

abiLIVE
webinar series

Degrees of Freedom

Proposals for Student Loan Dischargeability

Presented by ABI's Consumer Bankruptcy Committee
Co-Sponsored by the Legal Aid Society of Mid-New York, Inc.



Introductions

- Sponsored by the Legal Aid Society of Mid-New York
- Presented by the Consumer Bankruptcy Committee
- Speaker Introductions:
 - Karlene Archer
 - Legal Aid Society of Mid-New York, Syracuse, NY
 - Ed Boltz
 - Law Offices of John T. Orcutt, Durham, NC
 - Ray Hendren
 - Chapter 13 Trustee, Austin, TX

Overview and Agenda

Where are we now, and where might we go from here?

- Private loans
 - “Educational benefit” litigation
 - Class actions
 - Application of *Taggart v. Lorenzen*
 - Recent legislation
- Federal loans:
 - *McCoy v. United States*
 - Department of Education policies
 - Second Circuit litigation
 - Recent legislation
- Chapter 13

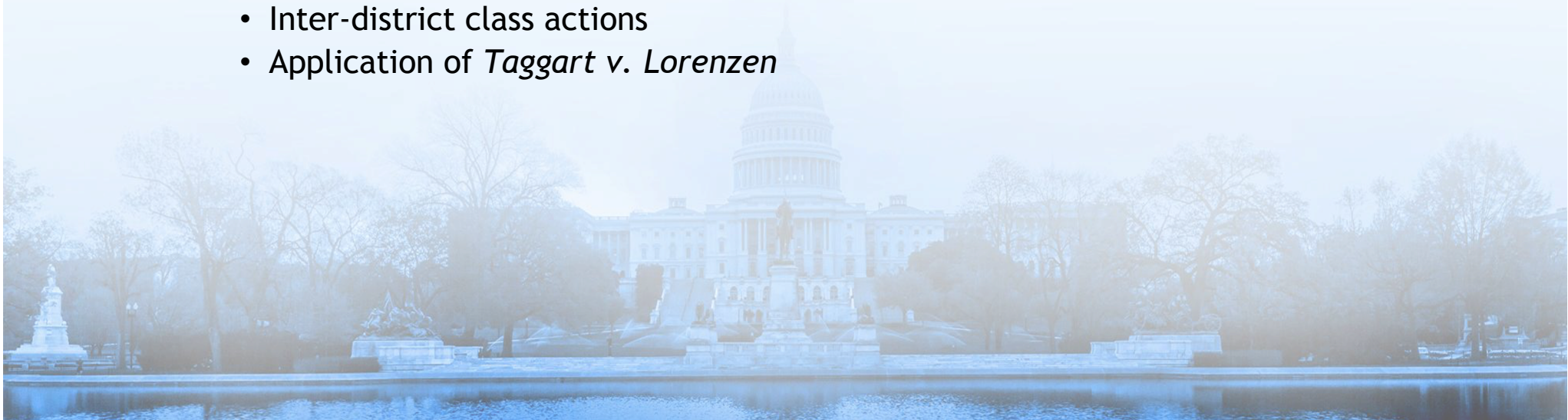
Private Loans

- Current Landscape
 - What clearly falls in and out of the discharge?
 - Recent litigation
 - *Homaidan v. Sallie Mae, Inc.*, No. 20-1981, 2021 U.S. App. LEXIS 20934 (2d Cir. July 15, 2021)
 - *McDaniel v. Navient Sols. LLC (In re McDaniel)*, 973 F.3d 1083 (10th Cir. 2020)
 - *Crocker v. Navient Sols. LLC (In re Crocker)*, 941 F.3d 206 (5th Cir. 2019)



Private Loans

- Questions
 - Are *Homaidan*, *McDaniel*, and *Crocker* correct?
 - What will be the next developments?
 - Inter-district class actions
 - Application of *Taggart v. Lorenzen*



Federal Loans

- Current Landscape
 - What clearly falls in and out of the discharge?
 - The Brunner standard vs. “totality of the circumstances”
 - Cert denial in *McCoy v. United States*, 810 Fed. Appx. 315 (5th Cir. 2020)



Federal Loans

- Questions
 - Do the standards create a circuit split such that SCOTUS will weigh in, and should it?
 - Is the Second Circuit moving backwards, or moving at all?
 - Compare *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg)*, 610 B.R. 454 (Bankr. S.D.N.Y. 2020); *Tingling v. Educ. Credit Mgmt. Corp. (In re Tingling)*, 990 F.3d 304 (2d Cir. 2021)

Federal Loans

- Questions

- Should the Dept. of Ed. designate “safe harbors” to which it will consent to undue hardship?
 - See ABI Commission on Consumer Bankruptcy, Docket ID ED-2017-OPE-0085, Request for Information on evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings (May 21, 2018)
 - See Foohey, Pamela and Ament, Aaron and Zibel, Daniel, *Changing the Student Loan Dischargeability Framework: How the Department of Education Can Ease the Path for Borrowers in Bankruptcy*, 106 Minn. L. Rev. Headnotes 1 (2021), Available at SSRN: <https://ssrn.com/abstract=3865693>
 - See Bruckner, Matthew A. and Gotberg, Brook and Jiménez, Dalié and Ondersma, Chrystin D., *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. Colorado L. Rev. 183 (2020), Available at SSRN: <https://ssrn.com/abstract=3366707>

The FRESH START Act

- The FRESH START Act of 2021 does not include private loans. Is that the right move?
- What are your predictions for its success in Congress?



Discussion: Student Loans in Chapter 13

- Roadblocks to progress on student loans during the Ch 13 case
 - Income Driven Repayment Plans
 - Student Loan Management Programs
 - Potential avenues for discharge in Chapter 13 only



Questions?



Karlene Archer,
Moderator
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Edward C. Boltz
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Ray Hendren
*Chapter 13 Trustee
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Faculty: Degrees of Freedom: Proposals for Student Loan Dischargeability

Karlene Archer is a staff attorney at the Legal Aid Society of Mid-New York in Syracuse, N.Y. She previously was an associate in the Bankruptcy and Financial Restructuring Group at WilmerHale in Boston and later at Bradley Arant Boult Cummings in Nashville, Tenn., where she focused mainly on consumer bankruptcy compliance for mortgage-servicers and banks. Ms. Archer currently works on *pro bono* and *pro se* assistance initiatives for consumer debtors, as well as impact litigation initiatives for student loan dischargeability. She received her J.D. from Boston College Law School.

Edward C. Boltz is a member of the Law Offices of John T. Orcutt, P.C. in Durham, N.C., which he has managed since 1998. He represents clients in not only chapter 13 and 7 bankruptcies, but also in related consumer rights litigation, including fighting abusive mortgage practices and developing solutions for student loans. Mr. Boltz served as the president of the National Association of Consumer Bankruptcy Attorneys (NACBA) from 2013-16 and remains on its board of directors, co-chairing its Legislative Committee. He served on ABI's Consumer Bankruptcy Commission from 2017-19 and on the Bankruptcy Council for the North Carolina Bar Association, for which he co-chaired the committee that created a mortgage-modification program for the North Carolina bankruptcy courts. Mr. Boltz is a frequent speaker on bankruptcy issues at both national and local seminars, including at NACBA conventions and workshops, past NCLC workshops and the North Carolina Bankruptcy Institute. In June 2019, he testified on behalf of NACBA in Congress regarding the need for changes to the Bankruptcy Code to make student loans dischargeable and to the means test for disabled veterans. In 2008, he testified before Congress to similarly protect those in the National Guard and reservists, which was enacted as the National Guard and Reservists Debt Relief Act. For the Spring 2020 semester, Mr. Boltz served as an adjunct professor at the University of North Carolina School of Law, assisting clients in the Consumer Financial Transactions clinic with student loans. He is a member of the North Carolina State Bar, which certified him as a specialist in consumer bankruptcy law, and he is admitted to practice before the districts courts in both the Eastern and Middle Districts of North Carolina. Mr. Boltz received his B.A. from Washington University in St. Louis in 1993 and his J.D. from George Washington University in 1996.

Ray Hendren is the Standing Chapter 13 and Chapter 12 Trustee for the Western District of Texas in Waco. He is an ABI member and has served on the board of

directors of the National Association of Chapter 13 Trustees. Mr. Hendren received his B.S. from Abilene Christian University and his J.D. from Baylor University.