WAWB Best Practices extends its appreciation to the NACTT Academy for permission to republish the following article which appeared in the Academy's online journal March 17, 2024.

The New DOJ/DOE Guidance for Student Loan Bankruptcy Litigation: Promising Early Results

By Hon. Brian Lynch, Western District of Washington[*]

In the almost five years from January 1, 2018, to November 17, 2022, in the Tacoma Division of the Western Washington Bankruptcy Court, a total of thirteen (13) adversaries were filed seeking a hardship discharge of student loans under 11 U.S.C. § 523(a)(8). Two cases resulted in partial discharges contingent on completion of payments. Two more were concluded with the debtor steered to applying for an Income-Driven Repayment (IDR) plan. The remaining nine were dismissed. Six of the dismissed cases involved *pro se* plaintiffs.

In the next fourteen (14) months, through mid-February 2024, thirty (30) student loan hardship discharge actions have been filed in the Tacoma Division. Of those, three have been voluntarily dismissed. Three have been resolved with stipulated judgments granting either full or partial discharges totaling almost $298,000. The remaining adversaries are suspended during a period of case evaluation by the Department of Justice (DOJ). In all but one of the adversaries, the debtors are represented by counsel.

What happened? On November 17, 2022, the DOJ, in coordination with the Department of Education, issued guidance to department attorneys regarding student loan bankruptcy litigation in evaluating hardship discharge factors. *See Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation*, (Nov. 17, 2022), https://www.justice.gov/civil/page/file/1552681/download. The guidance relies on existing case law and Department of Education policy, in particular the elements laid out in the leading case *Brunner v. New York State Higher Education Services,* 831 F.2d 395 (2d Cir. 1987).

---

[*]*Judge Lynch gratefully acknowledges the assistance of his law clerk Brittani Bushman in gathering this data and assisting in the drafting of this article.*

The guidance provides specific goals for evaluating the elements:

> 1. To set clear, transparent, and consistent expectations for discharge that debtors understand regardless of representation;
> 2. To reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes use of an Attestation, and where feasible, information provided through prior submissions to the bankruptcy court and available student loan servicing records;
> 3. Where the facts support it, to increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.

The problem in the past for student loan borrowers in bankruptcy has been that hardship discharge litigation has been complex, expensive and arbitrary. Debtors in bankruptcy who are already financially strapped, have been reluctant to pursue discharge litigation, and either do not bring actions, fail to prosecute the actions, or are steered to the IDR process.[1] It has been difficult to find attorneys who will take on the work, and debtors cannot afford to hire attorneys to pursue hardship discharge.

The new guidance has simplified the process. Typically when the adversary is brought, after the complaint is served, counsel for the debtors and the DOJ stipulate to suspend the adversary proceedings, while they go through an informal discovery process and case evaluation by the DOJ. Debtors are usually required to provide relevant information

---

[1]The IDR process has a number of drawbacks. There are four different types of IDR plans, each requiring payments for up to 20 to 25 years before the remaining loan balance will be forgiven. *See Federal Student Loan Repayment Plans*, FEDERAL STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans (last visited Feb. 21, 2024). However, the forgiven balance could be treated as taxable income for federal and state income taxes. Additionally, the IDR plans require yearly income and family size recertifications. *Id.* If at any time you no longer qualify for the IDR plan or choose not to re-enroll, any accumulated interest will be capitalized, resulting in borrowers paying more over time.

by completing an Attestation form. Most of the adversaries filed in our court since the guidance went into effect are at that stage. The majority of the cases underlying the adversaries are chapter 13's, and in those cases, agreements reached are contingent upon debtors completing plans.

The new guidance holds the promise of making bankruptcy a more useful tool for student loan borrowers. It is too early to draw many conclusions, but the number of filings and the fact that all but one of the debtors are represented by counsel, are an encouraging start.