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The Basics of Chapter 13s and Student Loans

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Income Driven Repayment Plans in Chapter 13

By Ed Boltz

Income Driven Repayment (IDR) plans for student loans became available to borrowers with the Income Drive Repayment plan in 2009. Subsequent plans, such as Pay As You Earn (PAYE) and Revised Pay As You Earn (REPAYE), were modeled after it 2014 and 2015. Payments under these payment are based on 10-15% of the borrower's household discretionary income,[1] without regard to assets, and can be as low as $0.00 a month. Depending on the plan, after 20 or 25 years of payments, any remaining balance will be cancelled.[2] If the borrower works for a governmental entity or a qualified non-profit, after 10 years of payments, the student loans will be forgiven.[3]

Prior to 2015, the Department of Education, its Guaranty Agencies and Student Loan Servicers would place all student loans for Chapter 13 Debtors in an administrative forbearance, which was colloquially called "putting the loan on the shelf." During the bankruptcy, no collection actions were taken, but interest continued to accrue. As Albert Einstein called "compound interest the most powerful force in the universe," this can mean a Chapter 13 plan has a devastating effect on student loans. For example, if nothing is paid on $100,000 of student loans during a 60-month Chapter 13 Plan, at 8% interest at the end of the bankruptcy the debtor will owe $148,984.57. For a Debtor with student loans, the "fresh start" becomes a "false start."[4] The Department of Education steadfastly refused to allow Chapter 13 Debtors to participate in the various income driven repayment plans.

When pressed, both at a policy level in Washington, D.C. by the National Association of Consumer Bankruptcy Attorneys (NACBA) and in specific cases starting in North Carolina,[5] with the argument that 11 U.S.C. § 525(c)[6] prohibited such discrimination, the Department of Education eventually relented and began quietly allowing Chapter 13 Debtors to participate in IDRs if Chapter 13 plans. To avoid objection, the Department of Education required the following provisions (which are interspersed with my comments) from the *Buchanan* case:

- The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part, of her student loan obligations.

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[1]The amount of the monthly payment can be determined using the Repayment Estimator found at: https://studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action

[2]Under current law, cancelled student loans will be reported as taxable income for the year in which the loan is finally cancelled.

[3]Forgiven student loans are, unlike those that are cancelled, are not reported as taxable income.

[4]In fact, a Debtor with $250,000 in student loans (a high but not unheard of amount) will likely have a balance so high upon exiting a Chapter 13, that he or she would exceed the debt limits of 11 U.S.C. §109(e) and never be able to file another Chapter 13 case.

[5]One of the first cases in which this was allowed was In re Buchanan, from the Middle District of North Carolina, case number 14-51161. With the provisions included in the Confirmation Order, dated June 13, 2015, and available as Docket Item 45.

[6]11 U.S.C. 525(c) provides that "A governmental unit that operates a student grant or loan program… may not deny a student grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title …, because the debtor or bankrupt is or has been a debtor under this title … or during the pendency of the case but before the debtor is granted or denied a discharge …."

The over-arching concern of the Department of Education was that, following *United Student Aid Funds, Inc. v. Espinosa*,[7] "unscrupulous debtors [will] abuse the Chapter 13 process by filing plans proposing to dispense with the undue hardship requirement in the hopes the bankruptcy court will overlook the proposal and the creditor will not object."[8] This concern was addressed directly and repeatedly, both by specifically disavowing any present attempt at discharge and by asking that the Plan be specially set for a Confirmation Hearing.[9]

- 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 was the fundamental change in practice by Ed. and its servicers, which, as stated above, had previously refused to consider applications by Chapter 13 debtors for IDRs, instead placing student loans into an "administrative forbearance." Debtors would only be allowed the appropriate IDR without any special preference.

- 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.[10] The plan provides that this will be approved by separate motion, but relief from the automatic stay is not necessary.[11]

- 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.
- The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.

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[7] 559 U.S. 260 (2010).

[8] *Id*. at 16.

[9] In fact, in additional to treating the Confirmation as a contested matter, with service on the United States, pursuant to Bankruptcy Rule 7004(c), to the Department of Education, the Attorney General, and the local U.S. Attorney, contacts at both the Department of Education and the U.S. Attorney's office were called and alerted to this requested departure from the practice of placing loans in administrative forbearance.

[10] It is important to note that in regards to student loans, "delinquent" is not be the same as "default", which requires that no payments have been made for more than 270 days. See 34 C.F.R. § 685.102. Outside of bankruptcy, default carries with it severe consequences including administrative wage garnishment, seizure of tax refunds, loss of eligibility for new student loans, etc.

[11] 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.

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 to avoid "unfair discrimination"[12] as to other unsecured claims and if the IDR should be made directly or by "conduit." This is also meant to provide a bit of a "carrot" for the Chapter 13 Trustee in consenting to the plan, in that the debtor will annually notify the Trustee of changes in the monthly IDR, which could result in a higher dividend to other unsecured creditors.[13]

- 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.
- 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.

After fears of discharge through a Confirmation Order, the second greatest concern of the Department of Education 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. Notice to the Trustee of a delinquency, is meant to allow for monitoring of the IDR payments if made directly by the debtor.

- 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.

Most courts would recognize that assisting a Chapter 13 debtor with an IDR for student loan is an additional service outside of any presumptive "No Look" fee and Chapter 13 can, in fact, be an ideal

[12]While a full discussion of the separate classification of student loans is outside the scope of this article, it should be noted that in effect every Chapter 7 (except that vanishingly rare case where student loans are discharged) separately classifies student loans, as the Debtor will, after discharge, either make voluntary payments or face the full brunt of the collection powers of the Department of Education. Options for separate classification can include:

- Fair Discrimination, see *In re Leser*, 939 F.3d 669 (8th Cir. 1991);
- Co-Sign Protection (when applicable);
- Above-median debtor paying 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;
- Filing of a Chapter 20, i.e. a Chapter 7 to discharge all other unsecured debts followed by a Chapter 13.

[13]Even though most jurisdictions have some requirement that debtors notify the Chapter 13 Trustee of substantial changes in financial circumstances, it must be admitted that this obligation is "More honor'd in the breach than the observance…." Hamlet, Act 1, scene 4, line 16.

venue for this often necessary legal representation[14] as any attorney's fee can be paid through the plan, without delaying providing the debtor relief.[15]

- Notice of Final Plan Payment. In Chapter 13 cases, within 30 days after the Debtor completes all payments under the plan, the Chapter 13 Trustee shall file and serve on the Required Parties a notice stating that the Debtor has paid in full the amount required to cure any default on the claim and has paid all payments due to Creditor during the Chapter 13 plan. The notice shall also inform the Creditors of its obligation to file and serve a response under subdivision (f). If the Debtor contends that final cure payment has been made and all plan payments have been completed, and the Trustee does not timely file and serve the notice required by this subdivision, the Debtor may file and serve the notice.
- Response to Notice of Final Cure Payment. In Chapter 13 cases, within 21 days after service of the notice under subdivision (e), the Creditor shall file and serve on the Debtor, debtor's counsel, and the Trustee a statement indicating (1) whether it agrees that the Debtor has paid in full the amount required to cure the default on the claim, (2) whether the Debtor has otherwise made all payments due during consistent with § 1322(b)(5) of the Code, and (3) whether payments made during the plan were applied towards any period of forgiveness or cancellation of the Eligible Loan. The statement shall itemize the required cure or post-petition amounts, if any, that the Creditor contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

These last two provisions, while not included in the *Buchanan* Order, have been proposed elsewhere to take steps to ensure that IDR payments made during the bankruptcy are credited towards the period of cancellation or forgiveness.[16] This language is again patterned on the Notice of Final Cure for long-term non-dischargeable claims against a debtor's principal residence in Bankruptcy Rule 3002.1(f) and (g).

With the often insurmountable challenge of satisfying the *Bruner* test to discharge student loans and the total student loan debt in the United States exceeds $1.4 trillion (only surpassed by mortgage debt), it is increasingly necessary that debtors be given options in Chapter 13 for dealing with those student loans. To meet this debtor's attorneys will need to be creative and Chapter 13 Trustees (to say nothing of bankruptcy judges) will need show flexibility and accommodate the current state of affairs. Allowance of IDRs in Chapter 13 through adoption of the *Buchanan* provisions is a reasonable and fair solution that is become more common throughout the country.

[14]In the event that the difficulties debtors face in successfully navigating the student loan Income Driven Repayment plans is unclear, the report from the Consumer Financial Protection Bureau Student Loan Ombudsman Transitioning From Default to an Income-Driven Repayment Plan discusses how "a series of administrative, policy and procedural hurdles may limit access to or enrollment in IDR for borrowers with previously defaulted federal student loans."

[15]See *In re Coleman*, 560 F.3d 1000 (9th Cir. 2009), which held that even an "Attorney Fee Only" plan can be appropriate as a debtor often "cannot finance … undue hardship litigation up-front, she would have to proceed with the undue hardship litigation pro se, if at all." The same should hold for IDR representation.

[16]Application of IDR payments to these periods of cancellation or forgiveness have been problematic outside of bankruptcy, see Panicked Borrowers, and the Education Department's Unsettling Silence, The New York Times (April 7, 2017).

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

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

Part 17 Nonstandard Plan Provisions

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

2) Identification of Federal Student Loan Debt

a) Only Federal Student Loans that are currently in an income-driven repayment ("IDR") plan, or which Debtor is eligible to repay under an IDR plan during the pendency of this Chapter 13 case, are listed in subsection (2)(b), below. Debtor could owe other student loan obligations. The special provisions contained in this Part 17 of the Chapter 13 Plan only apply to the Federal Student Loans listed in subsection (2)(b), below.

b) As of June 16, 2018, the Debtor's Federal Student Loan debt includes the following Title IV Student Loans:

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

c) The Federal Student Loans identified in subsection (2)(b), above, are held by the United States Department of Education ("Education") pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070, et seq. Hereinafter, Education is referred to as "Title IV Loan Holder."

3) Federal Student Loans not in Default

As of June 16th, 2018, the Debtor is not in default, as defined in 34 CFR 682.200(b) or 685.102, as applicable, on any Federal Student Loans listed in subsection (2)(b) of this Section.

4) Proof of Claim

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

5) Initial Participation in an IDR Plan

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

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

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

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

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

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

(e) Within thirty (30) days of Debtor's receipt of a notice that the Title IV Loan Holder has determined Debtor's qualification for participation in an IDR plan and calculated Debtor's monthly IDR plan payment, the Debtor shall notify the Chapter 13 Trustee of the IDR participation and the amount of the IDR plan monthly payment. Debtor is responsible to file with the Bankruptcy Court a motion to modify the Chapter 13 Plan to permit monthly payment under the IDR plan, indicating whether the payments will be made directly by the Debtor or through the Chapter 13 Trustee's office, and adjusting the Chapter 13 plan dividends, if necessary.

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

6) Waivers

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

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

7) Annual Certification of Income and Family Size

Pursuant to 34 CFR 685.209, 34 CFR 685.221, or 34 CFR 682.215, as applicable, the Debtor shall annually certify (or as otherwise required by the Title IV Loan Holder) the Debtor's

income and family size, and shall notify the Chapter 13 Trustee of any adjustment (increase or decrease) to the Debtor's monthly IDR plan payment resulting from annual certification.

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

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

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

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

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

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

8) Discontinuation of Participation in IDR

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

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

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

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

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

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

9) Opportunity for Title IV Loan Holder to Cure

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

actions that Debtor alleges to be in violation of this Section of the Chapter 13 Plan and/or 11 U.S.C. § 362(a).

10) Notice

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

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

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

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I. Introduction

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

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

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

II. Federal Student Loan Data

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

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

According to the Federal Reserve Bank of New York, "[s]tudent loan debt is the only form of consumer debt that has grown since the peak of consumer debt in 2008. Balances of student loans have

[1] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2015*, Washington, D.C., 2015. ("Federal Student Aid, a principal office of the United States Department of Education, is required by legislation to produce an *Annual Report*, which details Federal Student Aid's financial and program performance. The *Federal Student Aid Annual Report FY 2015* is a comprehensive document that provides an analysis of Federal Student Aid's financial and program performance results for Fiscal Year 2015.").

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

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

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

A nondischargeable student loan debt is almost assured to be too large for a debtor to repay in the five year span of a Chapter 13 plan. Further, a student loan debtor is not required by the Bankruptcy Code to accelerate their loan payments and pay the student loan debt in full during the course of a Chapter 13 case. Student loan debtors in bankruptcy may pay that debt according to the terms of their original loan, such as a ten-year standard repayment plan. However, once in Chapter 13, the debtor's Chapter 13 plan payments or plan percentage might be too low to fulfill the standard plan monthly payment amount. If the debtor's confirmed Chapter 13 plan provides for less than the full monthly payment on the Federal student loan, then due to partial payments the student loan will soon be in default. Additionally, the nondischargeable debt will continue to grow due to interest. The bankruptcy community should encourage Chapter 13 debtors to pay down their student loan debt while their bankruptcy cases proceed. By addressing student loan debt in an IDR plan during the Chapter 13 plan, the debtor will not face later the setback of an undischarged student loan debt with accrued interest in default status.

III. The History of Student Loan Dischargeability in Bankruptcy Proceedings

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

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

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[2] *Student Loan Debt by Age Group*, FED. RESERVE BANK OF NEW YORK (Mar. 29, 2013).
[3] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016.
[4] The Department of Education's Federal Student Aid Office provides statistics by student loan type, including dollars outstanding and number of loan recipients. *See* https://studentaid.ed.gov/sa/about/data-center/student/portfolio.
[5] *Id.*
[6] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016.
[7] U.S. CONST. ART I, § 8 cl. 4.

- The Bankruptcy Act of 1867 that provided both voluntary and involuntary proceedings and applied to individuals and merchants.

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

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

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

Federal student loans first became available in 1958. In the late 1960s to early 1970s, student loan balances and discharge in bankruptcy were under scrutiny. News reports and anecdotes indicated that students completing college and graduate school would immediately file bankruptcy proceedings to shed all of their student loan debt, and then proceed on to lucrative careers. In 1970, Congress authorized the formation of a *Commission on the Bankruptcy Laws of the United States*. Following public hearings, testimony, and research, the Commission produced its *Report to Congress* on July 30, 1973.[9] As is true today, at the time of the Commissions' 1973 Report, the Federal government ". . . [was] by far the largest higher education student loan financing system in the country . . ." [10] The 1973 Report states the Commission heard testimony and received communications and information "to the effect that easy availability of discharge from education loans threatens the survival of existing educational loan programs."[11] At public hearings, concern was expressed by representatives of the National Council of Higher Education Loan Programs and the New Jersey Board of Higher Education about anticipated student loan defaults and bankruptcies.[12] Although the Commission was not aware of evidence suggesting significant problems with student loan discharge, it advised that the use of bankruptcy to avoid payment of student loans without "any real attempt to repay the loan . . . discredit[s] the system and cause[s] disrespect for the law and those charged with its administration."[13] The Commission stated:

> . . . examples of the abuse of the discharge in the case of educational loans have . . . come to the Commission's attention. Some individuals have financed their education and upon graduation have filed petitions under the Bankruptcy Act and obtained a discharge without any attempt to repay the educational loan and without the presence of any extenuating circumstances, such as illness. The Commission is of the opinion that not only is this reprehensible but that it poses a threat to the continuance of educational loan programs. The Commission, therefore, recommends that, in the absence of hardship, educational

[8] Pub. L. No. 75-696, 52 Stat. 840, 851 (1938).
[9] House Doc. No. 93-137 Part I, II (September 6, 1973) (hereinafter 1973 Report). The Commission's recommendations formed the basis for discussion and debate in Congress, and the foundation for the next bankruptcy legislation—the 1978 Bankruptcy Reform Act.
[10] 1973 Report, Part I, fn 4, at 178-79.
[11] 1973 Report, Part I, at 11.
[12] 1973 Report Part I, fn 4, at 178.
[13] 1973 Report, Part I, at 170.

> loans be nondischargeable unless the first payment falls due more than five years prior to the petition.[14]

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

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

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

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

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

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

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[14] 1973 Report, Part 1, p. 176-77.
[15] 1973 Report, Part II, pp. 3, 136.
[16] Pub. L. No. 95-598, 92 Stat. 2549 (1978).
[17]

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

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

IV. Nondischargeability and Undue Hardship Discharge Today

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

> (A) (i) an education benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan.[19]

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

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

But what about debtors in Chapter 13 repayment plans, which can last up to sixty months before a discharge is entered? Some courts hold that a Chapter 13 debtor cannot file a complaint to determine

[18] Pub. L. No. 101-647, 104 Stat. 4789 (1990).
[19] § 523(a)(8).
[20] FED. R. BANKR. P. 4007.
[21] FED. R. BANKR. P. 4007(b).

dischargeability of student loan debt at the beginning of the Chapter 13 case, but must wait until they are closer to the issuance of a discharge.[22]

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

- That the debtor cannot, based on current income and expenses, maintain a minimal standard of living for himself or herself and his or her dependents if forced to repay the student loans;
- That this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
- That the debtor has made good faith efforts to repay the loans.

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

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

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

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

V. Federal Student Loan Programs

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

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[22] *See* Wheeler v. ECMC, 555 B.R. 464 (Bankr. M.D. Pa 2016).
[23] *In re* Rumer, 469 B.R. 553 (Bankr. M.D. Pa 2012).
[24] The *Brunner* test is used in the 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th, and 11th Circuits.
[25] Brunner v. New York Higher Education Services Corp, 831 F.2d 395 (2nd Cir. 1987).
[26] Hurst v. Southern Arkansas University, 553 B.R. 133 (B.A.P. 8th Cir. 2016); Fern v. Fedloan Servicing et al, (*In re* Fern) Case No. 14-00168, 2016 WL 3564376 (Bankr. N.D. Iowa 2016).
[27] *In re* Nash, 446 F. 3d 188, 190 (1st Cir. 2006).
[28] *In re* Bronsdon, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).
[29] *See In re* Blanchard, 2014 WL 4071119 (Bankr. D. N.H. August 14, 2014); Ayele v. Educational Credit Management Corp., 490 B.R. 460 (D. Mass. 2013).

(FFELP); the William D. Ford Federal Direct Loan Program (Direct Loans); and the Federal Perkins Loan Program (Perkins Loans).

VI. Loan Servicers and Loan Holders

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

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

VII. Repayment of Student Loans

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

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

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

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

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

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

VIII. Income-Driven Repayment Plan

The first IDR plan, the Income Contingent Repayment Plan, was authorized by Congress in the 1990s. Generally, the monthly payment amount under an IDR plan is a percentage of the individual's *discretionary income*. The percentage differs depending on the type of IDR plan. Under all four IDR plans, any remaining loan balance is forgiven if the Federal student loans are not fully repaid at the end of the repayment period. Whether the individual will have a balance to be forgiven at the end of the repayment period depends on a number of factors, such as how quickly the individual's income rises and the individual's income relative to debt. Because of these factors, an individual might fully repay the loan

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

before the end of the repayment period; in such a case, there would be no amount remaining due to be forgiven.

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

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

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

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

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

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

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

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

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

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[31] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2015*, Washington, D.C., 2015.
[32] *Id.*
[33] *Id.*
[34] U.S. DEPT. OF ED. FED. STUDENT AID, *Annual Report FY 2016*, Washington, D.C., 2016, p. ii.

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

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

TABLE 1[35]

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

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

*Loan debt does not include any consolidation loans.

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

[35] *Federal Student Aid: Income Driven Plans*, U.S. DEPT. OF ED. (last visited February 27, 2018).

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

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

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

As Chapter 13 cases last between three to five years,[36] some debtors seek to continue to repay their student loans under their ED repayment plan[37] during the Chapter 13 case. A Chapter 13 plan may separately classify claims, and must provide the same treatment for all claims within a class.[38] For example, a Chapter 13 plan can have a class consisting of the secured mortgage lender, a class of secured automobile note holders, a class of priority tax debts, and a class of general unsecured creditors (credit cards, doctors' bills etc.). "The plan may designate a class or classes of unsecured claims . . . but may not discriminate unfairly against any class designated."[39] To put a substantially similar type of claim into a different class to treat it better or worse than the other similar claims is claims discrimination. There must be a valid reason to classify and treat seemingly similar claims differently.

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

If, however, the Chapter 13 plan classifies unsecured student loan debt separately from general unsecured debt, and the plan proposes that student loan debt receives the full monthly student loan repayment plan amount (at a higher percentage of repayment than to other unsecured creditors), the Chapter 13 trustee or a general unsecured creditor could object to plan confirmation, or the court could reject the Chapter 13 plan as proposed based on unfair discrimination within the unsecured debt class.[40]

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[36] 11 U.S.C. § 1322(d) (2012) (amended 2016).
[37] *See supra* Repayment of Student Loans.
[38] § 1322(a)(3), (b)(1).
[39] § 1322(b).
[40] McCullough v. Brown (In *re* Brown), 162 B.R. 506 (D. N.D. Ill. 1993) (reversing judgment, holding that debtors'

Recently, some bankruptcy courts now permit nondischargeable student loan debt to be classified separately from other general unsecured creditors.[41] When a bankruptcy court confirms a Chapter 13 plan in which the debtor separately classifies unsecured student loan debt to be paid at a rate that satisfies an ED repayment plan, the Chapter 13 debtor will make substantial and actual progress towards the repayment of that nondischargeable debt during the course of the bankruptcy case. For debtors enrolled in an IDR plan, the time spent making IDR payments while in bankruptcy also applies towards the total time required to attain student loan forgiveness under the IDR plan.

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

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

- Provide the debtor may not use the Chapter 13 plan to discharge all or part of the debtor's unpaid student loan (which is nondischargeable absent an undue hardship finding by the court);
- Identify the student loan(s);
- Confirm the debtor is not in default on Federal student loan debts;
- Provide the debtor may continue in or apply to enroll in IDR;
- Provide the amount of the debtor's monthly IDR plan payment and the day each payment is due;
- Indicate the student loan(s) creditor class;
- Indicate if IDR plan payment will be made through the Chapter 13 trustee's office or outside of the Chapter 13 plan by the debtor;

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plans, which provided for full payment of their student loans and payments of only 10 percent to other unsecured creditors, "discriminated unfairly" against the other unsecured creditors in violation of the Bankruptcy Code).

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

- Explicitly provide that the debtor waives 362(a) stay violation and 362(d) causes of action against ED for its communication, administrative processing, and recertification of the debtor's IDR plan; and
- Provide a process for debtor to exit the IDR plan voluntarily, and the consequences of a debtor's failure to pay the monthly IDR plan payment.

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

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

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

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

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

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

The Chapter 13 trustee may request assurances in the plan that the IDR plan payment will be remitted timely by the debtor, that delayed or missed IDR plan payments will not affect the Chapter 13 trustee's remittance to other creditors in the case, and that the Chapter 13 trustee's office will not be liable

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[42] *In re* Engen, 561 B.R. at 533 (citing Daniel A. Austin & Susan E. Hauser, Graduating with Debt: Student Loans under the Bankruptcy Code 69-70 (ABI, 2013). *See also In re* Potgieter, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010) ("[T]he separate classification of the debtor's student loan obligations does not violate Section 1122."); *In re* Coonce, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) (separate classification of student loan debt is permissible).
[43] *In re* Engen, 561 B.R. at 541.

to fund any missed IDR plan payments. The trustee's participation as a pass-through entity for debtor's IDR plan payments is as a courtesy to the debtor, with the mutual goal that the debtor with nondischargeable student loan debt will be in a better financial position at the conclusion of the bankruptcy case.

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

XII. Conclusion

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

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

ABOUT THE AUTHORS

❑ **Amanda L. Anderson** is a contract attorney at the Executive Office for United States Attorneys, Office of Legal and Victim Programs, Asset Recovery, focused on bankruptcy law and asset recovery on behalf of the United States government. Before assuming this role, Ms. Anderson served for over fifteen years at the Administrative Office of the United States Courts in Washington, D.C., in various attorney roles including Deputy Chief and Division Chief of the Bankruptcy Judges Division, and as a Senior Attorney in the Defender Services Office. Her portfolio included national policy development and implementation; legislation; publications; judgeship and clerks' office issues; and liaison and ombudsman for all bankruptcy judges. Previously, Ms. Anderson worked in private practice, with experience as both creditors' and debtors' counsel. She began her bankruptcy law career as a judicial law clerk to the Honorable Charles M. Caldwell, S.D. Ohio.
A graduate of the American University's Washington College of Law in Washington, D.C., and Tulane University in New Orleans, Louisiana, Ms. Anderson has been a frequent lecturer and guest speaker at judiciary, bankruptcy association, and bar association seminars and educational symposia on bankruptcy law, federal courts, and legislation.

❑ **Mark A. Redmiles** Mark A. Redmiles has served in a bankruptcy and financial litigation leadership capacity for the Department of Justice for over sixteen years. Since 2012, he has been the Assistant Director for Asset Recovery Staff with the Executive Office for U.S. Attorneys. Mr. Redmiles provides executive leadership to the asset forfeiture, bankruptcy, and financial litigation program areas and staff.

From 2002 to 2012, he was with the Executive Office for United States Trustees and was Deputy Director for five of those years. Mr. Redmiles also has served as a Professorial Lecturer in Law at the George Washington University Law School, where he has taught a Creditors' Rights and Debtors' Protection course.

Appendix 1: Federal Student Aid Portfolio Summary

Data Source: National Student Loan Data System (NSLDS)

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

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

Notes:

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

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

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

Appendix 2: Federal Student Loan Programs

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

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

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

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

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

FFELP loans include the following:

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

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

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

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

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

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

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

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

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

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

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

D. Federal Insured Student Loan Program (FISLP)

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

UNITED STATES BANKRUPTCY COURT
FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:
John Q. Debtor
Social Security No. xxx-xx-1234
Address:987 Street, Town US 12345-6789

Case No. 20-87654
Chapter 13

Debtor

NOTICE OF OBJECTION TO CLAIM

The Debtor above-named, through counsel, has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do no want the court to eliminate or change your claim, then on or before November 4, 2021, you or your attorney must file with the court a written response to the objection, explaining your position, at :

U.S. Bankruptcy Court, P.O. Box 26100, Greensboro, NC 27402-6100

If you mail your response to the court for filing, you must mail it early enough so that the court will receive it on or before the date stated above.

You must also send a copy to:

Law Offices of John T. Orcutt
Attn: **Edward Boltz**
1738-D Hillandale Road
Durham, N.C. 27705

U.S. Bankruptcy Administrator
101 South Edgeworth Street
Greensboro, NC 27401

Richard M. Hutson, II
Chapter 13 Trustee
P.O. Box 3613
Durham, N.C. 27702-3613

Attend the hearing on the objection, to be held only if a response is filed or if directed by the court on November 18, 2021, at 9:30 a.m. in Courtroom #1 Second Floor, of the United States Bankruptcy Court, located at 101 S. Edgeworth St., Greensboro, NC 27401.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Dated: September 28, 2021

LAW OFFICES OF JOHN T. ORCUTT, P.C.

/s Edward Boltz
Edward Boltz
N.C. State Bar No. 23003
1738-D Hillandale Road
Durham, N.C. 27705
Telephone: (919) 286-1695
Fax: (919) 286-2704
Email: eboltz@johnorcutt.com

UNITED STATES BANKRUPTCY COURT
FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:
John Q. Debtor

Social Security No. xxx-xx-1234
Address:987 Street, Town US 12345-6789

Case No. 20-87654
Chapter 13

Debtor

OBJECTION TO CLAIM

NOW COMES the Debtor above-named, through counsel, who respectfully object to the proof of claim # 1 filed by the creditor NAVIENT PC TRUST (hereinafter referred to as "said creditor"), dated September 9, 2020, for the following reasons:

Contested Matter

1. Pursuant to Federal Bankruptcy Rule 3006 and *In re Frank*, 322 B.R. 745 (Bankr. M.D.N.C. 2005), *affirmed by United States v. Frank*, 2006 U.S. Dist. LEXIS 16417 (M.D.N.C. 2006), this Objection to Claim is a contested matter and, accordingly, said creditor should be allowed neither to amend or withdraw its claim without hearing on notice to the Trustee, Debtor and Debtors' counsel.

Defense: Expiration of Statute of Limitations

2. Based upon information and belief, the last date of activity on this account with the original creditor was no later than on July 1, 2008, based on the date when Navient capitalized interest on this debt, as shown on the payment history attached hereto.

3. The history of the Debtor's payment periods and tolling due to prior bankruptcies is as following:

Event	Date	Statute of Limitations Time (3 years or 1096 days)
Loan Date	7/16/04	-
Capitalized Interest Date	7/1/08	-
09-82236 Filed	12/15/09	532
09-82236 Discharged	4/8/13	-
13-81601 § 108(c)(2) Date	5/9/13	-

13-81601 Filed	12/23/13	228
13-81601 Discharged	5/21/19	-
13-81601 § 108(c)(2) Date	6/20/19	-
20-80404 Filed	8/31/20	439
	Total:	1199

4. Given that the present bankruptcy was filed on August 31, 2020, more than three (3) years or 1096 days following the date of last activity, not including periods of time tolled by the Debtor's prior bankruptcies, such debt should be disallowed as exceeding the Statute of Limitations at N.C.G.S. § 1-52(1). *See In re Kittrell*, 2012 Bankr. LEXIS 633 (Bankr. M.D.N.C. Feb. 3, 2012).

WHEREFORE, the Debtor prays that the Court enter an Order disallowing the claim in its entirety. Dated: September 28, 2021

LAW OFFICES OF JOHN T. ORCUTT, P.C.

/s Edward Boltz

Edward Boltz
N.C. State Bar No. 23003
1738-D Hillandale Road
Durham, NC 27705
Telephone: (919) 286-1695
Fax: (919) 286-2704
Email: eboltz@johnorcutt.com

UNITED STATES BANKRUPTCY COURT
FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:
John Q. Debtor
Social Security No. xxx-xx-1234
Address:987 Street, Town US 12345-6789

Case No. 20-87654
Chapter 13

Debtor

AFFIDAVIT OF SERVICE

I, Cynthia Hunter, certify under penalty of perjury that I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age and that on September 28, 2021, I served copies of the foregoing **NOTICE OF OBJECTION AND OBJECTION TO CLAIM**:

By regular, **first-class United States mail**, addressed to:

Proof of Claim address:

NAVIENT PC TRUST
Attn: Officer or Managing Agent
C/O Navient Solutions, L.L.C.
Post Office Box 9640
Wilkes-Barre, PA 18773-9640

Non-FDIC, NC Secretary of State website verified address:

NAVIENT PC TRUST
Attn: Officer or Managing Agent
13865 Sunrise Valley Drive
Herndon, VA 20171

By **automatic electronic noticing** to:

U.S. Bankruptcy Administrator

Richard M. Hutson, II
Chapter 13 Trustee
/s Cynthia Hunter

Cynthia Hunter

Date	Description	Principal	Interest	Fees	Total	UnpaidPrincipalBalanceValue
########	LATE FEE	$0.00	$0.00	$18.89	$18.89	$19,231.44
########	LATE FEE	$0.00	$0.00	$18.89	$18.89	$19,231.44
########	LATE FEE	$0.00	$0.00	$18.89	$18.89	$19,231.44
########	LATE FEE	$0.00	$0.00	$19.58	$19.58	$19,231.44
########	LATE FEE	$0.00	$0.00	$19.58	$19.58	$19,231.44
2/4/2019	PAYMENT	$0.00	($16.18)	$0.00	($16.18)	$19,231.44
1/5/2019	PAYMENT	$0.00	($114.37)	$0.00	($114.37)	$19,231.44
1/5/2019	PAYMENT	$0.00	($293.91)	$0.00	($293.91)	$19,231.44
########	PAYMENT	$0.00	($204.15)	$0.00	($204.15)	$19,231.44
########	PAYMENT	$0.00	($408.30)	$0.00	($408.30)	$19,231.44
8/4/2018	PAYMENT	$0.00	($408.28)	$0.00	($408.28)	$19,231.44
7/5/2018	PAYMENT	$0.00	($147.75)	$0.00	($147.75)	$19,231.44
7/5/2018	PAYMENT	$0.00	($57.49)	$0.00	($57.49)	$19,231.44
6/4/2018	PAYMENT	$0.00	($61.29)	$0.00	($61.29)	$19,231.44
5/7/2018	PAYMENT	$0.00	($17.15)	$0.00	($17.15)	$19,231.44
5/7/2018	PAYMENT	$0.00	($44.08)	$0.00	($44.08)	$19,231.44
4/5/2018	PAYMENT	$0.00	($61.16)	$0.00	($61.16)	$19,231.44
3/5/2018	PAYMENT	$0.00	($61.12)	$0.00	($61.12)	$19,231.44
1/5/2018	PAYMENT	$0.00	($121.94)	$0.00	($121.94)	$19,231.44
########	PAYMENT	$0.00	($16.94)	$0.00	($16.94)	$19,231.44
########	PAYMENT	$0.00	($43.68)	$0.00	($43.68)	$19,231.44
########	PAYMENT	$0.00	($60.49)	$0.00	($60.49)	$19,231.44
########	PAYMENT	$0.00	($146.97)	$0.00	($146.97)	$19,231.44
8/4/2017	PAYMENT	$0.00	($33.91)	$0.00	($33.91)	$19,231.44
8/4/2017	PAYMENT	$0.00	($87.01)	$0.00	($87.01)	$19,231.44
7/7/2017	PAYMENT	$0.00	($57.18)	$0.00	($57.18)	$19,231.44
6/5/2017	PAYMENT	$0.00	($60.29)	$0.00	($60.29)	$19,231.44
5/5/2017	PAYMENT	$0.00	($60.24)	$0.00	($60.24)	$19,231.44
4/8/2017	PAYMENT	$0.00	($60.23)	$0.00	($60.23)	$19,231.44
3/4/2017	PAYMENT	$0.00	($60.06)	$0.00	($60.06)	$19,231.44
1/6/2017	PAYMENT	$0.00	($43.61)	$0.00	($43.61)	$19,231.44
1/6/2017	PAYMENT	$0.00	($16.97)	$0.00	($16.97)	$19,231.44
########	PAYMENT	$0.00	($120.99)	$0.00	($120.99)	$19,231.44
########	PAYMENT	$0.00	($57.80)	$0.00	($57.80)	$19,231.44
9/7/2016	PAYMENT	$0.00	($120.52)	$0.00	($120.52)	$19,231.44
8/5/2016	PAYMENT	$0.00	($60.17)	$0.00	($60.17)	$19,231.44
########	PAYMENT	$0.00	($60.17)	$0.00	($60.17)	$19,231.44
6/7/2016	PAYMENT	$0.00	($60.01)	$0.00	($60.01)	$19,231.44
5/5/2016	PAYMENT	$0.00	($59.93)	$0.00	($59.93)	$19,231.44
4/4/2016	PAYMENT	$0.00	($59.85)	$0.00	($59.85)	$19,231.44
3/4/2016	PAYMENT	$0.00	($57.80)	$0.00	($57.80)	$19,231.44
2/5/2016	PAYMENT	$0.00	($59.68)	$0.00	($59.68)	$19,231.44
1/8/2016	PAYMENT	$0.00	($59.13)	$0.00	($59.13)	$19,231.44
########	PAYMENT	$0.00	($59.83)	$0.00	($59.83)	$19,231.44
########	PAYMENT	$0.00	($59.73)	$0.00	($59.73)	$19,231.44
########	PAYMENT	$0.00	($59.98)	$0.00	($59.98)	$19,231.44
9/4/2015	PAYMENT	$0.00	($59.25)	$0.00	($59.25)	$19,231.44
8/6/2015	PAYMENT	$0.00	($59.16)	$0.00	($59.16)	$19,231.44
7/5/2015	PAYMENT	$0.00	($59.07)	$0.00	($59.07)	$19,231.44
6/4/2015	PAYMENT	$0.00	($58.98)	$0.00	($58.98)	$19,231.44
5/4/2015	PAYMENT	$0.00	($58.89)	$0.00	($58.89)	$19,231.44

4/4/2015	PAYMENT	$0.00	($57.80)	$0.00	($57.80)	$19,231.44
3/5/2015	PAYMENT	$0.00	($58.71)	$0.00	($58.71)	$19,231.44
1/5/2015	PAYMENT	$0.00	($56.45)	($59.77)	($116.22)	$19,231.44
########	UNKNOWN	($9,217.16)	$9,217.16	$0.00	$0.00	$19,231.44
########	CAPITALIZED INTEREST	$9,217.16	($9,217.16)	$0.00	$0.00	$28,448.60
########	PAYMENT	$0.00	$0.00	($52.02)	($52.02)	$19,231.44
########	LATE FEE	$0.00	$0.00	($13.39)	($13.39)	$19,231.44
########	LATE FEE	$0.00	$0.00	$13.39	$13.39	$19,231.44
########	LATE FEE	$0.00	$0.00	$13.39	$13.39	$19,231.44
########	LATE FEE	$0.00	$0.00	$13.39	$13.39	$19,231.44
########	LOAN SALE	$19,231.44	$6,725.93	$71.85	$26,029.22	$19,231.44
########	LATE FEE	$0.00	$0.00	$13.16	$13.16	$0.00
########	LATE CHARGE REVERSAL	$0.00	$0.00	($71.85)	($71.85)	$0.00
########	RESALE	($19,231.44)	($6,725.93)	$0.00	($25,957.37)	$0.00
########	LATE FEE	$0.00	$0.00	$13.16	$13.16	$19,231.44
########	CAPITALIZED INTEREST	($6,243.76)	$6,243.76	$0.00	$0.00	$19,231.44
########	CAPITALIZED INTEREST	$6,243.76	($6,243.76)	$0.00	$0.00	$25,475.20
########	CAPITALIZED INTEREST	($5,712.90)	$5,712.90	$0.00	$0.00	$19,231.44
########	CAPITALIZED INTEREST	$5,712.90	($5,712.90)	$0.00	$0.00	$24,944.34
########	LATE FEE	$0.00	$0.00	($9.90)	($9.90)	$19,231.44
########	LATE FEE	$0.00	$0.00	$9.90	$9.90	$19,231.44
########	LATE FEE	$0.00	$0.00	$9.90	$9.90	$19,231.44
########	CAPITALIZED INTEREST	$707.60	($707.60)	$0.00	$0.00	$19,231.44
7/9/2009	ADJUSTMENT	($50.00)	$0.00	$0.00	($50.00)	$18,523.84
7/9/2009	ADJUSTMENT	$50.00	$0.00	$0.00	$50.00	$18,573.84
########	LATE FEE	$0.00	$0.00	$9.53	$9.53	$18,523.84
5/8/2009	CAPITALIZED INTEREST	$418.04	($418.04)	$0.00	$0.00	$18,523.84
########	ADJUSTMENT	($50.00)	$0.00	$0.00	($50.00)	$18,105.80
########	ADJUSTMENT	$50.00	$0.00	$0.00	$50.00	$18,155.80
########	LATE FEE	$0.00	$0.00	$9.71	$9.71	$18,105.80
########	LATE FEE	$0.00	$0.00	$9.71	$9.71	$18,105.80
2/6/2009	CAPITALIZED INTEREST	$438.01	($438.01)	$0.00	$0.00	$18,105.80
########	ADJUSTMENT	($50.00)	$0.00	$0.00	($50.00)	$17,667.79
########	ADJUSTMENT	$50.00	$0.00	$0.00	$50.00	$17,717.79
########	LATE FEE	$0.00	$0.00	$10.02	$10.02	$17,667.79
########	CAPITALIZED INTEREST	$654.67	($654.67)	$0.00	$0.00	$17,667.79
9/4/2008	ADJUSTMENT	$50.00	$0.00	$0.00	$50.00	$17,013.12
9/4/2008	ADJUSTMENT	($50.00)	$0.00	$0.00	($50.00)	$16,963.12
########	LATE FEE	$0.00	$0.00	$9.82	$9.82	$17,013.12
7/1/2008	REPAYMENT FEE	$495.53	$0.00	$0.00	$495.53	$17,013.12
7/1/2008	CAPITALIZED INTEREST	$4,517.59	($4,517.59)	$0.00	$0.00	$16,517.59
########	DISBURSEMENT	$12,000.00	$0.00	$0.00	$12,000.00	$12,000.00


No Payments from disbursement date until
2014 Ch 13
Although loan was reported as part of original Ch 13
in '09, Creditor did not respond, and did not represent
the loan to judge or referee.

In re Engen

United States Bankruptcy Court for the District of Kansas

December 12, 2016, Decided

Case No. 15-20184, Chapter 13

Reporter
2016 Bankr. LEXIS 4251 *; 561 B.R. 523

In re: MARK H. ENGEN and MAUREEN E. ENGEN, Debtors.

Subsequent History: As Amended January 11, 2017.

LexisNexis® Headnotes

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > ... > Plans > Plan Confirmation > Confirmation Criteria

HN1[] Under Chapter 13, a debtor uses post-petition disposable income to pay prepetition debts under a confirmed plan over a three-to five-year commitment period. Debtors are above median income and propose a five-year commitment period. While debtors must provide for payment of priority claims under *11 U.S.C.S. § 507* in full over the life of the plan, they seldom pay nonpriority unsecured debt in full. The Court may confirm a plan failing to pay nonpriority unsecured debt in full if the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan. *11 U.S.C.S. § 1325(b)(1)(B)*. Thus, confirmed plans failing to pay all nonpriority unsecured debts retain a debt balance at the end of the commitment period. A full compliance discharge under *11 U.S.C.S. § 1328(a)* discharges the remaining balance. However, a *§ 1328(a)* discharge is subject to exceptions, and a debtor's liability for those debts excepted from discharge continues after plan completion. Student loans are one of those debts excepted from discharge under *§ 1328(a)*.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN2[] Debtors seeking a *11 U.S.C.S. § 523(a)(8)* undue hardship discharge are required to file an adversary proceeding under *Fed. R. Bankr. P. 7001(6)*. This bankruptcy litigation is sufficiently expensive, and so demanding, that debtors rarely even try to have student loan debt discharged. In a Chapter 13 case, debtors cannot seek an undue hardship discharge under *§ 523(a)(8)* until after completion by the debtor of all payments under the plan. *11 U.S.C.S. § 1328(a)*. Clearing *§ 523(a)(8)*'s undue hardship hurdle is challenging and confusing for debtors because the Code does not define what constitutes undue hardship.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN3[] *11 U.S.C.S. § 523(a)(8)* imposes harsher consequences on student loan debtors than those debtors who hold gambling debts or abuse most forms of consumer credit or, for that matter, other debts owed to the federal government. No other legitimately contracted consumer loan is subjected to the assumption of criminality. The result is that *§ 523(a)(8)* renders student loan debt presumptively nondischargeable while other *§ 523(a)* debts are "presumptively dischargeable." For student loan debts, debtors must prove dischargeability as opposed to other *§ 523(a)* exceptions which require creditors to prove nondischargeability.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

HN4[] 11 U.S.C.S. § 1322(b)(1) is permissive and allows debtors to designate and discriminate between unsecured creditors in a Chapter 13 plan as provided by 11 U.S.C.S. § 1122. 11 U.S.C.S. § 1322(b)(1). However, debtors may not discriminate unfairly. 11 U.S.C.S. § 1322(b)(1). Section 1122(a) allows the separate classification of claims that are substantially similar. In a Chapter 11 case, § 1129(b)(1) requires that a plan not discriminate unfairly, and is fair and equitable. 11 U.S.C.S. § 1129(b). In Chapter 13, § 1322(b)(1) contains the prohibition that the plan may not discriminate unfairly against any class designated for separate classification. The Code allows fair discrimination and in Kansas, the Model Form Chapter 13 Plan provides for separately classified creditors. Section 1122(a) only requires that dissimilar claims not be classified together. There is no requirement that all substantially similar claims be placed in the same class nor is there a prohibition against classifying substantially similar claims separately. Classification is simply the grouping together of claims with respect to which the plan proposes a common treatment. The fact that some unsecured creditors will receive more than others does not mean that discrimination is unfair; each case must be decided on its own merits.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Evidence > Burdens of Proof > Allocation

HN5[] Debtors bear the burden to show their proposed plan passes 11 U.S.C.S. § 1322(b)(1) scrutiny.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN6[] Both Chapter 11 and Chapter 13 allow separate classification of general unsecured debt but prohibit unfair discrimination, 11 U.S.C.S. §§ 1129(b) and 1322(b), and many courts have looked to cases interpreting one for assistance in applying the other. Support for this analysis stems from § 1322(b)'s specific reference to § 1122. However, unfair discrimination should be less stringent in Chapter 13 than in Chapter 11. First, in Chapter 11, voting class gerrymandering is a concern. In contrast, in Chapter 13, creditors do not vote and are protected by their ability to object to confirmation of a plan without fear of waiver from other creditors. Thus, unfair discrimination should be a less strict requirement in Chapter 13, to avoid giving each creditor the power to unduly hold up confirmation. Second, the allegations of unfair discrimination in Chapter 11 are likely to involve very different issues than those that arise in Chapter 13 and the results of a refusal to confirm the plan are drastically different. Chapter 13 unfair discrimination issues commonly include nondischargeable claims while nondischargeability infrequently affects unfair discrimination issues in Chapter 11.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN7[] Under 11 U.S.C.S. § 1141(d)(2), the 11 U.S.C.S. § 523(a) exceptions to discharge do not apply to a non-individual Chapter 11 plan of reorganization. Finally, if confirmation is denied, a business debtor under Chapter 11 may terminate operations and liquidate while an individual Chapter 13 debtor cannot simply cease to exist. Therefore, the unfair discrimination analysis under Chapter 13 should be more lenient than under Chapter 11.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN8[] In the context of 11 U.S.C.S. § 1322(b)(1), determining fairness is best left to the discretion of the first-line decision maker, the bankruptcy judge and the Court has wide discretion in determining whether

proposed discrimination is unfair discrimination.

Counsel: **[*1]** For Mark H Engen, Debtor: David A. Reed, Kansas City, KS.

For Maureen E. Engen, Joint Debtor: David A. Reed, Kansas City, KS.

Judges: Robert D. Berger, United States Bankruptcy Judge.

Opinion by: Robert D. Berger

Opinion

MEMORANDUM OPINION AND ORDER APPROVING SEPARATE CLASSIFICATION **AND DISCRIMINATION IN FAVOR OF STUDENT LOANS**

Confirmation of Debtors' Chapter 13 plan is pending before the Court.[1] William H. Griffin, the Chapter 13 trustee (Trustee), objects to confirmation and alleges Debtors' separate classification and favored treatment of presumptively nondischargeable student loans is unfairly discriminatory in violation of *11 U.S.C. § 1322(b)(1)*.[2] The Debtors propose a plan in which student loan creditors are paid as a separate class before other general unsecured creditors. The Court's reference to "separate classification" includes this favorable treatment. The Court, having reviewed the pleadings and counsels' arguments, overrules the Trustee's objection. Debtors' proposed plan satisfies *§ 1322(b)(1)* because Debtors' separate classification and favored treatment of student loans does not discriminate unfairly, and the student loan claims are substantially similar.[3]

VENUE AND JURISDICTION

This Court has jurisdiction over the parties and the subject **[*2]** matter pursuant to *28 U.S.C. §§ 157(a)* and *1334(a)* and *(b)*, and the Amended Standing Order of Reference of the United States District Court for the District of Kansas that exercised authority conferred by *§ 157(a)* to refer to the District's bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013.[4] Furthermore, this Court may hear and finally adjudicate this matter because it is a core proceeding pursuant to *28 U.S.C. § 157(b)(2)(L)*. The parties do not object to venue, jurisdiction or the Constitutional authority of this Court.

FINDINGS OF FACT

On February 4, 2015, husband and wife Mark Engen and Maureen Engen (Debtors) filed for Chapter 13 relief.[5] Debtors are above median income. On February 4, 2015, Debtors filed a Chapter 13 Plan (the Initial Plan).[6] On March 13, 2015, the Trustee filed an objection to confirmation of Debtors' Initial Plan because: (a) Debtors' original Form B22C reflected negative disposable income; (b) the Trustee requested documentation of Debtors' cell phone expenses; and (c) Debtors did not sufficiently address a mortgage balloon payment due to BMO Harris Bank (BMO).[7] On April 27, 2015, Debtors amended **[*3]** their means test calculation.[8] On May 4, 2015, Debtors filed an Amended Chapter 13 Plan (the Amended Plan).[9] On May 5, 2015, the Trustee objected to confirmation of Debtors' Amended Plan.[10] On January 23, 2016, David A. Reed entered his appearance as attorney of record for the Debtors.[11] On February 5, 2016, Debtors filed a

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[1] Doc. 52. Debtors, Mark H. Engen and Maureen E. Engen, appear by their attorney, David A. Reed, Kansas City, KS. Trustee, William H. Griffin, appears by Karie L. Fahrenholz, Roeland Park, KS.

[2] Doc. 27, 39, 57. All future statutory references are to the Bankruptcy Code (Code), as amended by the ***Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101-1532***, unless otherwise specifically noted.

[3] *See § 1322(b)(1)*.

[4] D. Kan. Standing Order No. 13-1, *printed in* D. Kan. Rules of Practice and Procedure at 168 (March 2016).

[5] Doc. 1.

[6] Doc. 4.

[7] Doc. 18.

[8] Doc. 23.

[9] Doc. 25.

[10] Doc. 27.

[11] Doc. 51. Debtors appeared by attorney, Teresa M. Kidd, Lenexa, KS, until January 23, 2016.

Fourth Amended Chapter 13 Plan (the Proposed Plan).[12]

The Debtors' proposed monthly plan payment is $4,983 per month, which will pay BMO Harris Bank NA (the first mortgagee) $15,412.46 without interest on account of its prepetition arrearage claim, $1,415.25 on account of a post-petition arrearage, and the principal due on the note in the amount of $115,622.99, all of which will pay the first mortgage note in full during the five-year commitment period.[13] Ocwen Financial's second mortgage position is stripped off under the Plan because it is wholly unsecured; Ocwen has not filed a proof of claim and the deadline has passed. The other secured debt paid under the Plan is to Hyundai Capital America for an auto loan in the amount of $34,646.87. The priority tax claims paid through the Plan for the Internal Revenue Service and the Kansas Dept. of Revenue aggregate $25,381.67; in **[*4]** addition, Debtors owe non-priority unsecured tax claims in the amount of $7,556.22. Non-priority general unsecured debt on which proofs of claim have been filed total $91,120.30, of which $64,791.59 are student loans. The Debtors propose to pay various administrative expenses under the Plan, including the Trustee's fee and the unpaid balance on administrative priority attorney fee claims. A summary of the proposed Plan treatment and prepetition payments to unsecured creditors is set out below. On February 8, 2016, Debtors filed an updated Form 122C which shows that their average monthly income is $12,126.00 and their monthly disposable income is -$1,122.23.[14] On February 24, 2016, the Trustee filed an objection to confirmation of Debtors' Proposed Plan as to the separate classification; there are no other objections to confirmation.[15]

Debtors' Proposed Plan treats student loan creditors Navient Solutions (Navient) and the U.S. Department of Education as separately classified creditors pursuant to *§ 1322(b)(1)*.[16] The Proposed Plan provides that separately classified student loan creditors will be paid without post-petition interest before other general unsecured claims. Together, the debts to Navient **[*5]** and the U.S. Department of Education comprise the Student Loan Claims. Navient's $34,281.77 claim arises from Mark Engen's Direct PLUS Loan with the U.S. Department of Education.[17] Mark is a parent borrower on behalf of his dependent son.[18] The U.S. Department of Education's $30,509.82 claim arises from student loans originated by Maureen Engen.[19] The total balance of the Student Loan Claims is $64,791.59.

Debtors' Proposed Plan states that the Student Loan Claims:

> [W]ill NOT share pro rata in the amount to be paid to general unsecured creditors as determined by Official Form 22C or the liquidated value of the estate pursuant to the "Best Interest of Creditors" test. Special Class Creditors will be paid pro rata with other specially classed creditors, if any, following payment of administrative claims, secured claims and priority claims in the manner provided by this Plan.[20]

Creditors have filed priority claims totaling $25,381.67, secured claims totaling $213,751.40, and general unsecured claims totaling $91,120.30. The Student Loan Claims of $64,791.59 comprise over 71 percent of the general unsecured claims.[21] Debtors' Proposed Plan also states: "Pay available **[*6]** funds, if any, to filed and allowed student loan claims. No available funds are

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[12] Doc. 52. Debtors' Proposed Plan resolved the Trustee's objection regarding BMO's claim.

[13] The anti-modification provision under *§ 1322(b)(2)* does not apply because the mortgage note balloons in 2018, which is during the five-year commitment period of the Plan.

[14] Doc. 54.

[15] Doc. 57. The Trustee originally objected to the Amended Plan—not the Proposed Plan. However, Debtors' Proposed Plan did not resolve the Trustee's student loan separate-classification objection.

[16] Doc. 52, at 9-10 ¶ 11.

[17] Claim 8-1. PLUS loans are federal loans for graduate students and parents of dependent undergraduate students.

[18] Parents cannot transfer a Direct PLUS Loan to a child. The parent is responsible for repaying the loan. *See Direct PLUS Loan Basics for Parents*, *http://www.studentaid.ed.gov/sa/sites/default/files/direct-loan-basics-parents.pdf* .

[19] Claim 24-1. The private creditor claim bar date was June 9, 2015, and August 5, 2015, for government creditors.

[20] Doc. 52, at 9 ¶ 11. A special class creditor is synonymous with a separately classified or separate class creditor under *§ 1322(b)(1)*.

[21] Under the Kansas Form Chapter 13 Plan, "general unsecured claims" refers to non-priority unsecured claims.

projected or anticipated."[22] Paragraph 12, titled Student Loan Obligations, of Debtors' Proposed Plan does not list the Student Loan Claims or reference their listing as separately classified creditors in paragraph 11.[23] Debtors' Proposed Plan would have paid a zero percent dividend to Student Loan Claims and a zero percent dividend to other general unsecured creditors—based on circumstances that existed at the time the Proposed Plan was filed. However, since the filing of their case, Maureen has received a pre-tax distribution in the amount of $73,269.34 as the beneficiary of a parent's IRA.[24] Since Maureen became entitled to this distribution more than 180 days after the filing of the case, then to the extent applicable, it does not fall within the ambit of *§ 541(a)(5)*. Nevertheless, Debtors concede that the beneficial IRA distribution is property of the estate under *§ 1306*, possibly freeing up assets or income for distribution to general unsecured claimants.[25] At this point, the distribution and use of the proceeds are not resolved. It is not necessary that it be resolved prior to this Court's ruling on separate classification. **[*7]** Regardless, even if there were not a pending issue with regard to the distribution, the issue as to separate classification is ripe for adjudication since Chapter 13 debtors' acquisition of post-petition property or material increase in income is a common occurrence.

The Trustee's May 5, 2015, objection to confirmation alleges Debtors' separate classification of the Student Loan Claims unfairly discriminates against general unsecured creditors in violation of *§ 1322(b)(1)*.[26] The Trustee asserts that under *Knowles*,[27] the nondischargeable nature of Debtors' student loans, without more, is insufficient to discriminate in favor of the Student Loan Claims.[28]

Debtors' initial brief asserts the separate classification of Student Loan Claims is fair under *§ 1322(b)(1)*.[29] Debtors voluntarily participated in a Debt Management Plan (DMP) through Money Management International (MMI) prior to seeking Chapter 13 relief.[30] Debtors deposited $79,445 with MMI from January 18, 2011, to November 17, 2014. MMI disbursed $78,629.98 to prepetition general unsecured creditors.[31] Debtors' MMI Account Summary[32] indicates that, prior to filing bankruptcy, and after interest and penalties charged by creditors during the repayment period, the Debtors **[*8]** paid down their non-student loan unsecured debts from $73,884.89 to $12,192.16—a net reduction of $61,692.73 over 47 months. All of Debtors' MMI payments went to unsecured creditors but "[a]bsolutely none of the $79,445 went to the student loan creditors."[33]

Unfortunately, Debtors' participation in MMI's DMP was not all positive. Debtors did reduce their general unsecured debt, but fell into default on their home mortgage and note and Student Loan Claims.[34] Further, to help fund their DMP, Debtors reduced their income tax withholdings.[35] This reduction resulted in an Internal Revenue Service priority tax claim of $22,277.06[36] and a Kansas Department of Revenue priority tax claim of $3,104.61.[37]

Debtors also rely on *Knowles*,[38] arguing that while "their plan appears to discriminate against the other

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[22] Doc. 52, at 10 ¶ 11.

[23] Doc. 52, at 9-10 ¶ 11 and 12.

[24] Doc. 62; Motion to Reconsider, Doc. 70.

[25] It is unclear whether the beneficial interest existed on the petition date, which could affect the liquidation test under ***§ 1325(a)(4)***; the beneficial interest was not listed on the Debtors' schedules.

[26] Doc. 27.

[27] *In re Knowles, 501 B.R. 409 (Bankr. D. Kan. 2013)*.

[28] Doc. 27.

[29] Doc. 41.

[30] *Id.* at 4.

[31] Doc. 41-1, at 2.

[32] *Id.* at 2-3.

[33] Doc. 41, at 4.

[34] *Id.*

[35] *Id.*

[36] Claim 6-2. For tax years 2011, 2012, 2013, and 2014. The Court was informed at the most recent hearing by the Trustee that additional liability is due for the tax year 2015. However, a proof of claim has not been filed by the obligee.

[37] Claim 2-2. For tax years 2012 and 2014. The Court was informed at the most recent hearing by the Trustee that additional liability is due for the tax year 2015. However, a proof of claim has not been filed by the obligee.

[38] *In re Knowles, 501 B.R. 409, 415 (Bankr. D. Kan. 2013)*.

general unsecured creditors, this treatment is not forbidden" because § 1322(b)(1) allows discriminatory treatment so long as a plan "does not discriminate unfairly."[39] Debtors contend the separate classification of the Student Loan Claims does not discriminate unfairly as "[n]early 80% of debtors [sic] unsecured debts [excluding student loans] were paid immediately prior to the filing of their bankruptcy case."[40] As noted, the Court's **[*9]** reference to "separate classification" contemplates the favorable treatment provided to the student loans in the separate class.

Go to table1

The Proposed Plan provides that the Student Loan Claims will be paid in full without post-petition interest before payment of other general unsecured claims. Under the Kansas Form Chapter 13 Plan, "general unsecured creditors" excludes unsecured priority claims. The MMI payments did not pay the non-student loan general unsecured debt in full because **[*10]** of the accrual of interest and penalties during the repayment period.

ANALYSIS

A. Law

The provisions of the Code applicable to this decision are §§ 523, 1122, 1129, 1322, and 1325.

Section 523(a)(8) provides:

> (a) discharge under section . . . 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
>
> (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 . . .

Section 1122 provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

Section 1129(b)(1) provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of **[*11]** this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Section 1322 in pertinent part provides:

> The plan—
>
> (3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class, . . .and
>
> (b) Subject to subsections (a) and (c) of this section, the plan may—
>
> (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; . . .
>
> (5) . . . provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due. . . .

Section 1325(a)(1) provides:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—

[39] Doc. 41, at 4-5.

[40] *Id.* at 5.

> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

HN1[] Under Chapter 13, a debtor **[*12]** uses post-petition disposable income to pay prepetition debts under a confirmed plan over a three-to five-year commitment period. Debtors are above median income and propose a five-year commitment period. While debtors must provide for payment of priority claims under § 507 in full over the life of the plan,[41] they seldom pay nonpriority unsecured debt in full. The Court may confirm a plan failing to pay nonpriority unsecured debt in full if "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."[42] Thus, confirmed plans failing to pay all nonpriority unsecured debts retain a debt balance at the end of the commitment period. A full compliance discharge under § 1328(a) discharges the remaining balance. However, a § 1328(a) discharge is subject to exceptions, and a debtor's liability for those debts excepted from discharge continues after plan completion. Student loans are one of those debts excepted from discharge under § 1328(a).[43]

B. Discharge of Student Loans and the Undue Hardship Test Under § 523(a)(8)

"Despite the continued **[*13]** growth of student loan debt, Congress has increasingly restricted a debtor's ability to discharge his or her student loans through bankruptcy."[44] In 1978, Congress added § 523(a)(8), prohibiting the discharge of federal student loans in a Chapter 7 proceeding unless they were due and owing for five years. "Congress was primarily concerned about abusive student debtors and protecting the solvency of student loan programs."[45] Congress wanted "to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings."[46] In 1990, Congress extended the nondischargeability provision to Chapter 13 full compliance discharge cases and extended the five-year waiting period to seven years.[47] In 1998, a Code revision eliminated all waiting periods as a means to discharge a student loan. In 2005, Congress added § 523(a)(8)(B), extending nondischargeability to private student loans—not only government-related student loans.[48] Under § 523(a)(8), student loans are nondischargeable, "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[49]

HN2[] Debtors seeking a § 523(a)(8) undue hardship discharge are required to file an adversary proceeding under Fed. R. Bankr. P. 7001(6).[50] This "bankruptcy litigation is sufficiently expensive, and . . . so demanding, that debtors rarely even try to have student

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[41] An exception to this requirement for assigned Domestic Support Obligations does not apply here. *See* § 1322(a)(4).

[42] **§ 1325(b)(1)(B)**.

[43] § 1328(a) incorporates **§ 523(a)(8)** by reference.

[44] Jennifer Grant & Lindsay Anglin, Student Loan *Debt: The Next Bubble*?, 32-11 Am. Bankr. Inst. J. 44, 44 (2013). *See also* Brendan Baker, *Deeper Debt, Denial of* ***[*14]*** *Discharge: The Harsh Treatment of* Student Loan *Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. Pa. J. Bus. L. 1213, 1218 (2012) ("[L]egislation . . . shows a clear progression towards complete nondischargeability of all forms of student loans in bankruptcy.").

[45] Educ. Credit Mgmt. Corp v. Polleys (In re Polleys), 356 F.3d 1302, 1309 (10th Cir. 2004). *See also* Santa Fe Med. Svcs., Inc. v. Segal (In re Segal), 57 F.3d 342, 348 (3rd Cir. 1995) ("Congress sought principally to protect government entities and nonprofit institutions of higher education . . . from bankruptcy discharge.").

[46] Polleys, 356 F.3d at 1306. *But see* Baker, supra note 44, at 1217 (indicating that when the 1970 Bankruptcy Act Commission considered the issue "less than one percent of government-backed loans were discharged in bankruptcy) (citing H.R. Doc. No. 93-137, pt. 1, at 178 n.5 (1973)).

[47] Grant, *supra* note 44, at 44.

[48] *Id*.

[49] **§ 523(a)(8)**.

[50] *But see* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 262, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (finding that "[a]lthough the Bankruptcy Court's failure to find undue hardship was a legal error, the confirmation order is enforceable and binding on [the creditor] because it had actual notice of the error and failed to object or timely appeal."). Unless otherwise noted, all references to Rules herein are to the Federal Rules of Bankruptcy Procedure.

loan debt discharged."[51] In a Chapter 13 case, debtors cannot seek an undue hardship discharge under § 523(a)(8) until "after completion by the debtor of all payments under the plan."[52] Clearing § 523(a)(8)'s undue hardship hurdle is challenging and confusing for debtors because the Code does not define what constitutes undue hardship. Courts apply a variety of judicially formulated tests that are frequently criticized by commentators because debtors "must establish a certainty of hopelessness to achieve a discharge."[53]

For many debtors, achieving an undue hardship discharge is an exercise in futility. In 2010, a U.S. Bankruptcy Court found that a man suffering from diabetes and kidney disease leading to legal blindness had not shown the requisite certainty of hopelessness, despite the Social **[*15]** Security Administration's finding that his blindness constituted a permanent disability.[54] One bankruptcy court noted that "hardship discharges are rarely granted other than in the case of a debtor's death."[55] HN3[↑] Section 523(a)(8) imposes harsher consequences on student loan debtors than those debtors who hold gambling debts or abuse most forms of consumer credit[56] or, for that matter, other debts owed to the federal government. "No other legitimately contracted consumer loan . . . is subjected to the assumption of criminality. . . ."[57] The result is that § 523(a)(8) "renders student loan debt presumptively nondischargeable" while other § 523(a) debts are "presumptively *dischargeable*."[58] For student loan debts, debtors must prove dischargeability as opposed to other § 523(a) exceptions which require creditors to prove nondischargeability. Section 523(a)(8) sets a "near-impossible burden for which reform is needed."[59]

C. Chapter 13 Separate Classification and Discrimination

HN4[↑] Section 1322(b)(1) is permissive and allows debtors to designate and discriminate between unsecured creditors in a Chapter 13 plan as provided by § 1122.[60] However, debtors may not discriminate unfairly.[61] Section 1122(a) allows the separate **[*16]** classification of claims that are substantially similar. In a Chapter 11 case, § 1129(b)(1) requires that a plan "not discriminate unfairly, and is fair and equitable."[62] In Chapter 13, § 1322(b)(1) contains the prohibition that the plan may not discriminate unfairly against any class designated for separate classification. The Code allows fair discrimination[63] and in Kansas, the Model Form Chapter 13 Plan provides for separately classified creditors.[64] Section 1122(a) only requires that "dissimilar claims not be classified together."[65] "There

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[51] Daniel A. Austin, Student Loan *Debt in Bankruptcy: An Empirical Assessment*, 48 Suffolk U.L. Rev. 577, 582 (2015).

[52] § 1328(a). *See also* Bender v. Educ. Credit Mgmt. Corp. (In re Bender), 368 F.3d 846 (8th Cir. 2004) (stating that undue hardship should be determined at the time of discharge, not at commencement of the **§ 523(a)(8)** proceeding); Raisor v. Educ. Loan Serv. Ctr., (In re Raisor), 180 B.R. 163 (Bankr. E.D. Tex. 1995) (dismissing as premature a student loan dischargeability action when filed seven months after the Chapter 13 plan, but three years before the plan's scheduled completion).

[53] Grant, *supra* note 44, at 45. In the 10th Circuit, the test is less rigorous. In re Polleys, 356 F.3d at 1308.

[54] Wallace v. Educ. Credit Mgmt. Corp. (In re Wallace), 443 B.R. 781 (Bankr. S.D. Ohio 2010).

[55] In re Cummins, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001).

[56] Jane Quinn, *Student Loans: Time to Reform the Law That Treats Debtors Like Crooks* (Sept. 24, 2010, updated Dec. 13, 2013), http://www.cbsnews.com/news/student-loans-time-to-reform-the-law-that-treats-debtors-like-crooks/ .

[57] Baker, supra note 44, at 1217 (quoting H.R. Rep. No. 94-1232, at 75 (1976), reprinted in H.R. Rep. No. 95-595, at 149 (1977), and 1978 U.S.C.C.A.N. 5963, 6110).

[58] United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 277 n.13, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (italics in original); 3 BANKR. SERVICE L. ED. § 27:1524 (citing cases holding that student loans are presumptively nondischargeable).

[59] Grant, *supra* note 44, at 88.

[60] *See* § 1322(b)(1).

[61] *Id*.

[62] **§ 1129(b)(1)**.

[63] Stephen L. Sepinuck, *Rethinking Unfair Discrimination in Chapter 13*, 74 Am. Bankr. L.J. 341, 341 (2000).

[64] D. Kan. Standing Order No. 12-1, *printed in* D. Kan. Rules of Practice and Procedure at 119 (March 2016), *available at* http://www.ksb.uscourts.gov/images/local rules/SO 12 1.pdf .

[65] 7 COLLIER ON BANKRUPTCY ¶ 1122.03[1], at 1122-6 to 1122-7 (Alan N. Resnick & Henry J. Sommer, eds. 16th ed. 2016).

is no requirement that all substantially similar claims be placed in the same class nor is there a prohibition against classifying substantially similar claims separately."[66] "Classification is simply the grouping together of claims with respect to which the plan proposes a common treatment."[67] The fact that some unsecured creditors will receive more than others does not mean that discrimination is unfair; "[e]ach case must be decided on its own merits."[68]

Separate classification makes "Chapter 13 flexible and more attractive to Debtors . . . [and] encourage[s] debtors to file Chapter 13 proceedings instead of Chapter 7." **[*17]** [69] On motion and after notice and a hearing, bankruptcy courts may rule on the classification of claims under *Rule 3013*.[70] Several cases have held that the nondischargeable nature of student loan debt is sufficient to allow separate classification.[71] "[C]ourts have allowed the separate classification of debts that would be nondischargeable in a chapter 7 case, reasoning that Congress itself indicated a policy choice to distinguish such debts."[72] Public policy also supports the separate classification of student loans.[73] Student loans adversely affect a debtor's ability to pay debt before and after bankruptcy. This difficulty is amplified by the loan's nondischargeable nature and negatively impacts the economy and lenders. Failing to allow separate classification and favorable treatment of student loans leads to a disharmonious outcome under the Code in which student loans are special enough not to discharge unless the rigorous undue hardship test is met, but not sufficiently special to separately classify. Separate classification is proper under the Code and student loans "can be classified separately from other types of Schedule F nonpriority unsecured debt."[74] The issue before the Court is whether Debtors' proposed **[*18]** separate classification and favorable treatment of the Student Loan Claims is unfairly discriminatory under *§ 1322(b)(1)*.[75] ***HN5***[↑] Debtors bear the burden to show their Proposed Plan passes *§ 1322(b)(1)* scrutiny.[76]

D. Judicially Formulated *§ 1322(b)(1)* Unfair Discrimination Tests

HN6[↑] Both Chapter 11 and Chapter 13 allow separate classification of general unsecured debt but prohibit unfair discrimination[77] and "many courts have looked to cases interpreting one for assistance in

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[66] *In re City of Colorado Springs Spring Creek Gen. Improv. Dist., 187 B.R. 683, 687 (Bankr. D. Colo. 1995)*.

[67] *In re Bentley, 266 B.R. 229, 236 (B.A.P. 1st Cir. 2001)*.

[68] *In re Kovich, 4 B.R. 403, 407 (Bankr. W.D. Mich. 1980)*.

[69] James B. McLaughlin, Jr., and Robert W. Nelms, *Classification of Unsecured Claims in Chapter 13 of the Bankruptcy Reform Act of 1978: What is Fair?*, 7 CAMPBELL L. REV. 329, 346 (1985).

[70] This is a seldom used procedure in Chapter 13.

[71] *See In re Gregg, 179 B.R. 828 (Bankr. E.D. Tex. 1995)* (finding that separate classification for nondischargeable student loans was not unfairly discriminatory against other unsecured creditors); *In re Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991)* (holding that a Chapter 13 plan properly placed an educational loan into a special class and allowed payment at a higher rate than other unsecured debts); *In re Freshley, 69 B.R. 96 (Bankr. N.D. G a. 1987)* (holding that Congressional intent encouraging repayment of student loans is a sufficient basis for separate classification and is not unfairly discriminatory to other unsecured creditors).

[72] 8 COLLIER ON BANKRUPTCY ¶ 1322.05[2], at 1322-18-19 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2016). *See also Freshley, 69 B.R. at 98*.

[73] *See In re Sullivan, 195 B.R. 649 (Bankr. W.D. Tex. 1996)* (prompt payment of some student loans may warrant separate classification and more favorable treatment because nonpayment of federally guaranteed loans imposes a direct burden on taxpayers); *Freshley, 69 B.R. 96* (underlying policy choices of Congress to encourage repayment of student loans provides a sufficient basis for the debtor's separate classification).

[74] 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).

[75] *See McCullough v. Brown (In re Brown), 162 B.R. 506, 508 (N.D. Ill. 1993)* (explaining that the right to separately classify student loans is not an issue; the only issue is that of unfair discrimination, which is different from classification).

[76] *Groves v. LaBarge (In re Groves), 39 F.3d 212, 214 (8th Cir. 1994)*; *In re Janssen, 220 B.R. 639, 643 (Bankr. N.D. Iowa 1998)*.

[77] ***§§ 1129(b)*** and *1322(b)*.

applying the other."[78] Support for this analysis stems from § 1322(b)'s specific reference to § 1122. However, unfair discrimination should be less stringent in Chapter 13 than in Chapter 11.[79] First, in Chapter 11, voting class gerrymandering is a concern. In contrast, in Chapter 13, creditors do not vote and are protected by their ability to object to confirmation of a plan without fear of waiver from other creditors. Thus, "unfair discrimination should be a less strict requirement in Chapter 13, to avoid giving each creditor the power to unduly hold up **[*19]** confirmation."[80] Second, "the allegations of unfair discrimination [in Chapter 11] are likely to involve very different issues than those that arise in Chapter 13 and the results of a refusal to confirm the plan are drastically different."[81] Chapter 13 unfair discrimination issues commonly include nondischargeable claims while nondischargeability infrequently affects unfair discrimination issues in Chapter 11.[82] HN7[↑] Under § 1141(d)(2), the § 523(a) exceptions to discharge do not apply to a non-individual Chapter 11 plan of reorganization. Finally, if confirmation is denied, a business debtor under Chapter 11 may terminate operations and liquidate while an individual Chapter 13 debtor cannot simply cease to exist.[83] Therefore, the unfair discrimination analysis under Chapter 13 should be more lenient than under Chapter 11.

Within the context of Chapter 11, much of the litigation regarding separate classification of claims arises from a debtor's efforts to separately classify large deficiency claims associated with the strip down of debts secured by commercial real estate. These efforts are seldom met with success,[84] but in another aspect of **[*20]** Chapter 11 proceedings, it is insightful that unsecured creditors who are critical to a debtor's reorganization efforts are frequently paid in order to keep the doors of a business open.[85] A Chapter 11 debtor requests this special treatment in what are colloquially referred to as First Day Motions.[86] As a result, prepetition creditors may be paid for prepetition debts at the onset of Chapter 11 proceedings, well before it is determined whether the debtor-in-possession will successfully reorganize or liquidate its assets under a plan or under a § 363 sale. It is disconsonant to allow such relief to a Chapter 11 business, but not to allow a debtor to separately classify a student loan debt. Chapter 11 business debtors are not entitled to greater benefits of reorganization than Chapter 13 consumer debtors.

Cases have reached varying outcomes on whether a Chapter 13 plan that separately classifies *and* provides favorable treatment to student loan creditors is **[*21]** unfairly discriminatory under § 1322(b)(1). The Code does not define unfair discrimination and "courts have struggled to define the limits of unfair discrimination under § 1322(b)(1)."[87] Courts "have developed a variety of tests, criticized them, and then continued to apply them."[88] "[D]ecisions have run the gamut of everything goes to nothing is allowed."[89] It has been observed that, "a majority of courts have reached the wrong result in a significant percentage of the cases involving claims of unfair discrimination" regarding debtors favoring

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[78] Sepinuck, supra note 63, at 348.

[79] Id. at 349. *See also* Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L.J. 227, 245 (1998) (indicating that Chapter 11 unfair discrimination analysis needs a tougher standard than Chapter 13 because the Chapter 13 standard needs to address stalwarts raising unfair discrimination as an absolute right).

[80] Sepinuck, supra note 63, at 349. *See also* Markell, supra note 79, 245 (indicating that a Chapter 13 creditor or the standing trustee may "holdup confirmation if a court adopts a strict test of unfair discrimination.").

[81] Sepinuck, supra note 63, at 351.

[82] *Id.*

[83] *Id.*

[84] ROBERT J. ROSENBERG, ET AL., A LENDER'S PARTICIPATION IN A CHAPTER 11 CASE § 13[2] at 72-73 n.5 (2009); DAVID R. KUNEY & ALEX R. ROVIRA, THE SINGLE ASSET REAL ESTATE CASE BASIC PRINCIPLES AND STRATEGIES 127-131 (2012).

[85] *See* 2 COLLIER ON BANKRUPTCY ¶ 105.02[4][a], at 105-20 to 105-24 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2016).

[86] DEBRA I. GRASSGREEN, ET AL. FIRST DAY MOTIONS 58-68 (3rd ed. 2012).

[87] In re Knowles, 501 B.R. 409, 415 (Bankr. D. Kan. 2013); In re Bentley, 266 B.R. 229, 237 (B.A.P. 1st Cir. 2001). *See also* Sepinuck, supra note 63, at 342.

[88] Sepinuck, supra note 63, at 342.

[89] In re Hill, 4. B.R. 694, 697 (Bankr. D. Kan. 1980).

nondischargeable student loan claims.[90] HN8[↑] Determining fairness is best left to the discretion of the "first-line decision maker, the bankruptcy judge"[91] and "[t]he Court has wide discretion in determining whether proposed discrimination is unfair discrimination."[92]

A multitude of judicially created methods examine when discrimination is unfair. The Strict Approach from *Iacovoni*[93] forbids any discrimination unless explicitly authorized by the Code. *Iacovoni's* specific holding was superseded by statute.[94] The Flexible Approach advanced in *Sutherland*[95] treats § 1322(b)(1)'s unfair discrimination provision as requiring no more than compliance with § 1325(a)(4)'s best interests of the creditors test. However, **[*22]** the *Sutherland* holding "effectively renders the prohibition [against unfair discrimination] meaningless, reading it out of the Code entirely"[96] and "courts have shown no enthusiasm for this approach."[97] The Balance Approach in *McCullough*[98] requires the debtor to "place something material onto the scales to show a correlative benefit to the other unsecured creditors."[99] The Balance Approach has not received much deference and "fails to provide a way to consider other strong public policies that may justify discriminatory treatment."[100] The Reasonableness Approach examines whether the proposed discrimination is reasonable.[101] This test "leaves the matter to the personal views and values of the judges without providing any real guidance, predictability, or consistency."[102] The Reasonableness Approach fails because it "simply replaces the vague term 'unfair' with the equally vague term 'reasonable.'"[103] The Bright-Line Approach,[104] Percentage of Repayment Approach,[105] and Interest of Debtor Approach[106] have also attracted minority attention. However, the Multifactor Approach is the most common method of examining unfair discrimination.[107]

The Multifactor Approach comprises factors initially **[*23]** developed in *Kovich*.[108] In approving discriminatory Chapter 13 plans favoring a codebtor and a claim for back rent, the *Kovich* court held:

> Each case must be decided on its own merits. [1] Is there a reasonable basis for the classification? [2] Is the debtor able to perform a plan without the classification? [3] Has the debtor acted in good

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[90] Sepinuck, supra note 63, at 342.

[91] Knowles, 501 B.R. at 416 (quoting In re Crawford, 324 F.3d 539, 542 (7th Cir. 2003)).

[92] Knowles, 501 B.R. at 415.

[93] 2 B.R. 256 (Bankr. D. Utah 1980).

[94] In 1984, Congress amended § 1322(b)(1) allowing separate classification of codebtor claims as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), H.R. 5174, 98th Cong. (1984).

[95] 3 B.R. 420 (Bankr. W.D. Ark. 1980).

[96] Sepinuck, supra note 63, at 353. See also In re Cook, 26 B.R. 187, 189 (D.N.M. 1982); In re Dziedzic, 9 B.R. 424, 426 (Bankr. S.D. Tex. 1981).

[97] Sepinuck, supra note 63, at 353.

[98] McCullough v. Brown (In re Brown), 162 B.R. 506 (N.D. Ill. 1993).

[99] Id. at 517-18.

[100] Sepinuck, supra note 63, at 354.

[101] See, e.g., In re Alicea, 199 B.R. 862, 866 (Bankr. D.N.J. 1996); Lawson v. Lackey (In re Lackey), 148 B.R. 626, 632 (Bankr. N.D. Ala. 1992); In re Lawson, 93 B.R. 979, 982 (Bankr. N.D. Ill. 1988); In re Furlow, 70 B.R. 973, 978 (Bankr. E.D. Pa. 1987).

[102] Sepinuck, supra note 63, at 360.

[103] Id.

[104] Courts advanced various bright-line tests so creditors would know when discrimination was unfair to avoid litigating every disparate treatment. See In re Chandler, 210 B.R. 898 (Bankr. D.N.H. 1997); In re Taylor, 137 B.R. 60 (Bankr. W.D. Okla. 1992); In re Strickland, 181 B.R. 598 (Bankr. N.D. Ala. 1995); In re Colley, 260 B.R. 532 (Bankr. M.D. Fla. 2000).

[105] Courts apply tests based on the percentage of repayment of student loan debt and other unsecured debt to determine when unfair discrimination occurs. See In re Sullivan, 195 B.R. 649 (Bankr. W.D. Tex. 1996), In re Williams, 253 B.R. 220 (Bankr. W.D. Tenn. 2000).

[106] Courts allowed discrimination as fair if it rationally furthered an articulated, legitimate interest of the debtor. See In re Hamilton, 102 B.R. 498 (Bankr. W.D. Va. 1989), In re Lawson, 93 B.R. 979 (Bankr. N.D. Ill. 1988).

[107] Sepinuck, supra note 63, at 354.

[108] In re Kovich, 4 B.R. 403 (Bankr. W.D. Mich. 1980).

> faith in the proposed classifications? . . . [4] Are they [the class being discriminated against] receiving a meaningful payment or is the plan just a sham?[109]

These judicially created factors do not originate in the Code, nor did *Kovich* explain their origin.[110] While *Sutherland*[111] and *Iacovoni*[112] "attempt to read sections of the Code out of existence or ignore them completely,"[113] the Multifactor Approach "appear[s] to read sections *into* the Code."[114] Nevertheless, subsequent decisions embraced similar factors because the Multifactor Approach provided a way to analyze unfair discrimination "somewhere between total whim and an Act of God."[115] As courts applied the Multifactor Approach, it evolved into the following Four-Part Test:

> (1) whether the discrimination has a reasonable basis;
> (2) whether the debtor can carry out a plan without the discrimination;
>
> (3) whether the discrimination **[*24]** is proposed in good faith; and
>
> (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination.[116]

The Four-Part Test also elicited criticism with "wildly disparate results" because "the test relies upon abstract, undefined notions of reasonableness, legitimacy, and good faith."[117] None of the tests are without detractors and all seem too inflexible to accommodate the diversity of cases that the Court considers. A totality of the circumstances standard may be more appropriate.

The Tenth Circuit has not considered unfair discrimination under *§ 1322(b)(1)*.[118] Bankruptcy courts in the Tenth Circuit have used the aforementioned Four-Part test from *Leser*[119] and *Wolff*,[120] along with the Baseline Test from *Bentley*.[121] *Bentley* established the Baseline Test which looks at whether, despite the different treatment for each classification, the plan nevertheless offers each class benefits and burdens equivalent to those the class would receive under a Chapter 13 plan without separate classification.[122] The Baseline Test considers the following principles:

> (1) equality of distribution;
> (2) nonpriority of student loans;
> (3) mandatory versus optional contributions; and
>
> (4) the debtor's **[*25]** fresh start.[123]

Several courts applying the aforementioned examinations have found the separate classification of student loan debt in Chapter 13 fair under *§ 1322(b)(1)*.[124]

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[109] *Id. at 407* (bracketed numbers added).

[110] *Sepinuck, supra note 63, at 355*. *See also* McLaughlin, *supra* note 69, at 345.

[111] *3 B.R. 420*.

[112] *2 B.R. 256*.

[113] McLaughlin, *supra* note 69, at 344-45.

[114] *Id*. at 345 (emphasis in original).

[115] *In re Hill, 4 B.R. 694, 698 (Bankr. D. Kan. 1980)*.

[116] *In re Thibodeau, 248 B.R. 699 (Bankr. D. Mass. 2000)*; *In re Christophe, 151 B.R. 475 (Bankr. N.D. Ill. 1993)*; *In re Chapman, 146 B.R. 411 (Bankr. N.D. Ill. 1992)*; *Matter of Keel, 143 B.R. 915 (Bankr. D. Neb. 1992)*;(*In re Labib-Kiyarash), 271 B.R. 189 (B.A.P. 9th Cir. 2001)*; *McDonald v. Sperna (In re Sperna), 173 B.R. 654 (B.A.P. 9th Cir. 1994)*; *In re Bernal, 189 B.R. 507 (Bankr. S.D. Cal. 1995)*; *In re Carlson, 276 B.R. 653 (Bankr. D. Mont. 2002)*; *In re Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993)*; *In re Anderson, 173 B.R. 226 (Bankr. D. Colo. 1993)*; *In re Pora, 353 B.R. 247 (Bankr. N.D. Cal. 2006)*; *In re Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007)*; *In re Brown, 500 B.R. 255 (Bankr. S.D. Ga. 2013)*; *In re Leser, 939 F.2d 669 (8th Cir. 1991)*; *In re Wolff, 22 B.R. 510, (B.A.P. 9th Cir. 1982)*.

[117] *In re Bentley, 266 B.R. 229, 238 (B.A.P. 1st Cir. 2001)* (internal quotations omitted).

[118] *In re Knowles, 501 B.R. 409, 416 (Bankr. D. Kan. 2013)*; *In re Mason, 300 B.R. 379, 383 n.9 (Bankr. D. Kan. 2003)*.

[119] *939 F.2d 669*.

[120] *22 B.R. 510*.

[121] *266 B.R. 229*.

[122] *Knowles, 501 B.R. at 415*.

[123] *Bentley, 266 B.R. at 240-43*.

[124] *See In re Brown, 500 B.R. 255 (Bankr. S.D. Ga. 2013)* (debtor curing default complies with *§1322(b)(1)* when separate

The various tests seem too inflexible to properly reflect the discretion that this Court has with respect to confirmation of a Chapter 13 plan that contains a separately classified creditor. Judge Posner acknowledged the difficulty of establishing a test for separate classification:

> We haven't been able to think of a good test ourselves. We conclude, at least provisionally, that this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decision maker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of the relevant law, which in this case is Chapter 13 of the Bankruptcy Code; and to uphold his determination unless it is unreasonable (an abuse of discretion).[125]

Perhaps the various tests can function as a starting point for the Court's analysis, but none of the tests should stand as a rigid barrier to confirmation of the Debtor's plan. If such were the case, then the discretion of the bankruptcy court would be the unfortunate victim. Regardless, this **[*26]** Court shall embark on analysis of the Debtor's proposed separate classification employing the *Bentley* Baseline Test. The Court will then move on to a broader discussion of the separate classification that more accurately contemplates the facts of this case.

E. APPLYING THE *BENTLEY* BASELINE TEST SHOWS DEBTORS' PROPOSED TREATMENT DOES NOT DISCRIMINATE UNFAIRLY.

Bankruptcy courts in the District of Kansas apply the Baseline Test when considering *§ 1322(b)* challenges to the separate classification of student loans.[126] As a preliminary analysis or starting point, the Court will do so here. As discussed below, the Court does not limit its analysis to the *Bentley* Baseline Test.

1. Equality of Distribution

On its face, Debtors' Proposed Plan is discriminatory—that is the point of separate classification. However, the Code permits fair discrimination.[127] Here, while dividends on general unsecured claims are unknown, should a dividend occur during the Debtors' Chapter 13 commitment period, Debtors' Proposed Plan pays the Student Loan Claims without post-petition interest prior to other general unsecured claims. Despite this

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classification pays 78 percent of student loan debt and only 1 percent of unsecured debt); *Matter of Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012)* (discriminatory classification favoring student loan that decreased general unsecured recovery from 20 percent to 15 percent allowed to preserve debtor's participation in the Public Service Loan Forgiveness program); *In re Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009)* (separate classification and more favorable treatment of long-term student loan debt over general unsecured creditors was not unfairly discriminatory, at least not when debtor's default would potentially jeopardize her professional license); *In re Webb, 370 B.R. 418, 425-26 (Bankr. N.D. Ga. 2007)* (confirming debtors' separate classification "because Debtors will suffer needless accrual of interest and penalties . . . and unsecured creditors will enjoy a disproportionally small benefit otherwise."); *In re Cox, 186 B.R. 744 (Bankr. N.D. Fla. 1995)* (while debtors' proposal to pay nondischargeable student loans outside their plan may be discriminatory, it is not unfair since such treatment is specifically allowed by *§ 1322(b)(5)*); *In re Willis, 189 B.R. 203, 205 (Bankr. N.D. Okla. 1995)* (quoting *Lawson, 93 B.R. at 984*) ("discrimination is 'fair,' and therefore permissible, to the extent, and only to the extent, that is rationally furthers an articulated, legitimate interest of the debtor"); *In re Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993)* (holding that a Chapter 13 plan providing a 29 percent payment to unsecured creditors and 100 percent to student loan creditors did not discriminate unfairly because the unsecured creditors would receive nothing if debtors' case were converted to a Chapter 7); *In re Dodds, 140 B.R. 542, 543 (Bankr. D. Mont. 1992)* (holding that the debtors' plan satisfied *§§ 1322(b)(1)* and *(5)* because treating student loan debt as a long-term obligation is one possibility of satisfying the confirmation standard against unfair discrimination); *Matter of Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992)* (holding that a Chapter 13 plan's placement of student-loan debt in a separate class that provided for payment of that debt before other unsecured creditors did not unfairly discriminate against unsecured creditors because the plan provided for 100 percent of all unsecured claims and the student loan claims were nondischargeable); *In re Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991)* (allowing a Chapter 13 plan to place student loans in a separate class and pay them 100 percent while only paying 15 percent to unsecured creditors as long as the unsecured creditors do not receive less than they would in a Chapter 7 liquidation); *In re Freshley, 69 B.R. 96 (Bankr. N.D. Ga. 1987)* (holding that Congressional intent encouraging the repayment of student loans is sufficient grounds for a debtor's separate classification of those debts in a Chapter 13 plan and that such classification does not unfairly discriminate against unsecured creditors).

[125] *In re Crawford, 324 F.3d 539, 542 (7th Cir. 2003)*.

[126] *In re Salazar, 543 B.R. 669, 673-76 (Bankr. D. Kan. 2015)*; *Knowles, 501 B.R. at 416-18*; *In re Stull, 489 B.R. 217, 220-21 (Bankr. D. Kan. 2013)*; *Mason, 300 B.R. at 386-87*.

[127] *§ 1322(b)(1)*. *Sepinuck, supra note 63, at 341*.

distribution, Debtors' Proposed Plan is fair as Debtors' non-student loan unsecured creditors **[*27]** received a significant prepetition dividend that discriminated against the Student Loan Claims.

MMI applied Debtors' total voluntary payments to Debtors' prepetition non-student loan unsecured debt in the amount of $78,629.98.[128] Non-student loan unsecured creditors were paid down $61,692.73—a prepetition dividend of 83 percent—to the detriment of the Student Loan Claims. The difference between the total payments and the debt reduction is the accrual of additional interest and penalties during the repayment period of four years. If the total payments to MMI had been made through a Chapter 13 plan, the non-student loan unsecured debt may have been paid in full because post-petition interest would not have accrued. Even with interest and fees, Debtors would have at least $61,692.73 more general unsecured debt to pay through their Proposed Plan, if Debtors had not voluntarily reduced their prepetition debt through MMI. Had Debtors not so dramatically paid down non-student loan general unsecured debt, any potential future payments to that debt under Debtors' Proposed Plan would be substantially less on a pro-rata basis. Debtors' prepetition voluntary participation in MMI's DMP benefited unsecured **[*28]** creditors by decreasing the general unsecured claim amounts. The Court cannot ignore Debtors' prepetition actions.[129] Debtors' Plan properly proposes delaying or reducing potential distributions to non-student loan general unsecured creditors who in effect received a net prepetition 83 percent dividend at the expense of Debtors' Student Loan Claims and taxes. Debtors' proposed discrimination is permissible as the effect may equalize distributions between the Student Loan Claims and Debtors' prepetition unsecured debt. However, the Court does not solely hang its hat on Debtors' prepetition payments as other considerations warrant separate classification of Debtors' Student Loan Claims.

2. Nonpriority of Student Loans

This seems a rather curious factor since if student loan debt were a priority claim, then the Debtors' Plan would have to provide for payment in full of the debt; clearly *§ 1322(b)(1)* contemplates separate classification of non-priority unsecured claims. The Student Loan Claims are not entitled to priority status under *§ 507(a)*. Additionally, Student Loan Claims are presumptively nondischargeable under the Code.[130] "The choice Congress made to impart student loan debt with nondischargeable status **[*29]** sends a strong signal of intent that should not be easily ignored."[131] Thus, Congress intended the Student Loan Claims to receive *favored* status.[132]

The *Bentley* court opined that:

> . . .nondischargeability is not, and does not entail, priority as to any distribution in or through bankruptcy; it merely permits the holder to continue to enforce the debt after bankruptcy . . . . Accordingly, as far as the Code is concerned, nothing in the nature of the claims at issue here warrants or justifies treating student loans more favorably than the others.[133]

This Court respectfully disagrees. The policy behind many nondischargeable claims is based on society's interest in preventing mischievous debtors from usurping prior bad acts—false pretenses or fraud,[134] embezzlement and larceny,[135] intentional torts,[136]

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[128] Doc. 41, at 4. This is the aggregate net payment after deduction of the administrative fee of $815.02. The total payments to MMI were $79,445.00.

[129] *In re Nittler, 67 B.R. 217 (D. Kan. 1986)* (bankruptcy court failed to adequately consider prepetition conduct).

[130] Absent a showing of undue hardship. *See* ***§ 523(a)(8)***. *See also § 1322(b)(1)*. Of course, the shadow of *United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)*, looms over Chapter 13 plan confirmation and the binding effects of confirmation.

[131] *In re Webb, 370 B.R. 418, 426 (Bankr. N.D. Ga. 2007)*.

[132] *In re Knowles, 501 B.R. 409, 419 (Bankr. D. Kan 2013)*. *See also Sepinuck, supra note 63, at 386* ("[T]he vast majority of courts have recognized that at least in some contexts a nonpriority claim may be favored in Chapter 13.").

[133] *266 B.R. at 241*.

[134] ***§ 523(a)(2)***.

[135] ***§ 523(a)(4)***.

[136] ***§ 523(a)(6)***.

criminal restitution,[137] tax debts,[138] and domestic support obligations.[139] These debts are logically nondischargeable as they were: (a) wrongfully incurred--such as those for fraud, embezzlement, restitution, and other wrongdoing; (b) to protect innocent children to ensure an orderly society—child support obligations; or (c) to provide for familial obligations such as alimony and division of debts **[*30]** and property. The rationale behind nondischargeability of these debt groups is either punitive in nature, or designed to curtail rewards for "certain socially undesirable behaviors."[140] Unlike most of these nondischargeable debts, "the policy behind the non-dischargeability of student loans is fundamentally different from the policies behind the Code's other non-dischargeability designations."[141] The Congress acknowledged the uniqueness that is student loan debt while drafting the Bankruptcy Reform Act of 1978.

> [E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and relying for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future. In addition, there have been abuses of the system by those seeking freedom from educational debts without ever attempting to repay.[142]

Among *§ 523(a)*'s nondischargeable debts, student loans stand alone as the only debt "incurred for a supposedly socially beneficial purpose."[143] If repayment of the loans relies upon Debtors' future income, then a Chapter 13 plan seems an appropriate means to accomplish this **[*31]** task.

Debtors with student loan obligations face a quagmire. Without separate classification, debtors may face a higher debt burden after bankruptcy than before. This Court respectfully disagrees with other courts' holdings that without more, nondischargeability of student loans is an insufficient reason for discriminating in favor of Student Loan Claims.[144] This Court is not alone on this position.[145] Regardless, this Court does not limit its rationale to the singular factor of nondischargeability.

Sustaining the Trustee's objections would result in a smaller potential dividend to the Student Loan Claims. Debtors' Student Loan Claims will increase during the pendency of their five-year Proposed Plan as nondischargeable interest accumulates.[146] Thus, a large portion of nondischargeable debt would remain after Debtors complete their Proposed Plan, because Debtors' Student Loan Claims comprise 71 percent of their total unsecured debt. Debtors may owe more on their Student Loan Claims after completing their Proposed Plan and may owe more debt than before filing.[147] This **[*32]** hardly seems a result the Congress intended. Student loans are nondischargeable because the "Congress wishes to protect the government's fiscal health as a guarantor (or lender) of these loans."[148] Allowing Debtors to treat their Student Loan Claims favorably ahead of other general unsecured creditors furthers Congressional intent and protects the government's and

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[137] ***§ 523(a)(13)***.

[138] ***§ 523(a)(1)***.

[139] ***§ 523(a)(5)***.

[140] DEANNE LOONIN & PERSIS S. YU, ET AL., STUDENT LOAN LAW § 11.9.3, at 234 (National Consumer Law Center, 5th ed. 2015, updated at *http://wwwnclc.org*).

[141] *Id.*

[142] H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 133, *reprinted* in 1978 U.S. Code Cong. & Ad. News 5963, 6094.

[143] Roger Roots, *The* Student Loan *Crisis: A Lesson In Unintended Consequences*, *29 SW. U. L. Rev. 501, 513 (2000)*.

[144] *See In re Simmons, 288 B.R. 737 (Bankr. N.D. Tex. 2003)*.

[145] *In re Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007)*.

[146] AUSTIN AND HAUSER, *supra* note 74.

[147] *In re Knowles, 501 B.R. 409, 419 (Bankr. D. Kan. 2013)* (acknowledging that the nondischargeability rule combined with the nondiscrimination rule may result in debtors "owing more on their student loans after completion of their plan than before filing for Chapter 13 relief because of accumulation of equally nondischargeable interest that will accrue."); *In re Salazar, 543 B.R. 669, 670 (Bankr. D. Kan. 2015)* (noting that "[b]ecause interest on nondischargeable debts continues to accrue while a debtor is performing under a Chapter 13 plan but cannot be paid unless the debtor is paying all the unsecured claims in full, a debtor with student loan debts runs a very real risk of paying into a plan for three to five years only to find that she finishes her plan owing more on those debts than she did when she filed bankruptcy.").

[148] *Knowles, 501 B.R. at 418*.

the student loan program's fiscal health.[149]

Some courts that deny separate classification rely on the negative inference that "Congress has not granted student loan claims a priority in the bankruptcy distribution scheme, but it did bestow such status on support claims."[150] This Court respectfully disagrees. This reasoning could render the separate classification provision superfluous if it were so construed, a disfavored outcome.[151] As discussed below, this erroneous interpretation ignores case law that approved separate classification of familial support before that obligation was awarded priority status. Just because student loans are not entitled to priority under § 507(a) does not preclude debtors from separately **[*33]** classifying them with more favorable treatment under § 1322(b)(1). There are many reasons why Congress may have excluded student loans from § 507(a)'s priority treatment. First, granting student loans priority status may disqualify many debtors from Chapter 13 relief as § 1322(a)(2) requires full payment of § 507(a) priority claims. "[I]t would be impossible for many debtors with outstanding student loans to pay them all off during a three-year or five-year plan."[152] Unlike other § 507(a) priorities, many student loans are not incurred based on the debtor's ability to pay.[153] "Support obligations are created under judicial auspices after taking into account the debtor's income and expenses. Income taxes necessarily represent a fraction of income."[154] Some debtors carry large support and tax debts, "but such should not be the norm."[155] However, in this Court's experience, increasingly large and problematic student loan debt is increasing. Additionally, "student loans . . . are usually incurred without regard to the debtor's current budget and may well prove to be beyond the debtor's short-term budget once the education is over."[156] A blanket grant on priority status precluding debtors from qualifying for Chapter 13 relief runs afoul of "Congress's **[*34]** preference that individual debtors use Chapter 13 instead of Chapter 7."[157] Notably, prior to the Code's 1994 amendments, "most courts permitted favored treatment of support claims before they were accorded priority."[158] Equally, the Code does not disallow separately classifying student loan claims even though they are not priority.[159] The Code and public policy also allow separate classification of § 523(a)(15) obligations even though non-support familial

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[149] Over the ten-year period from 2015 to 2024, the Congressional Budget Office projects a net gain (profit) of roughly $135 billion from the Department of Education's student loan program based on the procedures currently used in the federal budget as prescribed by the Federal Credit Reform Act of 1990 (FCRA). Although, critics note a loss of $88 billion is projected using a fair-value approach. *See Fair-Value Estimates of the Costs of Selected Federal Credit Programs for 2015 to 2024*, CONGRESSIONAL BUDGET OFFICE, *available at* https://www.cbo.gov/publication/45383 .

[150] *See* Sepinuck, supra note 63, at 385.

[151] Geiger v. Kawaauhau, 523 U.S. 57, 62, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998).

[152] Sepinuck, supra note 63, at 385.

[153] Santa Fe Med. Svcs., Inc. v. Segal (In re Segal), 57 F.3d 342, 348 (3d Cir. 1995) (noting that student loans "are not based upon a borrower's proven credit-worthiness"). There are few underwriting requirements for government-backed student loans. "The Stafford, Perkins and PLUS loans do not depend on your credit score. The Stafford and Perkins loans are available entirely without regard to your credit history. The PLUS loan, however, requires that the borrower not have an *adverse credit history*. An adverse credit history is defined as being more than 90 days late on any debt or having any Title IV debt within the past five years subjected to default determination, bankruptcy discharge, foreclosure, repossession, tax lien, wage garnishment, or write-off." *See How do Federal Student Loans Use Credit*, THE SMART STUDENT GUIDE TO FINANCIAL AID, FINAID (2016), http://www.finaid.org/loans/creditscores.phtml (italics in original).

[154] Sepinuck, supra note 63, at 385 n.241. Some courts allowed the separate classification of domestic support claimants before ***BAPCPA*** defined domestic support obligations under ***§ 101(14A)*** and granted them priority status under ***§ 507(a)(1)***. ***198 A.L.R. Fed. 605*** (originally published in 2004).

[155] Sepinuck, supra note 63, at 385 n.241.

[156] Id. at 385-86 n.241. They are usually incurred by young college students who are not at the pinnacle of their financial acumen, or by parents who are desperate to support their children's aspirations for higher education.

[157] In re Bateman, 515 F.3d 272, 279 (4th Cir. 2008) (quoting McDonald v. Master Financial (In re McDonald), 205 F.3d 606, 614 (3d Cir. 2000) (internal quotations omitted)). *See also* In re Jackson, 2006 Bankr. LEXIS 4327, at *3 (Bankr. N.D. Ga. Mar. 16, 2006).

[158] Sepinuck, supra note 63, at 386.

[159] *Id.*

obligations are dischargeable under 1328(a).[160]

3. Mandatory Versus Optional Contributions

Generally, this factor examines a debtor's disposable income under the means test. The result of this test sets the mandatory contributions an above median income debtor must make to a Chapter 13 plan. Courts have looked favorably on debtors contributing additional funds to separate classification creditors in excess of what the means test requires.[161] Here, Debtors are not offering anything in addition to what is mandatorily required. However, Debtors voluntarily **[*35]** contributed $79,445 in prepetition funds to reduce their non-student loan general unsecured debt balance, after interest and fees, by 83 percent. Therefore, the third factor of the Baseline Test is neutral as applied to the Debtors and afforded little weight.

4. The Debtor's Fresh Start

A fundamental goal of the Code is allowing an honest, but unfortunate debtor a fresh start.[162] The Code is comprised of statutes of equity, and the "bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be 'inconsistent' with the Bankruptcy Code."[163] The fresh start is not absolute,[164] and bankruptcy courts must provide fair treatment to creditors. Congress intended more debtors to seek relief under Chapter 13 instead of Chapter 7.[165] Debtors not permitted to favor student loans in Chapter 13 risk not receiving a fresh start and may elect conversion to Chapter 7 in which unsecured creditors typically receive little to nothing.

Debtors have a legitimate interest in reducing the burden of their nondischargeable Student Loan Claims through their Proposed Plan.[166] "The amendment making such [student] loans nondischargeable in chapter **[*36]** 13 cases came as part of a federal budget balancing package, which suggests that its purpose was to serve a societal interest in maximizing the payments on such [student] loans."[167] Further, "the Code specifically permits debtors to cure defaults and maintain payments on long-term debts on which the final payment is due after the final payment of the plan, [and] a number of courts have permitted debtors to separately classify student loan debts for the purpose of providing them that specified treatment in a plan."[168]

Bentley stated that nondischargeability "*merely* permits the holder to continue to enforce the debt after bankruptcy."[169] In this context, use of the word *merely* is misplaced because a full compliance discharge is one of the most important aspects of the Debtors' bankruptcy. A discharge benefits not only the debtor and his family, but imparts a benefit to the economy and society as a whole. A student loan's nondischargeability, coupled with the government's collection powers, tips the scales in favor of separate classification.

Here, Debtors' Student Loan Claims are long-term debts under *§ 1322(b)(5)*,[170] and account for over 71 percent of their total unsecured debt. Debtors incurred substantial **[*37]** burdens by voluntarily discriminating

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[160] HENRY J. SOMMER & MARGARET DEE MCGARITY, COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 8.07[3], at 8-65 (2016).

[161] *See In re Stull, 489 B.R. 217, 224 (Bankr. D. Kan. 2013)* (plan does not unfairly discriminate by allowing debtor to pay his student loan claim from funds he receives in excess of his projected disposable income); *In re Knowles, 501 B.R. 409, 419-20 (Bankr. D. Kan. 2013)* (Debtors' discretionary income above their Code-computed projected disposable income can be voluntarily contributed to payment of student loans).

[162] *Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007)*.

[163] *In re Beaty, 306 F.3d 914, 922 (9th Cir. 2002)* (citing *In re Myrvang, 232 F.3d 1116, 1124 (9th Cir. 2000)*).

[164] *Grogan v. Garner, 498 U.S. 279, 286-87, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)*.

[165] *In re Bateman, 515 F.3d 272, 279 (4th Cir. 2008)*.

[166] 8 COLLIER ON BANKRUPTCY, *supra* note 72, ¶ 1322.05[2][a], at 1322-20.

[167] *Id.* (Footnote omitted.) *See also* ***Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990)***.

[168] 8 COLLIER ON BANKRUPTCY, *supra* note 72, ¶ 1322.05[2][a], at 1322-20.

[169] *Bentley, 266 B.R. at 241* (emphasis added).

[170] *In re Jackson, 2006 Bankr. LEXIS 4327, at *10 (Bankr. N.D. Ga. Mar. 16, 2006)*.

in favor of their other unsecured creditors prepetition. They fell into default on nondischargeable tax obligations and their mortgage note. Debtors are properly employing Code provisions permitting separate classification of their Student Loan Claims. Separately classifying Debtors' Student Loan Claims is permitted if Congress intended *§ 1322(b)(1)* to have any meaning, and if not student loans, then what debt? We allow separate classification of other creditors "with a special relationship to the debtor or with claims of a special nature. Courts have sometimes approved more favored treatment for doctors, landlords, trade creditors necessary for continued operation of a business, attorneys, and even banks from which future credit is needed"[171]

F. THE STUDENT LOAN COLOSSUS OR HOW STUDENT LOANS ARE SIGNIFICANTLY DIFFERENT FROM OTHER GENERAL UNSECURED DEBT

> The industry warnings are urgent and often dire: The housing market could stall. Marriages are being postponed. Workers won't have the savings to retire. The nation's food supply will be disrupted. They point to one threat: soaring student debt.
>
> A tripling **[*38]** of student debt over the past decade to more than $1.3 trillion has unleashed a torrent of Washington lobbying from outside the education sector, with various industries depicting a "crisis" they say requires federal intervention.[172] The U.S. government over the last 15 years made a trillion-dollar investment to improve the nation's workforce, productivity and economy. A big portion of that investment has now turned toxic, with echoes of the housing crisis.[173]

Much has changed in the 15 years since the *Bentley* Baseline test was adopted, and it is appropriate to look beyond the confines of that test. Student loans are unique and should be separately classified as the Code permits. Debtors' circumstances are such that separate classification and favorable discrimination of their Student Loan Claims are permissible under

§ 1322(b)(1). Both the text and purpose of the Code point to this conclusion. Student loans are different because unlike other nondischargeable debts, it is not the debtor's misconduct in acquiring the loans **[*39]** that supports nondischargeability.[174] Although acquiring an education without intending to pay for it is wrongful, "any such 'wrongdoing' is a function of the discharge itself, it was not what created the debt."[175] Further, the Code's fraud[176] and good faith provisions,[177] combined with the Chapter 13 trustee's powers, are intended to flush out such misdeeds.[178] Thus, the idea that student loans are nondischargeable to avoid fraud and a free ride is inaccurate. The Code already contains ample provisions to address fraud and debtors are allowed to keep other services or property acquired on unsecured credit. Further, as discussed *supra*,[179] student loans are unlike other types of *§ 523(a)* debt where the dischargeability rationale is based on society's interest in preventing mischievous debtors from usurping prior bad acts.

Student loans are also different because Congress has an interest in protecting the fiscal health of the federal

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[171] HENRY J. SOMMER, ET AL., CONSUMER BANKRUPTCY LAW AND PRACTICE § 12.4.3 at 339 (National Consumer Law Center, 11th ed. 2016) (citing *In re Hill, 4 B.R. 694 (Bankr. D. Kan. 1980)* (physicians, dentists, lawyers); *In re* Kovich, 4. B.R. 403 (Bankr. W.D. Mich. 1980) (landlord); *In re Sutherland, 3 B.R. 420 (Bankr. W.D. Ark. 1980)* (trade creditors, medical debts, banks)).

[172] Josh Mitchell, *Groups Push for Debt Relief—Farmers, real-estate agents and other say* student-loan *level threaten industries*, WALL STREET JOURNAL, Sept. 14, 2016, at A3.

[173] Josh Mitchell, *THE OUTLOOK: College Loan Glut Turns Sour*, WALL STREET JOURNAL, June 6, 2016, at A2.

[174] *See supra* Analysis C.

[175] *Sepinuck, supra note 63, at 381*.

[176] ***§ 523(a)(2)***.

[177] *See* ***§§ 1325(a)(3)*** and ***(a)(7)***. Debtors must propose plans and file petitions in good faith.

[178] It has been suggested that bankruptcy courts have a duty to review chapter 13 bankruptcy plans. *See United Student Aid Funds, Inc., v. Espinosa, 559 U.S. 260, 276-77, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)* ("the Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of *§§ 1328(a)(2)* and ***523(a)(8)***).

[179] Analysis C.

student loan program.[180] In furtherance of this goal, the government has enormous collection powers on federal student loans. The government may:

> garnish a borrower's wages without judgment, seize the borrower's tax refund (even an earned income tax credit), seize portions **[*40]** of federal benefits such a Social Security, and deny the borrower eligibility for new education grants or loans . . . and charge fees that often create ballooning balances.[181]

Under *§ 1095a* of the Higher Education Act, holders of defaulted student loans may garnish up to ten percent of the debtor's disposable income.[182] Further, the ten percent limit applies to a single garnishment by an individual note holder, not the cumulative maximum limit on a debtor's disposable income.[183] While the *Consumer Credit Protection Act* provides a cumulative limit of 25 percent on multiple garnishments,[184] practicality may limit cooperation between multiple claim holders without the debtor's intervention. Additionally, the government may reach further than private lenders by setting off tax refunds, Social Security, and other government benefits. Student loan debts have been subject to pernicious scams and collection efforts.[185]

Further, "[u]nlike any other type of debt, there is *no statute of limitations*. The government can pursue borrowers to the grave."[186] Congress stated that "[i]t is the purpose of this subsection to ensure that obligations to repay **[*41]** loans . . . are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced."[187] Conversely, the Internal Revenue Service generally may only pursue collection on assessed taxes "within 10 years after the assessment of the tax."[188] Demanding student loan repayment helps assure the fiscal integrity of the federal student loan program as taxpayers are left on the hook when debtors default. "Thus, to the extent that courts regard efforts to favor student loans as focusing 'solely on the interests of the debtor,' and the debtor's fresh start they miss the point."[189] Separate classification and favored treatment of student loans furthers the congressional goal of protecting the federal student loan program.

Originally, the federal student loans were "intended as a program of last resort for college students seeking to finance their educations."[190] Now, "[n]o longer can the average student from the lower middle classes hope to enter and exit a postsecondary institution with a valuable degree without, to some extent, participating in the guaranteed student loan program."[191] The increasing student loan burden **[*42]** has far reaching implications from recent graduates to the elderly. For many recent graduates it delays marriage,[192] defers car purchases,[193] postpones home ownership,[194] inhibits saving for

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[180] *Santa Fe Med. Svcs., Inc. (In re Segal), 57 F.3d 342, 348 (3rd Cir. 1995)*. *See also Sepinuck, supra note 63, at 382*.

[181] *Supra* note 131, § 6.1.3.1, at 74.

[182] *20 U.S.C. § 1095a*.

[183] *Halperin v. Reg'l Adjustment Bureau, Inc., 206 F.3d 1063 (11th Cir. 2000)*.

[184] *15 U.S.C. § 1673*.

[185] Michael J. Bologna, *CFPB, Ags Confront Student Debt-Relief Scams*, BNA'S BANKRUPTCY LAW REPORTER (March 24, 2016), *http://www.bna.com/cfpb-ags-confront-n57982068778/* .

[186] *Supra* note 140, § 6.1.3.1, at 75 (emphasis added). The Higher Education Technical Amendments of 1991 (HETA) eliminated all statutes of limitations on actions to recover on defaulted federally guaranteed student loans. *See also 20 U.S.C. § 1091a*.

[187] *20 U.S.C. § 1091a*.

[188] *26 U.S.C. § 6502(a)(1)*.

[189] *Sepinuck, supra note 63, at 383* (footnote omitted).

[190] *Roots, supra note 143, at 504*.

[191] *Id. at 523*.

[192] Rebecca Ungarino, *Burdened with Record Amount of Debt, Graduates Delay Marriage* (Oct. 7, 2014), *http://www.nbcnews.com/business/personal-finance/burdened-record-amount-debt-graduates-delay-marriage-n219371* .

[193] Halah Touryalai, *Backlash:* Student Loan *Burden Prevents Borrowers From Buying Homes, Cars* (June 26, 2013), *http://wwwforbes.com/sites/halahtouryalai/2013/06/26/backlash-student-loans-keep-borrowers-from-buying-homes-cars/#6d8275a477c5* .

[194] *Id.* Bob Bryan, *Young Americans have gone from being home owners to student debt holders*, (Dec. 1, 2015),

retirement,[195] and even hinders dating after college.[196] "[S]everal studies show that debt is also associated with significant mental and physical health problems, particularly in young people."[197] One study "linked debt to high blood pressure as well as poor self-reported mental and general health."[198] These stressors are not isolated on the debtor as their reach negatively impacts a debtor's family. Graduates saddled with high student loan debt are less likely to serve the public as they seek out high-income post-graduation employment opportunities.[199] "Those pursuing careers in securities or licensed professionals, such as attorneys and accountants, may face difficulties with licensing boards who can and do regard financial insolvency as a valid reason for the refusal to grant a license to work in a chosen profession."[200] For the elderly, student debt is becoming a growing concern as those 65 and older in 2013 had outstanding education loans of $18.2 billion compared with $2.8 billion in 2005.[201] For Americans age 65-74, 27 percent **[*43]** of student loans were in default; for those age 75 and older more than half of student loans were in default.[202] The elderly are particularly at risk because the government may garnish Social Security payments.[203] Borrowers of all ages are also subject to abusive collection practices as evidenced by the Consumer Financial Protection Bureau's acknowledgement to "clean up the student loan servicing market."[204] Separate classification is the right answer for student loan debt as "Chapter 13 protection increases annual earnings by $5,562, decreases five-year mortality by 1.2 percentage points, and decreases five-year foreclosure rates by 19.1 percentage points."[205]

As of June 30, 2016, outstanding student **[*44]** loan debt reached $1.259 trillion and comprised ten percent of household debt—ahead of credit card debt at six percent and automobile debt at nine percent.[206] To place this aggregate student loan balance in perspective, it exceeds the annual gross domestic product of all but the 11 largest economies in the world, including the economies of Russia, Spain and Mexico.[207] "Student loans are by far the fastest growing component of non-housing consumer debt."[208] Student loans ranked first in the percent of balances that were more than 90 days delinquent—ahead of credit cards, mortgages, auto loans, and home equity lines of credit.[209] Many student

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http://www.businessinsider.com/student-debt-prevents-house-buying-2015-11 .

[195] American Student Assistance, *Retirement Delayed: The Impact of Student Debt on the Daily Lives of Older Americans*, at 3 (2015), http://www.asa.org/site/assets/files/3680/retirement delayed.pdf .

[196] Karen Farkas, Student loan debt is viewed as 'baggage' in relationships, survey shows, CLEVELAND.COM (August 9, 2016 at 10:20 a.m.), http://www.cleveland.com/metro/index.ssf/2016/08/student loan debt is viewed as.html .; Nicole Audrey, *Student Debt Puts a Damper on Dating After College*, NBCNEWS.COM (August 7, 2016 at 2:25 p.m. ET, http://wwwnbcnews.com/feature/college-game-plan/student-debt-puts-damper-dating-after-college-n623871 .

[197] Abby Abrams, How Student Loan Debt Hurts Your Health (June 11, 2014), http://time.com/2854384/student-loan-debt-health/ .

[198] *Id.*

[199] Roots, supra note 143, at 522.

[200] Id. at 519.

[201] Natalie Kitroeff, *Student Debt May Be the Next Crisis Facing Elderly Americans* (Dec. 18, 2015), http://www.bloomberg.com/news/articles/2015-12-18/student-debt-may-be-the-next-crisis-facing-elderly-americans .

[202] *Id.*

[203] *Id.*

[204] Maggie McGrath, *Discover Slammed By CFPB For Illegal* Student Loan *Servicing Practices* (July 22, 2015), http://www.forbes.com/sites/maggiemcgrath/2015/07/22/discover-slammed-by-cfpb-for-illegal-student-loan-servicing-practices/#52662dcdc17c .

[205] Will Dobbie & Jae Song, *Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection*, 105(3) AMERICAN ECONOMIC REVIEW 1272 (2015).

[206] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, August 2016, available at: https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC 2016Q2.pdf .

[207] Statistics Times, *Projected GDP Ranking (2015-2020)*, http://statisticstimes.com/economy/projected-world-gdp-ranking.php (last visited Nov. 23, 2016).

[208] Austin, supra note 51, at 577.

[209] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, August 2016, available at:

loan borrowers now "shoulder educational debt loads that were unimaginable to their parents' generation."[210] Notably, "borrowers with the smallest debts are most likely to default," indicating that borrowers who run up six figure debts are not the source of trouble.[211] This predicament "now threatens the nation's economic growth"[212] and potentially widens the wealth and income disparity. The massive shift of the skyrocketing costs of college education to the middle class over the last three decades has replaced the decreased government subsidization of public colleges **[*45]** and universities. It is accurate to classify student loan debt as singular in identity since borrowers are in effect compensating for the reduced tax revenue allocated to post-secondary education. Adjusted for inflation, the cost to attend a four-year public university has increased 331% since 1983.[213] This societal tax burden has created what is in effect individual taxation to the public university attendee, much of which is funded by student loan borrowing.

In 2007, Congress attempted to alleviate student debt stress by introducing the income-based-repayment plan.[214] The income-based-repayment plan allows borrowers to make reduced loan payments based on a percentage of income regardless of the borrower's chosen occupation.[215] The outstanding balance is then forgiven after 20-25 years of timely payments.[216] Importantly, unlike other government sponsored forgiveness programs,[217] the forgiven debt is considered taxable income under the Internal Revenue **[*46]** Code.[218] Borrowers with forgiven debt under the income-based-repayment plan may easily face enormous tax burdens.[219] "Thus the debtor is asked to exchange one non-dischargeable debt, a student loan debt, for another non-dischargeable debt, a tax debt, which is not much progress towards the fresh start envisioned by the Bankruptcy Code."[220] For many borrowers, and especially parent Direct PLUS borrowers, this tax burden occurs at or near retirement—one of the worst possible times. Additionally, this tax bill is due in full immediately as the Internal Revenue Service does not have an income-based-repayment plan.[221] Here, Debtors do not even have the option to participate in an income-based-repayment plan on the Navient debt as "[t]he only federal student loans clearly not eligible for the

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https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC 2016Q2.pdf .

[210] Roots, supra note 143, at 502.

[211] Susan Dynarski, *Why Students With Smallest Debts Have the Larger Problem* (Aug. 31, 2015), http://www.nytimes.com/2015/09/01/upshot/why-students-with-smallest-debts-need-the-greatest-helphtml? r=0 .

[212] Jim Puzzanghera, *Soaring* student loan *debt poses risk to nation's future economic growth* (Sept. 5, 2015), http://www.latimes.com/business/la-fi-student-debt-20150906-story html .

[213] College Board 2013, trends in college pricing 2013.

[214] 20 U.S.C. § 1078(e).

[215] *See* Jonathan M. Layman, *Forgiven But Not Forgotten: Taxation of Forgiven Student Loans Under the Income-Based-Repayment Plan*, 39 Cap. U. L. Rev. 131, 151-52 (2011).

[216] Id. at 151-52.

[217] 20 U.S.C. § 1078. *See* Layman, supra note 215, at 137-38.

[218] ***I.R.C. § 108(f)(3)***. Demmons v. R3 Educ. Inc. (In re Demmons), 2016 Bankr. LEXIS 3659, 2016 WL 5874831, at *9 n.47 (Bankr. E.D. La. Oct. 7, 2016). *See also* Layman, supra note 215, at 147 (noting that with the exception of those instances specifically exempted from taxation, canceled student loans are subject to taxation as cancellation of indebtedness income). *See also* Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later* (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/your-money/for-student-borrowers-a-tax-time-bomb.html? r=0; Andrew Thompson, *Ex-students with 'Income-Based' Loan Payments Face Huge Tax Bill* (Feb. 15, 2016), http://www.nbcnews.com/business/personal-finance/ex-students-income-based-loan-payments-face-crushing-tax-bill-n517566 .

[219] Layman, supra note 215, at 147; Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later* (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/your-money/for-student-borrowers-a-tax-time-bombhtml? r=0 ; Andrew Thompson, *Ex-students with 'income-based' loan payments face huge tax bill* (Feb. 15, 2016), http://wwwnbcnews.com/business/personal-finance/ex-students-income-based-loan-payments-face-crushing-tax-bill-n517566 .

[220] Demmons v. R3 Educ. Inc. (In re Demmons), 2016 Bankr. LEXIS 3659, 2016 WL 5874831, at *9 note 47 (Bankr. E.D. La. Oct. 7, 2016).

[221] Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later* (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/your-money/for-student-borrowers-a-tax-time-bomb.html? r=0 .

[income-based-repayment] plan are those loans made to the parents of students under the PLUS program."[222] The public service loan forgiveness program allows the tax free forgiveness of unpaid student loan balances after the borrower has paid for 120 months. The purpose of the program is to encourage graduates to work in modestly paid positions in the public sector. The irony is that perhaps the greatest beneficiaries of **[*47]** this student loan forgiveness program will be physicians; it is estimated that each participant will discharge $131,000 in student loan debt under the program.[223] What's more, "[b]illons of dollars worth of bonds backed by student loans could soon face downgrades as bond ratings agencies react to borrowers revising their repayment plans."[224]"Should these bonds default, the federal government and ultimately the U.S. taxpayers could be stuck with billions of dollars in bad loans."[225] The recent projections of surpluses for student loan programs have melted away,[226] intensifying the need for borrowers to repay the loans as they are able—such as the Debtors propose in their plan.

At the end of the day, behind the numbers in a consumer bankruptcy case are individuals who are profoundly affected by financial circumstances, as well as their families, employers, and society. There seems little question that as a general rule, and certainly in the Debtors' case, separate classification of student loans for preferred treatment is proper, reasonable, and fair discrimination. The benefits to the Debtors, to the student loan creditors, to the taxpayers, and to other interests bring home this conclusion. Of course, a blanket rule that allows separate classification of student loans does not work because confirmation is determined on a case-by-case basis and is ultimately a matter for the Court's discretion.

Notably, the United States Constitution provides that Congress shall establish uniform laws on the subject of bankruptcies.[227] John Adams, who signed into law the first Federal *Bankruptcy Act* in 1800, considered bankruptcy and debt a major issue as our citizens were losing farms and going to debtors' **[*49]** prisons. Nondischargeable student loans may create a virtual debtors' prison, one without physical containment, but assuredly a prison of emotional confinement.

Student loans serve a valuable purpose beyond mere consumerism. They allow individuals the opportunity to obtain an education, an education that will hopefully allow student loan recipients to contribute to a prosperous society, an education that unfortunately is becoming harder to achieve without the assistance of government-backed student loans. At the same time, it is understandable that the Congress demands repayment. The Code generally prevents debtors from discharging their student loans and leaving taxpayers with the bill. Student loan creditors deserve separate classification in bankruptcy because the taxpayer-funded student loan system is critical to society's future welfare. It is one thing to not allow delinquent debtors an escape hatch from their student loans, but it is quite another to forbid debtors with limited resources from favoring a taxpayer backed nondischargeable obligation incurred for society's benefit. If bankruptcy is, in part, the art of compromise, then Debtors' Proposed Plan that fairly discriminates **[*50]** in favor of the Student Loan Claims is a permissible compromise under *§ 1322(b)(1)*.

It is this Court's experience that many consumer bankruptcies are filed by desperate individuals, who are financially, emotionally and physically exhausted. Sometimes lost in the discussion that the bankruptcy discharge provides a fresh start to honest but unfortunate debtors is that, perhaps as importantly, it provides a

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[222] *Layman, supra note 215, at 152*. *See also 34 C.F.R. § 682.215(a)(2)*. *See supra* note 17.

[223] Josh Mitchell, *Government on Track to Forgive Up to $131,000 Each in Student Debt for Thousands* **[*48]** *of Doctors*, THE WALL STREET JOURNAL (July 20, 2016, 10:45 a.m. ET), *http://blogs.wsj.com/economics/2016/07/20/government-on-track-to-forgive-up-to-131000-in-student-debt-for-thousands-ofdoctors/* (last visited Aug. 8, 2016).

[224] Charles Bovaird, *Bonds Based On Student Loans Face Downgrades* (JPM, NAVI) (Oct. 20, 2016) (quoting Mark Heppenstall, chief investment officer of Penn Mutual Asset), *http://www.investopedia.com/news/bonds-based-student-loans-face-downgrades-jpm-navi/* .

[225] *Id*.

[226] Josh Mitchell, *U.S. to Forgive at Least $108 Billion in Student Debt in Coming Years*, THE WALL STREET JOURNAL (Nov. 30, 2016) *http://www.wsj.com/articles/u-s-to-forgive-at-least-108-billion-in-student-debt-in-coming-years-1480501802*

[227] U.S. CONST. art. I, § 9.

commensurate benefit to society and the economy: People are freed from emotional and financial burdens to become more energetic, healthy participants. Of course, this beneficial effect is properly curtailed by the existence of debts that are excepted from discharge. Here, the Debtors do not seek to escape their liability for the Student Loan Claims, but to the contrary, they seek to pay them.

CONCLUSIONS OF LAW

The Trustee's position is that separately classifying the Student Loan Claims for favorable payment is unfairly discriminatory. The Code permits fair discrimination. The Court overrules the Trustee's objection. The Debtors' Plan properly provides for the separate classification of substantially similar student loan debt and does not discriminate unfairly in compliance with *§ 1322(b)(1)*.

IT IS ORDERED that **[*51]** the Trustee's objection to confirmation of Debtors' Chapter 13 Plan is **OVERRULED**.

IT IS SO ORDERED.

ROBERT D. BERGER

U.S. BANKRUPTCY JUDGE

DISTRICT OF KANSAS

Table1 (*Return to related document text*)

SUMMARY OF FILED CLAIMS	**$25,381.67**
Filed Claims	**$213,751.40**
Total Priority Claims	**$64,791.59**
Total Secured Claims	**$26,328.71**
Student Loan **Claims**	**$91,120.30**
Non-Student Loan **General Unsecured Claims**	**Undetermined**
Total General Unsecured Claims	
Proposed Separate Classification **Payment Based on Debtors'**	
Current Circumstances	
PREPETITION PAYMENTS TO	
GENERAL UNSECURED CREDITORS	
Beginning General Unsecured Debt Balance (excludes student loan)	**$73,884.89**
Debtors' Prepetition Payments to MMI (Debt Repayment Plan)	**$79,445.00**
MMI Disbursements to General Unsecured Creditors	**$78,629.98**
Ending General Unsecured Debt Balance	**$12,192.16**
General Unsecured Debt Principal Reduction Through MMI	**$61,692.73**
Dividend to General Unsecured Creditors Through MMI	**83%**

Table1 (*Return to related document text*)

End of Document

Faculty

Edward C. Boltz is the managing partner of the Law Offices of John T. Orcutt, P.C. in Durham, N.C., where 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.

Hon. Bess M. Parrish Creswell is Chief Judge of the U.S. Bankruptcy Court for the Middle District of Alabama in Montgomery, Ala., initially appointed on April 16, 2018, and named Chief Judge on Oct. 17, 2020. Prior to her appointment to the bench, she was a partner in Burr & Forman LLP's Creditors' Rights & Bankruptcy Group in Mobile, Ala., where she represented debtors, secured and unsecured creditors, creditor committees, and fiduciaries in workouts, debt restructuring, bankruptcy cases, financial transactions, and nonbankruptcy litigation. Prior to joining Burr & Forman, Judge Creswell practiced bankruptcy and financial restructuring at Alston & Bird LLP in Atlanta and clerked for Hon. C. Ray Mullins in the U.S. Bankruptcy Court for the Northern District of Georgia. She received her B.B.A. in 2001 from Campbell University, her M.B.A. from the Lundy-Fetterman School of Business, and her J.D. in 2004 from Wake Forest University School of Law.

Laurie K. Weatherford is the chapter 13 standing trustee for the Middle District of Florida in Orlando. Prior to her appointment in 1996, Ms. Weatherford was Of Counsel with the law firm of Maguire, Voorhis & Wells, representing primarily debtors and creditor committees in chapter 11 cases, and was a chapter 7 panel trustee. She tried a jury trial in the *In re Braniff* case and helped develop the Mortgage Modification Mediation Program for the U.S. Bankruptcy Court in Orlando. Ms. Weatherford frequently lectures on mortgage modification, student loan and various chapter 13 issues. Ms. Weatherford is a member of the National Association of Chapter 13 Trustees and serves on its Mortgage Committee. She also has served on the board of directors of the Central Florida Bankruptcy Law Association and is a past chairman of the Bankruptcy Committee of Orange County, Fla. Ms. Weatherford received her B.A. with honors from the University of Florida and her J.D.

with honors from Cumberland School of Law, where she was an honor court justice, a member of the International Law Moot Court Team and copy editor for the *Cumberland Law Review*.