seeking a determination of dischargeability under § 523(a)(8)), *aff'd*, 2011 WL 4625397 (S.D. Tex. Sept. 30, 2011); Thurman v. United Student Aid Funds, Inc., 2012 WL 993412 (W.D. Wash. Mar. 21, 2012) (same); *In re* Watkins, 461 B.R. 57, 59 (W.D. Mo. 2011)(Fed. R. Bankr. P. 4007 gives a bankruptcy court jurisdiction to decide a student loan dischargeability proceeding "at any time").
(2) Name the proper defendants
  (a) Use the NSLDS system for federal loans.
  (b) Private loans
  (c) Check state lawsuits
  (d) Many assigned to National Collegiate Student Loan Trust or TERI Loan Holdings.
  (e) Protect your client's privacy
    (i) Debtor may fear information disclosed will affect future employment or credit.
    (ii) Bankruptcy Rule 9037 incorporates basic protections.
      1. 9037(d) a party can request a protective order.
      2. Section 107(b)(2) provides that a party in interest may request that the bankruptcy court protect a person with respect to a scandalous or defamatory matter contained in a paper filed in a case.
(3) Serving the adversary
  (a) See Bankruptcy Rule 7004(b)
  (b) See NACBA Student Loans in Bankruptcy Workshop for detailed discussion of service under Rule 7004 including
    (i) Service on corporations.
    (ii) How to determine if the lender is an insured depository institution (which requires special service under Rule 7004(h).
    (iii) Can you serve registered agents?
    (iv) How to find who and where to serve.

(v) Serving an agency of the United States.

(4) Request discovery from Defendants

(a) Loan information

(i) E.g. each outstanding loan to state (and to produce related documents): the type of loan; the loan disbursement date and the amounts disbursed; the recipient of the loan proceeds; the identity of original lender, any guaranty agency, current holder of the loan, and current servicer; and the current status of the loan. As to the terms of the loan obligations, defendants should be asked to state and produce documents for each outstanding loan: the amount owing as of the date of filing of the adversary complaint; an itemization of the amount owing as between principal, interest, and fees or other charges; the contractual interest rate and the amount of per diem interest; and the monthly payment amount under the standard repayment plan.

(b) Good Faith

(i) E.g. amount and date of all voluntary and involuntary payments.

(c) Authentication of Documents

(d) Trial

(i) Prepare evidence and witnesses to demonstrate each element of proof

(ii) Based on your jurisdiction

1. *Brunner*
2. Totality of the circumstances

(e) Loan information

(i) E.g. each outstanding loan to state (and to produce related documents): the type of loan; the loan disbursement date and the amounts disbursed; the recipient of the loan proceeds; the identity of original lender, any guaranty agency, current holder of the loan, and current servicer; and the current status of the loan. As to the terms of the loan obligations, defendants should be asked to state and produce documents for each outstanding loan: the amount owing as of the date of filing of the adversary complaint; an itemization of the amount owing as between principal, interest, and fees or other charges; the contractual interest rate and the amount of per diem interest; and the monthly payment amount under the standard repayment plan.

(f) Good Faith

(i) E.g. amount and date of all voluntary and involuntary payments.

(g) Authentication of Documents

(h) Burdens

(i) It is the creditor's burden to prove that an educational debt is encompassed by 11 U.S.C. § 523(a)(8). *See In re Renshaw*, 222 F.3d 82, 86 (2nd Cir. 2000).

(ii) Where a debt is not so encompassed, the educational debt is automatically discharged by operation of law. *See Meyer v. Xerox*

Educational Services (In re Meyer), 2016 WL 3251662 (Bankr. N.D. Ohio 2016)

(iii) Thus, debtor is not seeking discharge of these non-qualified loans, but rather declaratory relief that the debts were discharged upon entry of order.

b) NON-BANKRUPTCY DISCHARGE CHAPTER 13 SOLUTIONS

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

(1) Income Driven Repayment Plans in Chapter 13

(a) Why?

(i) Previously the Department of Education, its Guaranty Agencies and Student Loan Servicers would place all student loans for Chapter 13 Debtors in administrative forbearance.

(ii) This meant that no collection actions were taken, but interest continued to accrue.

1. 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.
2. The "fresh start" becomes a "false start."

(b) The Executive Office of the Chapter 13 Trustee has issued template language for IDRs in Chapter 13 Cases.

(i) 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.

(2) The main features of the template:

(a) 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);

(b) Identify the student loan(s);

(c) Confirm the debtor is not in default on Federal student loan debts;

(d) Provide the debtor may continue in or apply to enroll in IDR;

(e) Provide the amount of the debtor's monthly IDR plan payment and the day each payment is due;

(f) Indicate the student loan(s) creditor class;

(g) 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;

(h) 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

(i) 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.

(j) IDR plans require separate classification for these student loans.
  (i) 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).
  (ii) *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.");
  (iii) *In re* Coonce, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) (separate classification of student loan debt is permissible).

ii) Other bases to allow separate classification for student loans.
  (1) Co-Signer Protection
  (2) Above-median debtor pays student loan from discretionary income, i.e. Social Security or belt-tightening, earned in excess of PDI
  (3) Below-median debtor extends plan to five years
  (4) Pro Rated Distribution to Other General Unsecured Claims
  (5) Chapter 20
  (6) Make progress towards 20/25 year cancellation or 10 year PSLF.
  (7) Maximize payment toward non-dischargeable debt.
  (8) Avoid accrual of post-petition interest: *In re* Kielisch, 258 F.3d 315 (4th Cir. 2001).

iii) Additional Language for use in IDR chapter 13 plans
  (1) 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.
  (2) ED shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan."
  (3) 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.
  (4) The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
  (5) 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.
  (6) 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.

(7) 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.
   (a) 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."

(8) 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.
   (a) 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.

(9) 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.
   (a) This is to allow for monitoring of the IDR payments if made directly by the debtor.
   (b) 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

(10) 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.
   (a) 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.

iv) Cure Defaults on Student Loan Through Bankrupty Plan

(1) 11 U.S.C. § 1322(b)(3) provides that "the plan may … provide for the curing or **waiving** of **any default**." (Emphasis added.)
(2) "Any default" should include student loan or even a default under a rehabilitation.
(3) "Curing", which generally means catching up on missed payments, must mean something different from "waiving", which implies forgiving of missed payments.

(4) 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.
(5) Such a cure or waiver could avoid the assessment of collection costs of up to 18.5% of the outstanding principal and interest.

4) CARES Act Provisions Concerning Student Loans

Excerpt from NACBA's CARES Act Amendments to the Bankruptcy Code and other Consumer Statutes
held March 30, 2020
To access go to: https://www.nacba.org/events/webinars/

a) **The federal government has already waived two months of payments and interest for many federal student loan borrowers. Is there a bigger break now with the new bill?**
   i) Yes. Until Sept. 30, there will be automatic payment suspensions for any student loan held by the federal government. It is hard to contact many of the loan servicers right now, so check your account online in the coming weeks. Once you are logged in, look for the current amount due. There, you should be able to see if the servicer has reset its billing systems so that you are showing no payment due.

b) **How do I know if my loan is eligible?**
   i) If you've borrowed money from the federal government — a so-called direct loan — in the past 10 years, you're definitely eligible. According to the Institute for College Access & Success, 90 percent of loans (in dollar terms) will be eligible.
c) Older Federal Family Educational Loans (F.F.E.L.) that the U.S. Department of Education does not own would not be eligible, nor would Perkins loans, loans from state agencies, or loans from private lenders like Discover, Sallie Mae and Wells Fargo. The holders of all those kinds of loans may be offering their own assistance programs.
d) Within a few weeks of the bill becoming law, you are supposed to receive notice indicating what has happened with your federal loans. You can choose to keep paying down your principal if you want. Then, after Aug. 1, you should get multiple notices letting you know about the cessation of the suspension period and that you may be eligible to enroll in an income-driven repayment plan.

e) **Will my loan servicer charge me interest during the six-month period?**
   i) The bill says that interest "shall not accrue" on the loan during the suspension period.
   ii) At the end of the suspension, keep a close eye on what your loan servicer does (or does not do) to put you back into your previous repayment mode. Servicer errors are common.

f) **Will the six-month suspension cost me money, since I'm trying to qualify for the public service loan forgiveness program by making 120 monthly payments?**
   i) No. The legislation says that your payment count will still go up by one payment each month during the six-month suspension, even though you will not actually be making any payments. This is true for all forgiveness or loan-rehabilitation programs.

g) **Is wage garnishment that resulted from being behind on my loan payments suspended during this six-month period?**
   i) Yes. So is the seizure of tax refunds, the reduction of any other federal benefit payments and other involuntary collection efforts.

h) **Are there changes to the rules if my employer repays some of my student loans?**
   i) Yes. Some employers do this as an employee benefit. Between the date the bill is signed and the end of 2020, they can offer up to $5,250 of assistance without that money counting as part of the employee's income. If the employer pays tuition for classes an employee is taking, that money will also count toward the $5,250.

i) If my income tax refunds are currently being garnished because of a student loan default, would this payment be garnished as well?
   i) No. In fact, the bill temporarily suspends nearly all efforts to garnish tax refunds to repay debts, including those to the I.R.S. itself. But this waiver may not apply to people who are behind on child support.

j) Would there be damage to my credit report if I took advantage of any virus-related payment relief, including the student loan suspension?
   i) No. There is not supposed to be, at least.
   ii) The bill states that during the period beginning on Jan. 31 and continuing 120 days after the cessation of the national emergency declaration, lenders and others should mark your credit file as current, even if you avail yourself of payment modifications.
   iii) If you had black marks in your file before the virus hit, those will remain unless you fix the issues during the emergency period.