



U.S. Department of Justice Guidance for Attorneys Regarding Student Loan Bankruptcy Litigation

Privileged and Confidential

September 2023

Agenda

1 Current Case and Statutory Standards

5 Income-Driven Repayment plans

2 Department of Justice Guidance

6 Questions

3 How the Guidance Affects the Process

4 The Department of Justice Attestation Form

TODAY'S PRESENTERS



Igor Roitburg
Managing Director
igor.roitburg@stretto.com
859.663.2928



George Vogl
Managing Director
george.vogl@stretto.com
847.585.2383

Current Case and Statutory Standards

Statutory Standard for Student Loan Discharge

11 U.S.C. § 523

- 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—

Unless excepting such debt from discharge under this paragraph would impose an **undue hardship** on the debtor and the debtor's dependents, for—

- - 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
 - An obligation to repay funds received as an educational benefit, scholarship, or stipend; or
- 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;

Majority Standard of Review for Student Loan Discharge

Brunner v New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987)

To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that:

- The debtor cannot presently maintain a minimal standard of living if required to repay the student loan,
- Circumstances exist that indicate the debtor's financial situation is likely to persist into the future for a significant portion of the loan repayment period, and
- The debtor has made good faith efforts in the past to repay the student loan.

Minority Standard of Review for Student Loan Discharge

In re Long., 322 F.3d 549, 553 (8th Cir. 2003) “Totality of Circumstances” test

The Totality Test looks to:

- The debtor’s past, present, and reasonably reliable future financial resources;
- A calculation of the debtor’s and their dependents’ reasonably necessary living expenses; and
- Any other relevant facts and circumstances surrounding each particular bankruptcy case.

Traditional Process for Seeking Discharge of Student Loans

- Debtor files bankruptcy case (any chapter)
- While pending, debtor files an adversary case against student loan lenders (Rule 7003 Fed.R.Bk.Pro.)
 - Debtor files a summons and complaint and serves on appropriate parties
 - Docketed and tracked as a separate legal action within case
 - Discovery, settlement conferences and trial using appropriate standard of review
- *Brunner* and *Totality* tests have been exceptionally difficult for debtor to prevail
- Litigation is often too costly for debtor, in bankruptcy, to afford
- *Duke Law Journal* 2020 study: 250,000 bankruptcy cases involving student loans filed annually, fewer than 300 debtors (less than .1%) received a discharge of student loans

Department of Justice Guidance

U.S. Department of Justice Guidance Standards

- Does NOT change initial process of seeking student loan discharge – adversary required
- Does provide an opportunity for the AUSA (Department of Justice (DOJ) Attorney), in cooperation with Department of Education (DOE), to:
 - Review debtor’s situation thoroughly in early stages of litigation – pre-discovery
 - Stipulate to the facts demonstrating that the debts would impose an undue hardship
 - Recommend to the Court that the student loan debt should be discharged if three conditions are met:
 - The debtor presently lacks an ability to repay the loan
 - The debtor’s inability to pay the loan is likely to persist in the future
 - The debtor has acted in good faith in the past in attempting to repay the loan
- From 12/5/22 – 7/17/23: 409 new complaints, 205 submitted attestations, 126 determinations, 70 complete discharges, 24 partial discharges, 32 guidance not met. 74.6% success rate. Remainder pending. (DOE presentation at NACTT)

U.S. Department of Justice Guidance Standards continued

- Does not limit potential discharge to specific bankruptcy chapters.
- Partial discharge specifically called for where appropriate and permissible. Paragraph IV(E)
- Footnote #22:

This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.

Does this reference pending cases or pending adversaries?

How the Guidance Affects the Process

New Process for Seeking Discharge of Student Loans

- Debtor files bankruptcy case (any chapter)*
- While pending, debtor files an adversary case against student loan lenders (Rule 7003 Fed.R.Bk.Pro.)
- Debtor prepares and submits attestation to AUSA (DOJ)
- DOE provides AUSA with “litigation report” containing record of account history
- AUSA “consults proactively” with DOE to evaluate specific circumstances of case
- AUSA makes recommendation on dischargeability
 - Complete discharge
 - Partial discharge
 - No discharge

The Department of Justice Attestation Form

Section I

- Personal information
 - Residence
 - Household size and structure
- Loan information
 - Balance of loans
 - Current repayment information
 - Educational history
 - Employment situation

Section II - Current Income and Expenses

- Household gross income
 - Includes all income from all sources in the household
 - No exceptions (compare to form 122 “Means Test”)
 - Income is the only element that must be supported
 - Most recent tax return filed w/affirmation of no substantial change
 - Pay advices from most recent two months of income*
 - Other proof of gross household income from employment
 - Other verification of sources of income other than employment

Section II - Current Income and Expenses continued

- Monthly expenses
 - IRS national standards are utilized for comparison for food, housekeeping supplies, apparel and services, personal care products and services and miscellaneous. Standards:
 - If debtor's expenses are below IRS standard, no further inquiry needed, and debtor is allowed the full National Standard amount.
 - If debtor's expenses are above the IRS standard, debtor can explain why and AUSA will consider explanation to determine allowance.
 - Payroll deductions
 - IRS local standards are utilized for comparison for housing, utilities and transportation. AUSA will limit these to actual expenses. Standards:
 - If debtor's expenses are below IRS standard, AUSA will use actual expenses.
 - If debtor's expenses are above the IRS standard, AUSA will use the standard.
 - Explanations still allowed by debtor and will be considered.

Section II - Current Income and Expenses continued

- Monthly expenses continued
 - Allowance of other necessary expenses (alimony, child support, babysitting, day care, nursery and preschool costs where reasonable and necessary)
 - Allowable if reasonable and necessary
 - Allowance for reasonable expenses not incurred
 - Recognizes that debtor often forgoes what would be reasonable and necessary expenses due to budget constraints
 - Explicitly gives debtor ability to identify and explain these expenses
 - AUSA will consider them in analysis
- Allowable expenses are then compared to income to determine current ability to pay
- If bankruptcy is filed within 18 months of adversary, Schedules I and J may be used
- Student loan repayment estimates are to be based on the Standard Repayment Plan

Section III - Future Inability to Repay Student Loans

- Checklist of five factors that raise a rebuttable presumption:
 - Debtor is over 65
 - Student loans have been in repayment status for at least 10 years
 - Debtor did not complete the education for which debt was incurred
 - Debtor has permanent disability or chronic injury, limiting ability to work
 - Debtor has been unemployed for 5 of the last 10 years

- Checklist of five factors that are to be considered but do not raise a presumption:
 - Incurred loans in pursuit of degree but was unable to complete
 - Not currently employed
 - Employed but unable to obtain employment in field
 - Employed but income is insufficient
 - Any other circumstances that make it unlikely to pay in the future

Section IV - Prior Efforts to Repay Loans

- Utilizes objective criteria with factors to be considered:
 - Making a payment on the loans
 - Applying for deferment or forbearance
 - Applying for enrollment in IDR
 - Applying for consolidation
 - Responding to collection efforts of servicer/collection agent
 - Engaging with DOE “meaningfully” regarding repayment options
 - Engaged with a 3rd party “meaningfully” for assistance to resolve student loan repayment
- Additionally reviews debtor’s efforts to:
 - Obtain employment
 - Maximize income
 - Minimize expenses
 - Generally, handle their finances
- Debtor inaction during the COVID moratoriums is explicitly not bad faith

Section V - Current Assets

- Lists five specific asset types
 - Real estate
 - Motor vehicles
 - Retirement accounts
 - Interests in businesses
 - Anticipated tax refunds
- AUSA is not to give dispositive weight to non-liquid assets
- AUSA is not to give dispositive weight to assets critical to debtor maintaining a minimal standard of living
- AUSA is not to give dispositive weight to exempt status of assets*

Section VI - Additional Circumstances

- A simple “catch-all” for the debtor to make any additional arguments they choose to

Income-Driven Repayment Plans

- Currently nine repayment plans under HEA, 4 balance-based, 5 income-driven
 - All plans are “by right” - eligible debtors cannot be denied
 - Balance-based allow for full repayment of loans with interest over time
 - Income-driven allow for payments based on borrowers' disposable income
 - Include provisions for forgiveness at end of plan
 - Include Public Service Loan Forgiveness
 - Generally last 10 – 25 years
 - Borrowers must enroll in plans and recertify income annually

Revised Pay As You Earn (REPAYE) plan becoming Saving on a Valuable Education (SAVE) plan

- Phase 1: Immediate upon payment restart
 - Spouses may file separate tax returns to exclude income
 - Include Public Service Loan Forgiveness
 - Poverty calculation up to 225% from 150%
 - Subsidy covers 100% of excess interest

- Phase 2: Effective July 1, 2024
 - Those enrolled in REPAYE will be automatically converted
 - Decreases discretionary income contribution from 10% to 5% for undergraduate loans (remains at 10% for graduate loans)
 - Those in other IDRs will be able to re-enroll into SAVE
 - 10-year forgiveness for \leq \$12k, 20-year forgiveness for \geq \$12k

Stretto Tools Assisting Debtor Attorneys

Bankruptcy Discharge Analyzer

- Populate borrower-specific data via wizard-based program
- Imports and analyzes NSLDS file
- Provides report on likelihood of success
- If success is likely:
 - Populates DOJ attestation
 - Substantially prepares complaint
 - Advises of supporting document requirements

Repayment Plan Analyzer

- Reviews potential administrative discharges
- Reviews PSLF eligibility
- Provides report on all repayment plan options for borrower
- Populates IDR enrollment forms and, if necessary, consolidation forms
- Advises of supporting document requirements



Questions? Thank You.