AMERICAN BANKRUPTCY INSTITUTE

2017 Central States Bankruptcy Workshop

Consumer Track

Student Loans

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CONCURRENT SESSION

2017

I. DISCHARGING STUDENT LOANS DEBTS: THOUGHTS AND OPTIONS

Why Even Try?

Iuliano's study is worth reading. He reviewed every bankruptcy case involving student loans in 2007. He found that of the 169,774 student loan debtors filing bankruptcy, only 213 filed adversary proceedings, a necessary step to discharge student loans. And of that 213, 51 received full discharges, 30 received partial discharges and 25 received an administrative remedy. In other words, 0.1% of bankruptcy filers even *tried* to discharge their student loans. And of those who tried, 50% of them received some kind of relief from the court and 25% received a full discharge of their student loans.

Another ABI article, Volume 83, Issue #1, Pardo & Lacey study, concluded that judge and attorney were largely determinative of outcome. Judge A and Judge B had disparate rates of finding student loan debt dischargeable.
And, having a highly experienced attorney made a big difference in outcome.

So, is it worth trying to discharge student loan debt?
Absolutely, in the right case.

Is It A Loan With An Educational Purpose?

If not, there is no need for an adversary proceeding.

11 USC 523(a) (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for— (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

United States Code (2012-01-18T18:28:32+00:00). United States Bankruptcy Code & Rules with Historical Notes (Kindle Locations 9663-9667). Kindle Edition.

It is the creditor's burden to show that it is a debt, more on that later, and that it is .
Unpaid tuition is not a loan, though some courts hold otherwise.

"The legislative history with respect to BAPCPA's amendments to § 523(a)(8) is sparse: The Report of the House Judiciary Committee states only:

Sec. 220. Nondischargeability of Certain Educational Benefits and Loans. Section 220 of [BAPCPA] amends section 523(a)(8) of the Bankruptcy Code to provide that a debt for a qualified education loan (as defined in section 221(e) [sic] (1) of the Internal Revenue Code) is

nondischargeable, unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents.

H.R.Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005) (emphasis added).

In re Campbell, 547 B.R. 49 (Bankr.E.D.N.Y.)(2016) which is the case dealing with the dischargeability of bar loans, that is, money to live on while you study for the bar exam. The court found this to be dischargeable, as not a loan with an educational purpose.

Government Loans

Is client eligible for Public Service Loan Forgiveness? (PSLF)
Loans will be in forbearance so long as you work for a qualified non-profit or government agency. Surprisingly, many clients have not applied. And you cannot rely on the student loan servicer to tell them about this option.

TPD (Total Permanent Disability) administrative discharge – Clients with mental/emotional disabilities cannot figure out how to fill out the forms. A client with these facts provides a good case for discharge by filing an Adversary Proceeding, but why go to that trouble and expense if you can just help them fill out the form?

You can re-open a chapter 7 to file AP LBR 4007.

Staffer v. Predovich (In re Staffer), 306 F.3d 967, 972 (9th Cir. 2002)

"However, we note that the court in *Menk* also emphasized that a motion to reopen for the purpose of maintaining a nondischargeability action "is purely an *administrative*matter for ease of management by the clerk's office." *Id.* at 912 (emphasis in original). As the dissenting member of the BAP panel in this case accurately noted, a separate motion to reopen is not a jurisdictional requirement, or even a prerequisite for commencing an action for nondischargeability of a debt under § 523(a)(3)(B). *See Staffer,*262 B.R. at 83 (Brandt, J., dissenting) ("[T]here is no warrant in Bankruptcy or Judicial Codes . . ., the pertinent rules, or otherwise, for requiring the administrative case to be reopened for the filing of appellant's adversary proceeding."). It was therefore unnecessary for the BAP to remand for a determination of whether Staffer's case should be reopened. Predovich could have proceeded directly to file his nondischargeability complaint."
Why Re-Open a Chapter 7? Why not file the adversary while the case is still open?
Well, your client may not have the funds to pay you to file an adversary. Post-petition income can be used to hire you.
Your client may even get the money to pay you from settling an FDPCA claim against the student loan collector.

Consolidation and Rehabilitation

These options are available to get borrowers out of default.
However, you get one try at each per lifetime.

UNLESS, you work this into the settlement of your student loan adversary proceeding. The government can waive the one time only limitation. It can also extend the date the first payment is due, giving your client more breathing time.
This can be reason enough to file an adversary, even if the settlement does not discharge any of the balance.

Income Based Repayment (IBR)

Again, only available for government loans, IBR, or ICBR, options base the monthly payment on income and living expenses, and provide for discharging balances after a certain time.
However, that discharge is a taxable event, your client will get a 1099C for debt forgiveness income.
Taxes for administratively cancelled student loans can be avoided by completion of IRS form 982 if the debtor is insolvent or discharge under bankruptcy.

Unfortunately, 'insolvent' means liabilities exceed assets, without regard to whether those assets are available for creditors due to exemptions or other protections. The biggest problem asset will be 401k plans or other retirement accounts, even though creditors cannot reach those.

Regarding bankruptcy, the instructions to Form 982 actuall provide that debts are not included in taxable income for a bankruptcy if:

A title 11 case is a case under title 11 of the United States Code (relating to bankruptcy), but only if you are under the jurisdiction of the court in the case and the discharge of indebtedness is granted by the court or is under a plan approved by the court.

The last part is a reason why a Ch. 13 should often be part of an administrative discharge of student loans. Even the cancellation of debt may not be a bankruptcy discharge, if it is included as a provision 'under a plan approved by the court, it should fall within this exclusion for taxable income.

Courts are not handling this well, frequently requiring debtors to to apply for IBR before considering discharging any of their student loan debt. And, using eligibility for low, even zero, per month plans as a basis for denying discharge.

> None of Fern's loans has ever been placed in repayment status, instead they have always been classified as deferred or in forbearance meaning that no payment is required. The Department of Education contends that Fern qualifies for at least two repayment plans. While the availability of repayment options is a relevant fact, it cannot be the only basis to consider in determining

> undue hardship. Relying upon *Jesperson*, the Department suggests that Fern is qualified for a repayment program where her "payment" would be $0.00 and because that "payment" amount will not affect her current standard of living the student loans should not be discharged.
>
> There are substantial and important differences between this case and *Jesperson* which must be placed in context. Jesperson was a lawyer who owed in excess of $300,000 in student loans. The Court of Appeals identified numerous grounds in reaching its conclusion that Jesperson's circumstances did not qualify for an undue hardship discharge of his student loan debt. These included: his age, good health, number of degrees, marketable skills, lack of dependents, self-imposed conditions which limited his monthly income and a failure to pay any amount on the student loan when he had sufficient income to do so. Most notably, Jesperson could afford a monthly payment of $629 under an income contingent repayment plan. In contrast, Fern has never been required to make a payment, and under either the Income Contingent Repayment Program or PAYE this would still remain the case. We do not interpret *Jesperson* to stand for the proposition that a monthly payment obligation in the amount of zero automatically constitutes an ability to pay.
>
> The Department also states that the Bankruptcy Court's conclusions about Fern's emotional burden related to the student loan obligations, the continued accrual of interest on the loans, the negative credit effect of the loans, and the potential tax obligation when the repayment plan expires were in error. We do not agree. These additional observations identified by the Bankruptcy Court simply served to supplement its determination of undue hardship under the totality of the circumstances test.

http://bkinformation.com/newcases/casecopies/Fern-2-8-2017.pdf

What About Filing An Adversary In A Chapter 13 case?

Engen allows separate classification of student loan debt, so your client can keep current on that while discharging other unsecured debt upon successful plan completion.
Judge Opperman in Flint-Bay City apparently allows this, though I am unaware of any other Eastern or Western District Judges allowing separate classification in Chapter 13 plans.

Being that so many debtors are shut out of even filing an adversary seeking discharge, because they have no money to pay a lawyer, Chapter 13 may be a way for them to pay an attorney. This

will work if all the plan payments are not required for other creditors, that is, if your plan can reserve funds that would otherwise go to unsecured creditors to pay your fees.

Serial chapter 13 filings, the last resort.
Your client has no real argument for a discharge, but cannot afford levies, wage garnishments and so on, so you file a five year Chapter 13 plan, knowing that the student loan balance will still be there at the end.
Then you file another 5 year Chapter 13 case.
Your client may even have filed a Chapter 7 first, before embarking on the endless 13 plan.
Our beloved Chapter 20.

Other Chapter 13 Options

(see attached Excerpt from STUDENT LOANS AND BANKRUPTCY: WHEN WORLDS COLLIDE, reprinted with permission of Edward C. Boltz, Law Offices of John T. Orcutt

National Collegiate Trust

National Collegiate Trust supposedly buys private student loans, and then assigns them to one of the 24 National Collegiate Trusts.
One of my clients was sued by 13 different NCT trusts. His loans were just assigned (allegedly) to different trusts.

Debtors have no leverage with private student loan creditors. There are no income based repayment plans, disability discharges, et cetera.
If you can make a deal, great.
NCT has been having some trouble proving in state courts that they actually own the student loan debt on which they are suing.
You can make favorable settlements. (see attached complaint)
In one case, NCT dismissed its case while its motion for summary judgment was pending.
If NCT files a claim in a Chapter 13 bankruptcy, object to it unless complete documentation is attached. An order disallowing the claim should be res judicata in any subsequent state court suit, in addition to helping your client successfully complete their Chapter 13 plan.

If you want to fight all the way:

Challenge *Brunner* on appeal:

http://cdn.ca9.uscourts.gov/datastore/bap/2013/04/16/RothV%20ECMC%20opinion-FINAL%20AZ-11-1233.pdf

https://www.americanbanker.com/opinion/student-loan-debtors-need-a-light-at-the-end-of-the-tunnel

http://www.abi.org/member-resources/blog/brunner-test-reexamined-in-western-district-of-new-york

RESOURCES:

NCLC Student Loan Manual

https://studentaid.ed.gov/sa/repay-loans/consolidation

https://studentaid.ed.gov/sa/repay-loans/disputes/prepare/contact-ombudsman

II. BANKRUPTCY TRUSTEES AND THE AVOIDANCE OF TUITION PAYMENTS

Introduction

In recent years, an interesting trend has developed in which bankruptcy trustees, using their "strong-arm" powers[1] are seeking to avoid or claw back tuition payments made to colleges and universities on behalf of their adult children for the benefit of creditors of the bankruptcy estate. The source of these payments made to these institutions often stems from student loan disbursements. While to some, the idea of a bankruptcy trustee seeking to force a school to turnover tuition payments to a trustee may seem abhorrent, a Chapter 7 trustee has a fiduciary duty to investigate the financial affairs of the debtor which includes pre-petition transfers and recover those transfers for the benefit of creditors.[2] The primary theory the trustees are relying on is that the payments to the institutions were made without receiving reasonably equivalent value and are therefore constructively fraudulent. With the ever increasing costs of tuition, trustees are increasingly on the lookout for cases in which sizable recoveries could be made for the bankruptcy estate. Colleges and universities have generally chosen to settle these adversary complaints with the trustees rather than face costly litigation in bankruptcy court, later seeking to be reimbursed by the student for the loses the schools have incurred. Some schools have gone so far as to threaten to withhold college transcripts and refuse to verify graduation to future employers or educational institutions unless they recover payments they are forced to turnover.[3] Increasingly, these schools are choosing to contest such avoidance actions.

Fraudulent Transfers and Avoidance of Tuition Payments by Trustees

Although trustees have recovered payments in bankruptcy cases in which tuition was paid within 90 days prior to a bankruptcy filing pursuant to Bankruptcy Code Section 547 on a preference theory, the more common approach involves the trustee utilizing Section 548 of the Bankruptcy Code. Section 548 allows a trustee to avoid pre-bankruptcy transfers either on an actual fraud theory in which the trustee must show that the transfers were made with intent to hinder, delay or defraud creditors, or, as is usually the argument in these tuition claw back cases, that the debtor made the transfer while insolvent or became insolvent as a result and that the debtor received less than reasonably equivalent value. Under the constructive fraudulent transfer theory, the trustee's case hinges on a showing that the parent(s) or debtor-transferor did not receive "reasonably equivalent value" in the exchange and that therefore the trustee may avoid the transfer. 11 USC Section 548 allows a bankruptcy trustee to avoid any transfer incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition and, as

[1] 11 U.S. Code § 544
[2] 11 U.S.C. §§ 704, 726.
[3] http://www.abi.org/feed-item/usc-in-tuition-battle-former-students-will-face-consequences

incorporated in the bankruptcy code, up to six years under applicable state fraudulent transfer law depending on the state in which the bankruptcy was filed. [4]

Reasonably Equivalent Value/Split in Authority

The litigation in these cases primarily revolves around the meaning of "reasonably equivalent value" and whether there is a direct economic benefit to the debtor-parent-transferor(s). Unfortunately, the Bankruptcy Code does not define the term and hence the courts are left to interpret it and, as in many other areas of bankruptcy law, a split of authority has developed.

Cases Permitting Trustee's Avoidance of Transfers

Gold vs. Marquette University (*In re Leonard*).[5] *In re Leonard*, is a significant case stemming from the Eastern District of Michigan in which the court held that tuition payments made by debtor parents on behalf of their adult child constituted avoidable transfers because the debtors themselves did not receive economic value in exchange for the payments. In this case, most of the money used to pay the university was derived from a student loan taken out by the adult child-student and his father, who, along with his wife, was a debtor in the bankruptcy. The university argued that the student loan funds that were transferred were never debtor's property and therefore never property of the bankruptcy estate but instead were held in trust for the education of their child. The court rejected this argument due to the fact that the student loan check was made payable to debtor and his son and the funds were deposited into debtor's joint checking account. The court next focused on whether the debtors received "reasonably equivalent value" which would negate an essential element of all of the trustee's fraudulent transfer theories under both the Bankruptcy Code § 548 and Michigan law. In this case, the court found in favor of the trustee and allowed the trustee to recover tuition payments that debtor-parents had made on behalf of their adult (18 year-old son). The University argued the position that although the debtors were insolvent at the time the transfers were made as they were made within months of the bankruptcy filing, the debtors did nevertheless receive reasonably equivalent value because the transfers enabled the debtor's son to attend the school and receive the benefit of a college education and the associated peace of mind of the parents in knowing that their child was receiving a quality education and would one day become financially independent. Hence there exists the equivalent value exchange. The court saw otherwise. Looking to 6th Circuit precedent, the court found that value cannot simply be an indirect benefit to the debtor and therefore cannot be reasonably equivalent value unless it is (1) an economic benefit; (2) concrete; and (3) quantifiable. Applying this standard, the court found that the debtors did not receive reasonably equivalent value for their tuition payments.

[4] See 11 U.S.C. § 544(b)

[5] Gold vs. Marquette University (*In re Leonard)*, 454 B.R. 444, 460 (E.D. Mich.2011)

Banner v. Lindsay *(In re Lindsay*).[6] In this case, debtor parents used proceeds stemming from the sale of a car and motorcycle to pay their adult child's tuition. The appointed trustee sued seeking to avoid the transfers as fraudulent conveyances under both Section 548 and the State of New York's version of the Uniform Fraudulent Conveyance Act which allows the trustee to rely on state law pursuant to Bankruptcy Code section 544. The bankruptcy court found that the debtor-parents must turn over to the trustee the amounts used to pay their son's tuition which came to over $35,000.00. The trustee alleged that the tuition payments were fraudulent transfers because the debtors received no fair consideration in return. Debtor parents argued that they had a moral obligation to pay for their adult child's education, yet the court found that they failed to offer any authority in support of that argument. The court also found that defendant-parents produced no evidence of their alleged legal obligation to pay for their adults son's tuition, such as a promissory note in favor of the university or lender and the court was not aware of any law requiring a parent to pay for a child's college education. Unlike other cases in which the trustee is able to claw back tuition payments from the university itself as transferee, in *Lindsay*, the court ordered the debtor parents themselves to pay the trustee the amount transferred.

Cases Denying Trustee's Avoidance of Transfers

DeGiacomo vs. Sacred Heart University, Inc. (*In re Palladino*).[7] In this case the bankruptcy court ruled against the trustee's attempts to recover over $60,000 in tuition and fees paid to a university and found that these payments were made in exchange for reasonably equivalent value because the debtors believed that a college degree would directly contribute to their child's financial self –sufficiency and that this was an economic benefit to the debtors. The court emphasized the term "reasonably" and, using music lessons in comparison, found that future outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of payment. The court held that "A parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent. This, it seems to me, constitutes a quid pro quo that is reasonable and reasonable equivalence is all that is required." This case has been appealed to the United States Court of Appeals for the First Circuit and is currently pending.[8]

Sikirica v. Cohen (*In re Cohen*).[9] Here, the trustee's theory was that because underlying state law did not require parents to pay for their adult child's post-secondary education, that such education is not a necessity and that therefore the bankruptcy trustee may recover those payments. The court disagreed finding that such expenses are reasonable and necessary for the maintenance of the debtor's family.

[6] Banner v. Lindsay (*In re Lindsay*), No. 06-36352 (CGM), 2010 WL 1780065, at *8(Bankr. S.D. N.Y. May 4, 2010)
[7] DeGiacomo vs. Sacred Heart Univ., Inc. (*In re Palladino*), 556B.R. 10 (Bankr. D. Mass. 2016)
[8] U.S. Court of Appeals for the First Circuit, Docket#: 17-1334, Docketed 04/05/2017
[9] Sikirica v. Cohen (*In re Cohen*), No. 05-38135-JAD, 2012 WL 5360956

Shearer v. Oberdick (*In re Oberdick*).[10] The trustee in this case also argued that parents have no legal obligation to provide for the education of their children past the age of 18. The parent-debtors countered by stating that they viewed the educational expenses as a family obligation. The court agreed with the parents recognizing that there is something of a societal expectation that parents will assist with such expense if they are able to do so and found that the expenditures in this case were made out of a reasonable sense of parental obligation.

A case presently pending in the US Bankruptcy Court for the District of Connecticut (New Haven), parents Robert and Jean DeMauro[11] paid approximately $47,000 in tuition to a university on behalf of their adult daughter. This case differs from the others in that the source of the funds used to pay the tuition were derived from the Federal Direct PLUS Loans Program, also known as Parent Plus Loans, and were disbursed directly from the U.S. Department of Education and were not comprised of funds owned or controlled by the Debtors. The university's position is that they were therefore third party funds and were never property of the bankruptcy estate because they never constituted an interest of the debtor's in property for purposes of 11 U.S.C. § 548(a)(1). The trustee, on the other hand, argues that because the debtor-parent was the sole obligor on the Master promissory note, and not merely a guarantor or co-maker, he has an interest in the property under state law. Trustee further argues that because the promissory note allowed the debtor to use the transferred funds for things such as books, supplies, equipment, transportation, a personal computer and the like, the debtor had an interest in them and they therefore can be avoided for benefit of the bankruptcy estate. In a recent decision out of the Eastern District of Pennsylvania[12], the Bankruptcy court, in a trustee action seeking to recover Parent Plus loan funds paid directly by the U.S. Department of Education to Penn State, found that the debtor nor his estate ever held an interest in the proceeds of the loans and that the debtor-parent-transferor received reasonably equivalent value in exchange for the transfers and dismissed the trustee's complaints. The court found that applicable non-bankruptcy law (i.e. the Higher Education Act), expressly prevented the loan proceeds from becoming property of the debtor or his estate, and because debtor never had possession of, control over, or an interest in, the loan proceeds, that those proceeds could not have been available to pay debtor's creditors. The judge found that the purpose of the fraudulent transfer provisions in the Bankruptcy Code and other state uniform fraudulent transfer acts is to protect creditors by preventing a debtor from placing assets otherwise available to pay creditors out of the reach of those creditors. The court agreed with the reasoning in *Oberdick* and *Cohen* above and found that a parent's payment of a child's undergraduate college expenses is a reasonable and necessary expense for the maintenance of the family and for preparing family members for the future and the parent

[10] Shearer v. Oberdick (*In re Oberdick*), 490B. R. 687 (Bankr. W.D. Pa. 2013)

[11] Robert R. DeMauro and Jean M. DeMauro, U.S. Bankruptcy Court, District of Connecticut, New Haven Division, Chapter 7 Case no.: 14-32312(JAM) Adversary Proceeding #: 15-03011

[12] In re: David Alan Lewis and Donna Lynn Lewis, United States Bankruptcy Court for the Eastern District of Pennsylvania, David Alan Eisenberg, as Chapter 7 Trustee, v. Pennsylvania State University Case no. 16-12372REF. Opinion Date: April 7, 2017 2014 WL 1344622

therefore receives reasonably equivalent value in exchange for the tuition payment. At the end of his opinion, the judge pointed out what he felt were critical issues left unaddressed by the litigants that were rendered moot by his ruling but that nevertheless he felt were important had the trustee been successful in his efforts to recover funds from the university. He outlined eight issues that he felt were troubling:

> 1. If the Trustee is successful, does someone owe Penn State the avoided tuition?
>
> 2. Under any result in this litigation, does [debtor] owe the bank non-dischargeable debt?
>
> 3. What happens if PSU files a claim against [debtor]?
>
> 4. Does [debtor] face BOTH (1) non-dischargeable liability to the bank for the loans AND (2) the avoided tuition payments owed to PSU?
>
> 5. Can PSU somehow bootstrap the status of the bank and have the debt be non-dischargeable?
>
> 6. If Debtor's debt to PSU is dischargeable or uncollectible, can PSU undertake collection efforts against [debtor]'s son and daughter?
>
> 7. Does that make [debtor] and his son and daughter necessary parties who must have been joined in the complaint as party defendants?
>
> 8. Can PSU refuse to give [debtor]'s son and daughter transcripts, etc., until paid in full by someone for all money avoided by the Trustee?

Conclusion

The case law continues to develop in this controversial area with bankruptcy court decisions at opposite ends of the spectrum. The courts must wrestle with an apparent dichotomy between the centuries long standing debtor-creditor laws regarding fraudulent conveyances and the benefits realized by today's society when parents financially assist their children beyond the traditionally recognized age of adulthood. Proposed legislation seeking to amend the Bankruptcy Code to prevent trustees from avoiding tuition payments made by debtors has lingered in Congress and eventually died, but it is likely that more bills will be forthcoming.[13]

[13] H.R.2267 — 114th Congress (2015-2016) PACT (Protecting All College Tuition) Act of 2015

III. THE DISCHARGE: TO BE OR NOT TO BE?

Student loans, like the Schrödinger's cat paradox, are both "impossible" to discharge and not impossible to discharge.

What is Undue Hardship?

11 U.S.C. § 523(a)(8)(A)-(B) defines debts that are not dischargeable, which includes nearly all student loans:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> …
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A)
>
> (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;
>
> …

What makes a hardship "undue?"

The *Brunner* Test

Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) set the standard for what constitutes undue hardship:

> (1) [Debtor] cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans;
> (2) Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
> (3) He has made good faith efforts to repay the loans.

This test was adopted by the Seventh Circuit in *Matter of Roberson,* 999 F.2d 1132, 1137 (7th Cir. 1993), and has since been further affirmed and interpreted by two key decisions:

- *Krieger v. Educ. Credit Mgmt. Corp.,* 713 F.3d 882, 884 (7th Cir. 2012) (finding undue hardship and discharging loans); and

- *Tetzlaff v. Educ. Credit Mgmt. Corp.,* 794 F.3d 756, 759-60 (7th Cir. 2015) (finding no undue hardship and denying discharge).

Comparing Undue Hardship With Other Hardship Standards under Chapter 11 and 13

Chapter 13 and Chapter 12 both contain hardship standards.

Chapter 13 Standard**.**

Pursuant to Section 1328(b) of the Bankruptcy Code, a debtor involved in a Chapter 13 bankruptcy may seek a hardship discharge of the underlying debt. Generally, a debtor may only receive a Chapter 13 hardship discharge if:

(1) The debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor;
(2) Creditors have received at least as much as they would have received in a Chapter 7 liquidation case; and
(3) Modification of the plan is not possible.

Injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge does not apply to any debts that are nondischargeable in a Chapter 7 case. *See* 11 U.S.C. § 523.

Under the first part of the test, bankruptcy courts typically have limited its application to catastrophic circumstances. The Bankruptcy Court for the Eastern District of Wisconsin has stated that, "[m]ost courts faced with a request for a [Chapter 13] hardship discharge have required the presence of catastrophic or compelling circumstances." *In re Young*, 370 B.R. 799, 803 (Bankr. E.D. Wis. 2007). In *Young*, the court refused a hardship discharge because the debtors had not faced death or disability but rather the reason for their request was "just chronically poor economics." *Id.*; *see also In re Dark*, 87 B.R. 497 (Bankr.N.D.Ohio 1988) (a hardship discharge was denied where debtor's marriage had terminated, debtor had lost the financial assistance from her mother due to the mother's death, and debtor had surgery which resulted in a reduction of her employment and income); *compare to In re Graham*, 63 B.R. 95 (Bankr.E.D.Pa.1986) (a hardship discharge was granted due to the death of debtor); *In re Bond*, 36 B.R. 49 (Bankr.E.D.N.C.1984) (a hardship discharge was granted where debtor had died); *In re McNealy*, 31 B.R. 932 (Bankr.S.D.Ohio 1983) (a hardship discharge was denied due to death of co-debtor).

The second part of the test requires that unsecured creditors actually receive no less than they would have received in a Chapter 7 liquidation. This is a "best interests" test identical to that required for confirmation of a Chapter 13 plan under Section 1325(a)(4) of the Bankruptcy Code 1325(a)(4). *See In re Cummins*, 266 B.R. 852, 856 (Bankr. N.D. Iowa 2001). "Where unsecured creditors would receive no distribution in a Chapter 7 liquidation, any payment to them in a Chapter 13 plan satisfies this requirement." *Id.*

The last part of the test requires that that modification under Section 1329 of the Bankruptcy Code is not practicable. Under Section 1329, the modified plan must meet the statutory requirements for confirmation and may not extend the life of the plan beyond five years after the first payment on the original plan was due.

Chapter 12

Pursuant to Section 1228(b) of the Bankruptcy Code, a Chapter 12 debtor may obtain a discharge under an uncompleted plan. The standard for obtaining this discharge is the same as a hardship discharge under Chapter 13, requiring the same three factors. Additionally, the hardship discharge under Chapter 12 also does not apply to any debts that are nondischargeable in a Chapter 7 case. *See* 11 U.S.C. § 523.

Comparison of Chapter 7 undue hardship standard and Chapters 12/13 hardship test	
Chapter 7 undue hardship for student loans	Chapter 12 and 13 hardship tests
Standard for undue hardship for discharge of student loans: (1) [Debtor] cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) Debtor has made good faith efforts to repay the loans.	Under Chapter 12 and 13, a debt may be discharged if the following test is met: (1) Debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor; (2) Creditors have received at least as much as they would have received in a Chapter 7 liquidation case; and (3) Modification of the plan is not possible. Note, this discharge does not apply to any debts that are nondischargeable in a Chapter 7 case, including student loans (unless the undue hardship test also is met).

IV. Real Life Application

Government-backed student loans vs. private student loans

While both are typically considered non-dischargeable under § 523(a)(8), government-backed loans are different in at least one key respect: the wide variety of standardized, guaranteed ways to reduce payments or receive a non-bankruptcy discharge.

Private lenders have a lot of flexibility in determining how they will work with any given borrower. But that flexibility also means that they can insist on certain payment terms, and the borrower does not have much leverage to negotiate.

The government-backed loans, on the other hand, are specifically subject to several laws and regulations designed to ease the financial burden of payments, work with financially strapped borrowers, and reward borrowers who diligently pay or who choose to work in certain fields. All of the following topics covered apply only to Federally-backed loans.

Rehabilitation

Borrowers who are in default are typically barred from eligibility for any payment plans or discharges. Rehabilitation, however, is remarkably simple.

To rehabilitate a defaulted Direct Loan or FFEL Program loan, a borrower must agree in writing to:

- make nine monthly payments,
- make each payment within 20 days of the due date, and
- make all nine payments during a period of 10 consecutive months.

In addition, the rehabilitation payment does not have to be the standard monthly amount. In fact, a borrower can request any monthly amount so long as it is $5 or more. However, the guarantor will typically request a payment amount that is equal to 15 percent of your discretionary income. In order to justify the lower amount, the borrower will be required to provide documentation of her income.

To rehabilitate a defaulted Federal Perkins Loan, a borrower must meet the foregoing requirements. However, there is less flexibility in the amount of the monthly payment, which is determined by the school where the borrower took out the loan.

Income-Sensitive Repayment Plans

- Income-Contingent Repayment Plan (ICR Plan)
- Income-Based Repayment Plan (IBR Plan)

- Revised Pay As You Earn Repayment Plan (REPAYE Plan)
- Pay As You Earn Repayment Plan (PAYE Plan)

ICR Plan	• Eligibility: everyone qualifies (including parent borrowers with PLUS loans who consolidate into a Direct Loan).
	• Generally, borrower pays the lesser of the following:
	  • 20 percent of discretionary income; or
	  • what borrower would pay on a repayment plan with a fixed payment over the course of 12 years.
	• Loan forgiveness after 25 years.

IBR Plan	• Eligibility: borrower must show a Partial Financial Hardship: if the annual amount due on eligible loans, as calculated under a 10-year Standard Repayment Plan, exceeds 15 percent of the difference between borrower's adjusted gross income (AGI) and 150 percent of the poverty line for borrower's family size in the state where borrower lives. • For those who borrowed money before 7/1/2014, borrower pays 15 percent of his discretionary income, but never more than the 10-year Standard Repayment Plan amount. • Loan forgiveness after 25 years. • For those who borrowed money after 7/1/2014, borrower pays 10 percent of his discretionary income, but never more than the 10-year Standard Repayment Plan amount (essentially the same as the PAYE Plan). • Loan forgiveness after 20 years.
REPAYE Plan	• Eligibility: everyone qualifies. • Generally 10 percent of your discretionary income, with no cap. • Loan forgiveness after 20 years (25 for graduate loans).
PAYE Plan	• Eligibility: only those who borrowed money after 10/1/2007 and received a Direct Loan after 10/1/2011, AND borrower shows a Partial Financial Hardship. • Generally 10 percent of your discretionary income, but never more than the 10-year Standard Repayment Plan amount; • Loan forgiveness after 20 years.

Public Service Loan Forgiveness

The Public Service Loan Forgiveness (PSLF) Program forgives the remaining balance on your Direct Loans after you have made 120 qualifying monthly payments under a qualifying repayment plan while working full-time for a qualifying employer.

Only employment with the following types of organizations qualifies for PSLF:

- Government organizations at any level (federal, state, local, or tribal);
- Not-for-profit organizations that are tax-exempt under Section 501(c)(3) of the Internal Revenue Code; and

- Other types of not-for-profit organizations that provide certain types of qualifying public services (including AmeriCorps and Peace Corps).

Alternatives to Bankruptcy Discharge

Total and Permanent Disability (TPD) Discharge:

1 – If borrower is a veteran, she can submit documentation from the U.S. Department of Veterans Affairs (VA) showing that the VA has determined that she is unemployable due to a service-connected disability;

2 – If borrower is receiving Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits, he can submit a Social Security Administration (SSA) notice of award for SSDI or SSI benefits stating that his next scheduled disability review will be within 5 to 7 years from the date of his most recent SSA disability determination; or

3 – Borrower can submit certification from a physician that she is totally and permanently disabled. Physician must certify that borrower is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that:

- Can be expected to result in death;
- Has lasted for a continuous period of not less than 60 months; **or**
- Can be expected to last for a continuous period of not less than 60 months.

Applying for TPD discharge on-line: https://secure.disabilitydischarge.com/registration

(Application attached as Exhibit.)

False Certification

1. Forgery: if the loan application was forged or signed by someone other than the borrower.

2. Ability to Benefit: if the borrower did not have a high school diploma or G.E.D., and the school failed to properly administer an approved exam to confirm the borrower would benefit from the educational program.

3. Disqualifying Status: if the borrower is legally ineligible to be certified or licensed in the occupation for which the education was specifically provided.

(All three applications attached as Exhibits.)

Due Process, Late Claims and Lessons Learned from a Successfully Lost Case.

In re Johnson, No. 13-35426-SVK, 2016 WL 106595 (Bankr. E.D. Wis. Jan. 8, 2016)

On November 13, 2013, Myron K. Johnson and Shevelle A. Johnson (the "Debtors") filed a Chapter 13 Petition for in the Eastern District of Wisconsin Bankruptcy Court. In their bankruptcy Schedules, the Debtors listed the United States Department of Education and ECMC as their only student loan creditors. The Debtors did not list Pennsylvania Higher Education Assistance Agency ("PHEAA") as one of their creditors in their bankruptcy petition, despite the fact that Ms. Johnson owes $87,349.73 to PHEAA on her student loan. PHEAA first became aware of the Debtors' bankruptcy case in July 2015, almost twenty months after the Debtors' bankruptcy filing. The bar date for creditors to file a claim was April 10, 2014. On July 31, 2015, PHEAA filed its proof of claim. The Trustee objected to PHEAA's proof of claim.

In response to the Trustee's objection, PHEAA argue that, under *In re Washington*, 483 B.R. 871 (Bankr. E.D. Wis. 2012), a late-filed claim can be allowed in a Chapter 13 case if three elements are satisfied and that PHEAA met each element: (1) the creditor did not receive notice of the Chapter 13 case until after the claims bar date expired; (2) upon learning of the case, the creditor promptly filed a proof of claim; and (3) the prejudice to the creditor created by disallowing the claim outweighs the prejudice to the other creditors caused by allowing the claim. PHEAA additionally argue that, under *In re Tarbell*, 431 B.R. 826, 828 (Bankr. W.D. Wis. 2010), due process and equitable considerations allow the late filing of a claim where it is clear that the creditor had no notice of the Chapter 13 case in time to file a proof of claim.

The Court upheld the Trustee's objection, primarily focusing on *Law v. Siegel*, 134 S. Ct. 1188 (2014), a case that decided after *Washington* and *Tarbell.* In *Law v. Siegel*, the Court noted, the Supreme Court emphasized that the equitable powers of the bankruptcy courts must be exercised within the confines of the Bankruptcy Code. Strictly applying Section 502(b)(9), which states that one reason to disallow a claim is if "proof of such claim is not timely filed," the Court stated that "a strict application of the relevant Code and Rule provisions without an equitable gloss requires disallowance of PHEAA's tardy claim."

Excerpt from STUDENT LOANS AND BANKRUPTCY: WHEN WORLDS NEED NOT COLLIDE

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National Consumer Law Center, Inc.

c. Separate Classification

Absent a finding of undue hardship under 11 U.S.C. § 523(a)(8), debtors are obligated to pay upon completion of their chapter 13 bankruptcy the amount owed on student loan debt that has not been paid during the plan. This includes any unpaid interest on the debt that has accrued during the plan.[1] When that is the case, it is often in the debtor's interest to pay off as much of the student loan debt in the chapter 13 plan as is permissible.

One way to pay more on the student loan than on other unsecured debts is to separately classify the student loan for payments at a higher percentage than other unsecured debts pursuant to 11 U.S.C. § 1322(b)(1). Recent cases have been divided, both in the means of analysis and the result, as to whether students can separately classify student loans. Debtors are permitted to discriminate among similar classes of creditors in a plan. The issue is whether a separate classification for one creditor discriminates unfairly against other creditors.

The following are case summaries illustrating arguments favoring separate classification of student loan debt:

- **Debtor would lose discharge under Public Loan Forgiveness program; Discrimination advances the goal of fresh start and the public policy objective of paying off student loan debts.**

In re Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012) (separate classification and higher payment rate for student loan debt not unfairly discriminate because it allowed debtor to participate in the Public Loan Forgiveness program and gave her the chance to write off approximately $50,000 of student loan debt. Such discrimination advanced the goal of a fresh start for the debtor and the public policy objective of payment of student loan debts. The cost of this discrimination to unsecured creditors was 5%, or a total of only $5,000).

- **Discrimination not unfair when there is no harm to the unsecured creditors.**

[1] If the student loan debt is nondischargeable, postpetition interest will not be discharged. *See In re* Kielisch, 258 F.3d 315 (4th Cir. 2001); *In re* Pardee, 218 B.R. 916 (B.A.P. 9th Cir. 1998), *aff'd*, 187 F.3d 648 (9th Cir. 1999); *In re* Jordan, 146 B.R. 31 (D. Colo. 1992).

In re Potgieter, 436 B.R. 739 (Bankr. M.D. Fla. 2010) (chapter 13 plan that separately classified student loan obligation and proposed to pay it at the contract rate outside of the plan did not unfairly discriminate because the plan provided for full repayment of all general unsecured claims; the student loan obligation was non-dischargeable such that the debt would be fully repaid at some point; and the debtor had the right, under § 1322(b)(4), "to provide for payments on any unsecured claim to be made concurrently with payments on any secured claim").

- **There is a reasonable basis and/or a less discriminatory approach would leave the debtor or creditors worse off.**

In re Mason, 456 B.R. 245 (Bankr. N.D. W. Va. 2011) (separate classification to allow student loan creditor to receive a higher percentage payment than other unsecured creditors may be allowed if the debtor can articulate a non-arbitrary reason why the discrimination is necessary and demonstrate that a less discriminatory approach is not advisable).

In re Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (in consolidated bankruptcy cases, debtors' separate classification for long-term student loan debt to allow for cure and maintenance not unfairly discriminatory when such classification reduced payments to other unsecured creditors by 21% and 26% because failure to maintain payments on student loan debts would leave debtors in a much worse position than they were in prior to filing; separate classification was unfair discrimination where equal treatment of all unsecured creditors would reduce the student loan payment by 20% while increasing the distribution to other creditors by 80%).

In re Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009) (separate classification of student loans to allow for maintenance of payments not unfairly discriminatory because it benefited the very creditors who were being discriminated against; debtor risked losing her optometry license, under state law, if she fell behind on her student loan payments which would jeopardize her ability to pay other unsecured creditors).

In re Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007) (direct payments to student loan creditors in accordance with contract terms is not unfair discrimination because general unsecured creditors would realize only an additional .2% dividend in the absence of such discrimination while debtors would otherwise suffer needless accrual of interest and penalties and may face the consequences of default upon completion of the chapter 13 plan).

In re Freshly, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (discrimination not unfair where separate classification of student loan from other unsecured debt was necessary for the debtor's rehabilitation under chapter 13, i.e. it would allow him to return to university and earn a degree and in light of the public policy goal of insuring repayment of student loans; plan proposed to full pay student loan debt of $2,258.00 while paying 1% of $5,314.53 of remaining unsecured debt).

- **Payment of student loans, ahead of other unsecured debt, not unfair discrimination**

In re Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992) (debtor's plan, which proposed concurrent payment of student loans and a secured claim, to be followed by full payment of the remaining unsecured claims did not unfairly discriminate under the test set forth in *Matter of Tucker* because the plan provided for full repayment of all unsecured claims; the student loan obligations were non-dischargeable; and the debtor had a right to under § 1322(b)(4) to propose this repayment structure).

- **Funds used are in excess of projected disposable income.**

In re Stull, 2013 WL 1279069 (Bankr. D. Kan. Mar. 27, 2013) (distinguishing this case from *In re Kubezcko*, which involved a below median debtor, court holds that an above-median debtor's chapter 13 plan to separately classify and pay a non-dischargeable obligation from income earned in excess of the projected disposable income committed to pay unsecured debt does not unfairly discriminate; plan in this case ultimately rejected because it proposed to pay interest on the student loan, which is prohibited by § 1322(b)(10) absent provision to pay all allowed claims in full).

- **Discrimination not unfair so long as unsecured creditors receive at least as much as they would in chapter 7 proceeding**

In re Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993) (plan that proposed to pay nondischargeable student loan debt in full while only paying 29% dividend to other unsecured creditors did not unfairly discriminate because creditors would otherwise receive little or no payment under a Chapter 7 filing; the discrimination had a reasonable basis, i.e. allows full repayment of student loans; allows for a fresh start; the discrimination was not proposed in bad faith; and the degree of discrimination was directly related to the rationale for the discrimination).

In re Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991) ("chapter 13 plan may provide for a greater percentage payment to an educational lender than to other unsecured creditors, but not by reducing the payments to those other creditors to a level below what they would get in a Chapter 7 liquidation of the debtor's assets"; plan that proposed to pay student loan debts in full but only 15% of other unsecured debts approved).

The following are case summaries in which separate classification of student loan debt was not permitted:

- **Nondischargeability, by itself, does not justify discrimination**

In re Groves, 39 F.3d 212 (8th Cir. 1994) (nondischargeability of student loans does not, by itself, justify "substantial" discrimination against general unsecured debt; additionally, a debtor's interest in a fresh start does not justify separately classifying student loans for the sole purpose of paying those debts in a manner that prejudices other unsecured claims).

In re Sperna, 173 B.R. 654 (B.A.P. 9th Cir. 1994) (nondischargeability, on its own, is not a reasonable basis for preferential treatment of student loans and does not demonstrate that such discrimination is necessary; record in these cases did not provide a sufficient evidence to determine if discrimination in favor of student loans was unfair; at issue were two chapter 13 plans that proposed to pay student loans in full while paying other unsecured debt lesser amounts, i.e. 1.4% and 12.21%)

McCullough v. Brown, 162 B.R. 506 (N.D. Ill. 1993)(chapter 13 plans that proposed to pay nondischargeable student loans in full and other unsecured claims between 10% and 20% could not be confirmed on the basis of nondischargeability; court holds that for a plan to pass the unfair

discrimination test "debtor must place something material onto the scales to show a correlative benefit to the other unsecured creditors").

- **Student loans co-signed by parents for children do not fall into the consumer debt exception and thus must meet the unfair discrimination requirement**

In re Santana, 480 B.R. 222 (Bankr. D.P.R. 2012) (limiting the application of the § 1322(b)(1) consumer debt exception to co-signed debt acquired for the benefit of the debtor rather than a co-signer, court holds that a student loan co-signed by debtor father for his son did not fall within the exception because students loans generally benefit the co-signer and not the debtor).

- **Fresh start and/or public policy in favor payment of student loans is not reasonable justification for discrimination**

In re Birts, 2012 WL 3150384 at 4 (E.D. Va. Aug. 1, 2012) (reversing bankruptcy court approval of chapter 13 plan that proposed to pay student loans outside of the plan thereby allowing the student loan lender to be paid more than three times as much as other unsecured creditors even though the student loan debt comprised a third of total unsecured debt. Debtor's status as a single mother with three children, her generic interest in a "fresh start" and a strong public policy in favor of the federal student loan program were insufficient to justify discrimination in favor of the non-dischargeable student loan debt; no case law supported this first reason while the other reasons were not unique and exist in every bankruptcy case involving student loans).

In re Bentley, 266 B.R. 229 (B.A.P. 1st Cir. 2001) (chapter 13 plan to pay debtors' student loan debt in full but a 3.6% dividend to other unsecured creditors was unfair discrimination; debtors' interest in a fresh start did not justify discrimination in a plan that proposed to pay only the minimum required into the plan, i.e. projected disposable income over three years. Court holds that where a plan redistributes benefits and burdens to benefit the debtor but burden the credit, it can only be found fair if there is some other correlative benefit to the unsecured creditors).

- **Avoiding harm to the debtor is not a reasonable basis for discrimination**

In re Kubeczko, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012) (unfair discrimination in a chapter 13 plan that separately classified student loan debt and proposed to pay a 48.86% dividend on that claim while remaining unsecured creditors would be paid a dividend of 0.27%. Absent the separate classification, all unsecured creditors would receive a dividend of approximately 8.06%. The fact that separate classification and payment of the student loan would have prevented debtor's default on student loans and the accrual of substantial interest was not enough to justify the discrimination).

In re Knecht, 410 B.R. 650 (Bankr. D. Mont. 2009) (debtor failed to demonstrate, under the four-factor *Wolff* test, chapter 13 plan that proposed to pay more than $36,000 to student loan debt and nothing to general unsecured creditors did not unfairly discriminate; debtor's sole basis for the discrimination was not knowing if he would live or work long enough to repay his student loan debt because of health issues but he failed to link his health issues to his life span or his ability to earn a respectable wage after completion of the plan; debtor admitted that he could carry out the plan without the discrimination; there was no evidence that the plan was proposed in good faith; and no evidence that the proposed discrimination was related to the basis or rationale for the discrimination).

- **Discrimination unfair in the absence of proof that it is necessary or reasonable**

In re Thibodeau, 248 B.R. 699 (Bankr. D. Mass. 2000) (debtor failed, under *Leser* test, to demonstrate that plan to separately classify and fully pay student loan arrearages, maintain student loan payments outside of plan and pay a 27% dividend on other general unsecured claims, while devoting less than the full amount of debtor's net disposable income to payments under the plan, did not unfairly discriminate).

In re Gonzalez, 206 B.R. 239 (Bankr. S.D. Fla. 1997) (chapter 13 plan that proposed to pay student loan debt in full and a 6% dividend to unsecured creditors could not be confirmed because debtor's offered no proof of the discrimination being "fair" or "necessary").

In re Renteria, 2012 WL 1439104 (Bankr. D. Colo. Apr. 26, 2012) (below median income debtors' chapter 13 plan to separately classify student loans to allow for 64% repayment of those claims over 60 month period versus a 1% repayment of all other unsecured claims constituted unfair discrimination under the *King/Simmons* test and *Machado* framework. The Plan failed under *King/Simmons* because the general unsecured creditors would receive less than they would absent the separate classification, i.e. 1% versus 12%. It also failed under *Machado* because the debtors did not propose to cure student loan arrearages and there was no evidence that the discriminatory treatment was necessary to ensure the debtors would not be worse off at the end of the Plan).

d. Avoiding Unfair Discrimination by filing "Chapter 20"

An option for avoiding the "unfair discrimination" argument would be for the debtor to first file a chapter 7 case, obtain a discharge of all other general unsecured claims, and then file a chapter 13 to deal with the non-dischargeable student loans. This is colloquially known as a "chapter 20" case.[2] In the second bankruptcy, there would be no other unsecured claims against which to unfairly discriminate. Confirmation of the debtor's chapter 13 plan in this situation may be subject to greater court scrutiny as to whether the plan was filed in good faith.[3]

e. Preferential Treatment Allowed for Debts with Co-Signors

Section 1322(b)(1) of the Code contains two distinct clauses. The first clause allows the debtor to designate a class of unsecured claims for favorable treatment, provided that the beneficial classification does not discriminate unfairly against other unsecured claims. The second clause of § 1322(b) (1) creates a specific exception to this general rule. It states, "however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims." Congress added this second clause in 1984 amendments to the Code. The purpose of the amendment was to protect non-filing co-obligors on debts of the debtor. Otherwise these co-obligors could face ramped-up collection actions, leading potentially to their filing their own bankruptcy petitions.[4] In fashioning the amendment, Congress intended to overrule decisions that would have

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[2] The Bankruptcy Code does not prohibit a debtor from filing a chapter 13 case after receiving a discharge in an earlier chapter 7 case. *See* Johnson v. Home Bank, 501 U.S. 78 (1991).
[3] *In re* Metz, 67 B.R. 462 (9th Cir. B.A.P. 1986) (chapter 20 is not a per se bad faith filing). *See also* Branigan v. Davis (*In re* Davis), 716 F.3d 331 (4th Cir. 2013).
[4] *See In re* Russell, 503 B.R. 788, 796 (Bankr. S.D. Ohio 2013) (discussing legislative history of amendment).

prevented the chapter 13 debtor from continuing to pay a creditor on the joint consumer debt the amount that creditor would have continued to receive absent the bankruptcy filing.[5]

Certain courts construing the second clause of § 1322(b)(1) have implied into the text an obligation that the debtor must also show a lack of unfair discrimination in the treatment of the co-signed debt.[6] There is no basis for this requirement, as the plain language of the second clause gives the debtor an unrestricted right to classify certain co-debtor claims separately.[7] The distinction created by the second clause makes little sense if the unfair discrimination test applies under the second clause in the same manner that it does under the first. Separate classification should be permitted so long as the debt is a consumer debt and was incurred for the benefit of the debtor.[8]

f. Graduated Payment Structures for Student Loans in Chapter 13 Plans

Another approach might be to establish a five-year plan, not separately classify the student loan for the first three years of the plan, and then classify it for greater payment during the plan's final two years.[9] The basis for this approach is the Bankruptcy Code provision that requires disposable income only to be paid out over three years.[10] Any amount that creditors receive in the final two years would be a bonus in any event. Courts have split on whether they will allow this separate classification of student loans in years four and five of a chapter 13 plan.[11]

As a related option, if the plan is voluntarily extended, for example from 36 to 60 months, the plan could provide for preferentially high payments to the student loan creditor during the first 36 months. Any shortfall to non-student loan creditors occurring during the first three years could be made up by directing additional payments to them during the fourth and fifth years.[12] This would allow for a consistently higher payment to the student loan creditor throughout the entire plan period.

g. Over-Median Income Debtors May Designate All Their Discretionary Income for Student Loan Payments

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[5] *In re* Renteria, 470 B.R. 838, 844-46 (B.A.P. 9th Cir. 2012); *In re* Russell, 503 B.R. 788, 796 (Bankr. S.D. Ohio 2013).
[6] *See e.g. In* re Linton, 2011 WL 3207366 (Bankr. E.D. Va. July 27, 2011) (agreeing with courts that require some consideration of degree of discriminatory treatment, but finding 100% payment of student loan debts while other unsecured creditors receive 5% to 6% to be acceptable).
[7] *In re* Rivera, 490 B.R. 130 (B.A.P. 1st Cir. 2013);
In re Renteria, 470 B.R. 838, 845-46 (B.A.P. 9th Cir. 2012).
[8] *See In re* Santana, 480 B.R. 222 (Bankr. D. P.R. 2012) (debtor-parent who co-signed student loan for benefit of son could not separately classify debt under second clause of section 1322(b)(1)because loan not for benefit of parent).
[9] *In re* Simmons, 288 B.R. 737 (Bankr. N.D. Tex. 2003) (plan providing for 100% repayment of student loan and zero percent to general unsecured creditors may be confirmed when all of debtor's disposable income paid into plan for first thirty-six months and student loan creditor paid in months forty-one through forty-eight of plan); *In re* Strickland, 181 B.R. 598 (Bankr. N.D. Ala. 1995) (holding that nondischargeable student loan debt could not be treated more favorably than other unsecured claims for first thirty-six months of chapter 13 plan, but remaining twenty-four months could be devoted solely to payment of student loan).
[10] 11 U.S.C. § 1325(b)(1)(B).
[11] *Compare In re* Stickland, 181 B.R. 598 (Bankr. N.D. Ala. 1995) (allowing separate treatment in years four and five), *and In re* Rudy, 1993 WL 365370 (Bankr. S.D. Ohio 1993) (same), *with In re* Sullivan, 195 B.R. 649 (Bankr. W.D. Tex. 1996) (not allowing separate classification).
[12] *See e.g. In re* Perrine, 2001 WL 34076434 (Bankr. C.D. Ill. July 13, 2001) (suggesting debtor could minimize disparity in treatment of student loan and non-student loan unsecured creditors by extending plan term six months beyond the proposed 36 months).

The means testing calculation can work to the benefit of an above-median-income chapter 13 debtor who wishes to continue making regular payments on a nondischargeable student loan. Where the debtor's "monthly disposable income" amount from his or her Form 22C is $0 or a negative number, bankruptcy courts have generally allowed above-median income chapter 13 debtors to use as much of their discretionary income as they wish to pay student loan creditors at a rate greater than other unsecured creditors.[13]

h. Student Loan Payments As "Special Circumstances" Under the Means Test

In order to reduce current monthly income under the means test, an above-median-income debtor will want to show the maximum allowable expenditures and expenses. Student loan payments would appear to be an obvious choice to apply toward this reduction. Unfortunately, student loan debt payments, like most general unsecured debts, are not allowable deductions from current monthly income for the means test calculation.[14] Yet, there is still a way in which the debtor may use student loan payments to reduce current monthly income and avoid the presumption of abuse. After deductions for allowed expenditures, the Code permits the debtor to rebut the presumption of abuse by demonstrating "special circumstances" that may bring the debtor's disposable income under the presumed abuse tolerance level set by the means test formula.[15] The Code defines these "special circumstances" only generally. The circumstances must "justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."[16] As examples of acceptable "special circumstances," the Code mentions "a serious medical condition or a call or order to active duty in the Armed Forces."[17]

Several courts have said that an obligation to pay a nondischargeable student loan can be a "special circumstance" similar to a serious medical condition or a call to military service.[18] For example, in *In re Delbecq*, the means test left the debtor with $304 in disposable monthly income, and she faced a trustee's motion to dismiss asserting the presumption of abuse. In response, the debtor argued that her monthly student loan payment of $350 was a "special circumstance" that rebutted the presumption.[19] If

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[13] *In re* Knowles, 501 B.R. 409, 412 (Bankr. D. Kan. 2013) (above-median chapter 13 debtor's direct payment of ongoing contractual payments to student loan creditor using funds not required by Code to be committed to plan did not constitute unfair discrimination under § 1322(b)(1)); *In re* King, 460 B.R. 708 (Bankr. N.D. Tex. 2011) (not unfair discrimination to pay student loan directly to creditor using income in excess of the amount mandated by the projected disposable income calculation); *In re* Abaunza, 452 B.R. 866 (Bankr. S.D. Fla. 2011) (using discretionary income, above-median debtor may pay student loan debt in full over the sixty months of the plan, while other unsecured creditors will receive a dividend of less than 1%); *In re* Sharp, 415 B.R. 803 (2009) (following *Orawsky*, above-median-income chapter 13 debtor's discretionary payments to student loan creditors not unfairly discriminatory). *But see In re* Stull, 489 B.R. 217 (Bankr. D. Kan. 2013) (allowing above-median income chapter 13 debtor to pay student loan in full with discretionary income, but holding § 1322(b)(10) precludes payment of interest on claim under plan).

[14] 11 U.S.C. § 707(b)(2)(A)(ii)(I) ("other necessary expenses" "shall not include any payments for debts"); *see also In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011) (student loan debt not an allowed priority expense under section 707(b)(2)(A)(ii), (iv), for Official Form 22A).

[15] 11 U.S.C. § 707(b)(2)(B)(i); *see* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 13.4.6.2 (10th ed. 2012 and Supp.).

[16] 11 U.S.C. § 707(b)(2)(B)(i).

[17] *Id.*

[18] *In re* Howell, 477 B.R. 314, 316/-/17 (Bankr. W.D.N.Y. 2012) (debtor rebutted presumption of abuse when magnitude of student loan debt would allow only nominal payments to other unsecured creditors); *In re* Edwards, 2012 WL 3042233 (Bankr. D. Ala. July 25, 2012) (agreeing that in some cases student loan payments may constitute special circumstances, but not in this case because debtors incurred other high unnecessary expenses); *In re* Sanders, 454 B.R. 855 (Bankr. M.D. Ala. 2011) (debtors who "either directly or on guarantor basis" were responsible for their son's student loan could claim the expense as a "special circumstance" under section 707(b)(2)(B)); *In re* Martin, 371 B.R. 347 (Bankr. C.D. Ill. 2007); *In re* Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007); *In re* Haman, 366 B.R. 307 (Bankr. D. Del. 2007) (debtor's obligation to pay as co-signor on son's student loan is "special circumstance"); *In re* Templeton, 365 B.R. 213 (Bankr. W.D. Okla. 2007); *see* Anthony P. Cali, *The "Special Circumstance" of Student Loan Debt Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 52 Ariz. L. Rev. 473 (Summer 2010) (reviewing decisions and policies related to issue and generally supporting treatment of student loans payments as "special circumstance").

[19] *In re* Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007).

her disposable income was reduced by the amount of her student loan payments, she would have no disposable income under the means test formula. The court agreed with the debtor and denied the trustee's motion to dismiss.[20]

In holding that the obligation to pay the student loans was a "special circumstance" under section 707(b)(2)(B)(i), the court in *Delbecq* looked to the legislative history of the means test. Congress intended that the means test bar from chapter 7 those debtors who had a meaningful ability to pay their debts. According to the court, forcing the debtor into chapter 13 would do nothing to further this intent. Because separate classification of student loan debts was permitted in a chapter 13 plan in the district, the non-student-loan creditors would receive nothing under any plan the debtor was likely to propose.[21] The student loan creditor would receive all disbursements under her plan. The student loan debt was presumed to be nondischargeable, so the debtor had no alternative but to pay it. Thus, the debtor did not have any meaningful ability to repay her non-student-loan debts either inside or outside of bankruptcy. This amounted to special circumstances that placed the debtor in clear need of chapter 7 relief and required adjustments to her income and expenses based upon the student loan debt. The obligation to make significant student loan payments may also be a basis for opposing a motion to dismiss a chapter 7 case under a claim of general abuse of chapter 7 or lack of bad faith.[22]

A similar issue involving student loans and the debtor's projected disposable income has arisen in chapter 13 cases. If the student loan payments can be excluded from projected disposable income as a "special circumstance," the payment of the regular monthly installments on the long-term debt directly to the creditor would be appropriate. This should be allowed, because the same "special circumstances" standard of section 707(b)(2)(B)(i) that reduces current monthly income under the means test for chapter 7 applies to adjustments to disposable income in chapter 13.

At least one court has agreed with this analysis in the context of chapter 13.[23] Finding that monthly payments of $450 toward a nondischargeable student loan were "special circumstances," the court in *In re Knight* held that a downward adjustment of the debtor's projected disposable income in the full amount of his scheduled student loan payments was appropriate. The court found that the debtor had no reasonable alternative to payment of his student loans. There would be a demonstrable economic unfairness to the debtor if completion of a chapter 13 plan left him in default on his student loans and subject to garnishment or tax offsets.[24] This would be inconsistent with the intent of BAPCPA to encourage debtors to complete chapter 13 repayment plans. As an alternative basis for its decision, the court in *In re Knight* found that the debtor was permitted to make payments on the student loans under section 1322(b)(5).

Some courts have rejected the view that the obligation to pay a nondischargeable student loan debt is, per se, a "special circumstance" that justifies additional deductions from monthly income under the means test.[25] A per se rule that any specific debt within a general category of expenditures will

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[20] *Id.*
[21] *See* § 10.9.1, *supra* (discussing chapter 13 plan classification issues related to student loans).
[22] 11 U.S.C. § 707(b)(1) and (3); *see In re* Thurston, 2008 WL 3414138 (Bankr. N.D. Ohio Aug. 8, 2008).
[23] *In re* Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007).
[24] *Id.* at 437. *See generally In re* Howell, 477 B.R. 314, 317 (Bankr. W.D.N.Y. 2012) (discussing the negative impact of chapter 13 on debtor's student loan debt as factor under section 707(b)(2)(B)(i) rebutting claim of abuse of chapter 7).
[25] *In re* Martin, 505 B.R. 517, 522 (Bankr. S.D. Iowa 2014) (agreeing with line of cases that hold that student loans are not typically special circumstance); *In re* Brown, 500 B.R. 255, 263 (Bankr. S.D. Ga. 2013) (paying student loan debt not "special circumstance" unless debtor can show incurring loans was due to job loss, required to maintain job, or similar necessity); *In re* Maura, 491 B.R. 493, 512/-/13 (Bankr. E.D. Mich. 2013) (incurring student loan debt is voluntary, foreseeable, and not unusual); *In re* Campbell, 2012 WL 162287 (Bankr. E.D. Ky. Jan. 18, 2012) (rejecting special circumstances treatment when debtor presented no evidence beyond nondischargeable nature of student loan debt); *In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011) (debtors did not establish student loan expense was necessary and could not be deferred under long-term payment options); *In re* Johnson, 446 B.R. 921 (Bankr. E.D. Wis. 2011) (student loan taken out voluntarily for career enhancement can never support "special circumstances" treatment, but debtor may classify student loan payments separately under section 1322(b)(5) to

always qualify for the "special circumstances" deduction is not a tenable position, and it is not one that any courts have endorsed. Under a fair reading of the statute, the debtor must make some particularized showing that, in his or her case, there is no alternative to payment of the student loan debt.[26] However, in rejecting debtors' arguments that student loan payments were "special circumstances," some recent decisions endorsed a line of reasoning that deviates from the statutory language as widely as does the view that student loans should always be treated as a "special circumstances." These courts adopted the position that "special circumstances" must be the result of some involuntary hardship that befell the debtor.[27] According to these courts, student loans are a routine obligation that individuals take on voluntarily. Under this view, payments toward a nondischargeable student loan would almost never be a special circumstance reducing disposable income under section 707(b)(2)(B).

The decisions that give substantial weight to the reasons why the debtor incurred a particular debt, such as a student loan, ignore the relevant statutory language.[28] By its terms, the statute requires only that the debtor demonstrate that certain circumstances are "special" to the extent that they require additional expenditures from current monthly income and there is no reasonable alternative to payment for these expenditures. There is nothing in the statutory language suggesting that anything about the past circumstances which created the obligation is relevant. The only criterion is that there presently be no reasonable alternative to the expenditure.[29] The standard should be met when there is nothing within the debtor's power to reduce or otherwise avoid the additional expense of the student loan.[30] The means testing system was intended to be a process to direct debtors with some truly discretionary income or an extravagant lifestyle into some form of debt repayment. The lack of alternatives for repayment of student loan debt should focus on the debtors' resources and expenses and not on whether student loans are a common or "voluntary" form of debt.[31]

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maintain payments); *In re* Harmon, 446 B.R. 721 (Bankr. E.D. Pa. 2011) (proceeding under chapter 13 would not impose unduly severe consequences upon debtor); *In re* Conlee, 435 B.R. 490 (Bankr. N.D. Ohio 2010); *In re* Siler, 426 B.R. 167 (Bankr. W.D.N.C. 2010); *In re* Carillo, 421 B.R. 540 (Bankr. D. Ariz. 2009); *In re* Pageau, 383 B.R. 221 (Bankr. D.N.H. 2008); *In re* Lightsey, 374 B.R. 377, 382 n.3 (Bankr. S.D. Ga. 2007).

[26] *See In re* Champagne, 389 B.R. 191 (Bankr. D. Kan. 2008) (emphasizing fact-intensive nature of special circumstances determination; rejecting view that nondischargeable student loan obligation is per se a special circumstance but also rejecting view that student loan debt burden can never satisfy this requirement).

[27] *In re* Zahringer (Bankr. E.D. Wis. May 30, 2008); *In re* Pageau, 383 B.R. 221 (Bankr. D.N.H. 2008) (there must be "special circumstances" in the reasons that led debtor to incur education loan).

[28] 11 U.S.C. § 707(b)(2)(B).

[29] *See In re* Haman, 366 B.R. 307, 313/-/14 (Bankr. D. Del. 2007) (rejecting view that circumstances must result from events outside debtor's control).

[30] *In re* Hammock, 436 B.R. 343 (Bankr. E.D.N.C. 2010) (need for education credentials for job advancement not sufficient to show "special circumstances" and lack of reasonable alternatives); *In re* Templeton, 365 B.R. 213 (Bankr. W.D. Okla. 2007); *see also In re* Knight, 370 BR. 429, 439/-/40 (Bankr. N.D. Ga. 2007) (a "reasonable alternative" is not to pay a miniscule percentage to student loan creditor along with all general unsecured creditors in chapter 13 plan and have debtor owe more on student loan after bankruptcy than before). *But see In re* Pageau, 383 B.R. 221 (Bankr. D.N.H. 2008) (in districts that allow separate classification of student loans in chapter 13 plans, treatment of student loan debt in this manner under a plan is reasonable alternative for dealing with expense, precluding finding of special circumstances for chapter 7 debtor); *In re* Lightsey, 374 B.R. 377, 382 n.3 (Bankr. S.D. Ga. 2007) (same).

[31] *In re* Sanders, 454 B.R. 855 (Bankr. M.D. Ala. 2011) (student loan repayment is "special circumstance" rebutting presumption of abuse; allowing indebtedness to increase under long-term payment program not a reasonable alternative); *In re* Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007).

STATE OF MICHIGAN
IN THE 33RD JUDICIAL DISTRICT COURT

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3,A DELAWARE STATUTORY TRUST

Plaintiff,

vs. Case No.

ALETA [redacted]
RICHARD [redacted]
JOINTLY & SEVERALLY

Defendant(s). /

SHERMETA LAW GROUP, P.C.
BY: TRICIA N. McKINNON (P60448)
Attorneys for Plaintiff
P.O. Box 5016
Rochester, Michigan 48308
(248) 519-1700 /

COMPLAINT

NOW COMES the Plaintiff, NATIONAL COLLEGIATE STUDENT LOAN, TRUST 2006-3,A DELAWARE STATUTORY TRUST by and through its attorneys, SHERMETA LAW GROUP, P.C., and for its Complaint against the above named Defendant(s) states to this Honorable Court as follows:

1. Jurisdiction and venue is proper in this Court.

2. Defendant(s) entered into a contract for a student loan with Plaintiff's assignor, BANK ONE (JP MORGAN CHASE BANK, N.A.), with account number *****0275/001-001000.

3. Upon information and belief, Defendant(s) has possession of the contract upon which this claim is based.

4. The contract was duly assigned, in the normal course of business, to Plaintiff.

5. Plaintiff and/or its assignor completed performance under the terms and conditions of the contract.

6. Defendant(s) has defaulted under the terms and conditions of the contract by failing to pay as promised.

7. There is presently due and owing the sum of $17,267.61.

WHEREFORE, Plaintiff prays for Judgment in the amount of $17,267.61 plus costs and interest.

SHERMETA LAW GROUP, P.C.

Dated: APRIL 22, 2015
748796/TA

BY: _____
Terri P. Gruca (P55821)
Tricia N. McKinnon (P60448)
Jessica L. Musinski (P75528)

OMB No. 1845-0065
Form Approved
Exp. Date 6/30/2016

TPD-APP

DISCHARGE APPLICATION: TOTAL AND PERMANENT DISABILITY
IMPORTANT INFORMATION

- **William D. Ford Federal Direct Loan Program**
- **Federal Family Education Loan Program**
- **Federal Perkins Loan Program**
- **TEACH Grant Program**

READ THIS FIRST

- This is an application for a total and permanent disability discharge of your William D. Ford Federal Direct Loan (Direct Loan) Program, Federal Family Education Loan (FFEL) Program, and/or Federal Perkins Loan (Perkins Loan) Program loan(s), and/or your Teacher Education Assistance for College and Higher Education (TEACH) Grant Program service obligation.
- You only need to submit a single application to the U.S. Department of Education to apply for discharge of all of your Direct Loan, FFEL, and/or Perkins Loan program loans and your TEACH Grant service obligations. **Throughout this application, the words "we," "us," and "our" refer to the U.S. Department of Education.**
- To qualify for this discharge, you must meet **one** of the following requirements:
  1. You are a veteran who has been determined by the U.S. Department of Veterans Affairs (VA) to be **unemployable due to a service-connected disability**, and you provide documentation from the VA of that determination;

     OR

  2. You have received a Social Security Administration (SSA) notice of award for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) stating that **your next scheduled disability review will be 5 to 7 years or more from the date of your last SSA disability determination**, and you provide a copy of that SSA notice of award.

     OR

  3. You provide a certification from a physician in Section 4 of this Discharge Application that you are unable to engage in any substantial gainful activity (see definition in Section 5) by reason of a medically determinable physical or mental impairment that:
     - Can be expected to result in death;
     - Has lasted for a continuous period of not less than 60 months; or
     - Can be expected to last for a continuous period of not less than 60 months.
- If you do not meet requirement #1 or requirement #2, you may qualify for discharge by obtaining a certification from a physician in Section 4 of this application, as described above for requirement #3. If you can provide the documentation to show that you meet requirement #1 or #2 above, you are **not** required to have a physician complete Section 4.
- If you are a veteran applying for discharge under requirement #1, you must provide documentation from the VA showing that the VA has determined that you are unemployable due to a **service-connected** disability. You do not meet this requirement if your disability is not service-connected. The following two types of VA determinations meet this requirement: (1) a determination that you have a service-connected disability (or disabilities) that is 100% disabling; or (2) a determination that you are totally disabled based on an individual unemployability determination.
- If you are applying for discharge under requirement #2, the SSA notice of award that you provide must show that your next scheduled disability review will be **5 to 7 years or more from the date of your last SSA disability determination**. You do not meet this requirement if the notice of award states that your next scheduled disability review will be within less than 5 years. If the notice of award does not clearly state the date of your next scheduled review, contact the SSA office that issued the award and request a Benefits Planning Query (BPQY). The BPQY provides a summary of your SSA disability benefits, including the scheduled date for your next disability review. If your BPQY shows that your next scheduled review will be 5 to 7 years or more from the date of your last SSA disability determination, you may submit a copy of your BPQY to show that you meet requirement #2.
- If you are granted a discharge based on requirement #2 or requirement #3, we will monitor your status during a 3-year post-discharge monitoring period. Your discharged loans or TEACH Grant service obligation may be reinstated if you do not meet certain requirements during this period, as explained in Section 6 of this form.
- Except for VA or SSA determinations as described above (requirements #1 and #2), a disability determination by another federal or state agency does not qualify you for this discharge.
- Loan amounts discharged due to total and permanent disability may be considered taxable income by the Internal Revenue Service (IRS). Contact the IRS for more information.
- If you wish to designate an individual or organization to represent you in matters related to your total and permanent disability discharge request, you must complete the Total and Permanent Disability: Applicant Representative Designation form. You may obtain this form from our Total and Permanent Disability Discharge Servicer (see below for contact information).
- Before submitting your application, make sure that Section 3 and (if required) Section 4 include all requested information. Incomplete or inaccurate information may cause your application to be delayed or rejected.

WHERE TO SEND YOUR COMPLETED DISCHARGE APPLICATION

Send your completed application with any required documentation (see the instructions in Section 2 on page 2) to the following address:

U.S. Department of Education
TPD Servicing
PO Box 87130
Lincoln, NE 68501-7130

If you need help completing this form, contact our Total and Permanent Disability Discharge Servicer:

Phone: **1- 888-303-7818**
E-Mail: disabilityinformation@nelnet.net
Web site: www.disabilitydischarge.com

OMB No. 1845-0065
Form Approved
Exp. Date 6/30/2016

DISCHARGE APPLICATION: TOTAL AND PERMANENT DISABILITY

William D. Ford Federal Direct Loan, Federal Family Education Loan, Federal Perkins Loan, and TEACH Grant Programs

WARNING: Any person who knowingly makes a false statement or misrepresentation on this form or on any accompanying documents will be subject to penalties that may include fines, imprisonment, or both, under the U.S. Criminal Code and 20 U.S.C. 1097.

SECTION 1: APPLICANT IDENTIFICATION

Please enter or correct the following information.

☐ **Check this box if any of your information has changed.**

SSN __ __ __ - __ __ - __ __ __ __

DOB _____

Name _____

Address _____

City, State, Zip Code _____

Telephone _____

E-mail Address (Optional) _____

SECTION 2: INSTRUCTIONS FOR COMPLETING AND SUBMITTING THIS APPLICATION

- Carefully read the entire application, including page 1, the instructions in this section, and the additional information on the following pages.
- Type or print in dark ink. Sign and date the application in Section 3. If you are required to have a physician complete Section 4, enter your name and Social Security Number at the top of page 2 (if not preprinted).
- Send the completed application with any required documentation to:

U.S. Department of Education, TPD Servicing, PO Box 87130, Lincoln, NE 68501-7130

1. Are you a veteran who has received a determination from the U.S. Department of Veterans Affairs (VA) that you are **unemployable due to a service-connected disability?**
   - ☐ Yes – Attach documentation of the VA determination and complete Section 3. **You are not required to have a physician complete Section 4.**
   - ☐ No – Continue to Item 2.
2. Have you received an SSA notice of award for SSDI or SSI benefits or an SSA Benefits Planning Query (BPQY) stating that **your next scheduled disability review will be 5 to 7 years or more from the date of your last SSA disability determination**?
   - ☐ Yes – Attach a copy of the SSA notice of award or BPQY and complete Section 3. **You are not required to have a physician complete Section 4.**
   - ☐ No – Complete Section 3 and **have a physician who is a doctor of medicine or osteopathy complete and sign Section 4**. **You must submit this application to us within 90 days of the date of your physician's signature in Section 4.**

SECTION 3: APPLICANT'S DISCHARGE REQUEST, AUTHORIZATION, UNDERSTANDINGS, AND CERTIFICATIONS

I request that the U.S. Department of Education discharge my Direct Loan, FFEL, and/or Perkins Loan, program loan(s), and/or my TEACH Grant service obligation.

I authorize any physician, hospital, or other institution having records about the disability that is the basis for my request for a discharge to make information from those records available to the U.S. Department of Education.

I understand that:

(1) If I am applying for discharge based on a physician's certification in Section 4, I must submit this application to the U.S. Department of Education within 90 days of the date of my physician's signature in Section 4.

(2) Unless I am a veteran who provides the documentation described above in Section 2, Item 1, I may be required to repay a discharged loan or satisfy a discharged TEACH Grant service obligation if I fail to meet certain requirements during a post-discharge monitoring period, as explained in Section 6.

(3) If I am a veteran who does not meet the requirement described above in Section 2, Item 1, and I have obtained a certification from a physician in Section 4, the certification by the physician on this form is only for the purposes of establishing my eligibility to receive a discharge of a Direct Loan Program loan, a FFEL Program Loan, a Perkins Loan Program loan, and/or a TEACH Grant service obligation, and is not for purposes of determining my eligibility for, or the extent of my eligibility for, VA benefits.

(4) If I wish to designate an individual or organization to represent me in matters related to my total and permanent disability discharge request, I must complete and submit the Total and Permanent Disability Discharge: Applicant Representative Designation form.

I certify that: **(1)** I have a total and permanent disability, as defined in Section 5; and **(2)** I have read and understand the information on the discharge process, the terms and conditions for discharge, and the eligibility requirements to receive future loans or TEACH Grants as explained in Sections 6 and 7.

_____ _____ _____

Signature of Applicant or Applicant's Representative (see NOTE below) **Date** Printed Name of Representative (if applicable)

NOTE: You may designate an individual or organization to represent you in matters related to your total and permanent disability discharge request. If you wish to designate a representative, you must complete the Total and Permanent Disability: Applicant Representative Designation form. You may obtain this form from our Total and Permanent Disability Discharge Servicer. See the "Read This First" section of this form for contact information.

Applicant Name: _____ Applicant SSN: __ __ __ - __ __ - __ __ __ __

SECTION 4: PHYSICIAN'S CERTIFICATION

Information and Instructions for Physician:

- The applicant identified above is applying for a discharge of a federal student loan and/or a teaching service obligation for a federal grant on the basis that he or she has a total and permanent disability, as defined in Section 5 of this form. To qualify for a discharge, the applicant must be unable to engage in any substantial gainful activity (as defined below and in Section 5) by reason of a medically determinable physical or mental impairment that **(1)** can be expected to result in death; or **(2)** has lasted for a continuous period of not less than 60 months; or **(3)** can be expected to last for a continuous period of not less than 60 months. This disability standard may be different from standards used under other programs in connection with occupational disability, or eligibility for social service or veterans benefits. A determination that the applicant is disabled by another federal agency (for example, the Social Security Administration) or a state agency does not automatically establish the applicant's eligibility for this loan discharge.
- Complete this form only if you are a doctor of medicine or osteopathy legally authorized to practice in a state, as defined in Section 5, and only if the applicant's condition meets the definition of total and permanent disability in Section 5.
- **Print legibly in dark ink or type. All fields must be completed. If a field is not applicable, enter "N/A." Your signature date must include month, day, and year (mm-dd-yyyy).**
- Provide all requested information for Items 1, 2, and 3 below, and attach additional pages if necessary. Complete the physician's certification at the bottom of this page. The applicant's loan discharge application cannot be processed if the information requested in this section is missing or if your signature is missing.
- If you make any changes to the information you provide in this section, you must initial each change.
- **Please return the completed form to the applicant or the applicant's representative.** The U.S. Department of Education may contact you for additional information or documentation.

1. Medically Determinable Physical or Mental Impairment. Does the applicant have a medically determinable physical or mental impairment that **(a)** prevents the applicant from engaging in any substantial gainful activity, in any field of work, and **(b)** can be expected to result in death, *or* has lasted for a continuous period of not less than 60 months, *or* can be expected to last for a continuous period of not less than 60 months?

☐ Yes ☐ No

Substantial gainful activity means a level of work performed for pay or profit that involves doing significant physical or mental activities, or a combination of both. *If the applicant is able to engage in any substantial gainful activity, in any field of work, you must answer "No." The determination of whether or not the applicant can perform substantial gainful activity is not based on whether the applicant can perform his or her current or past job or profession.*

IF THE ANSWER TO QUESTION 1 IS NO, DO NOT COMPLETE THIS APPLICATION.

2. Disabling Condition. Complete Items **(a)** and **(b)** regarding the applicant's disabling impairment. **Do not use abbreviations or insurance codes.**

(a) Provide your diagnosis of the applicant's impairment: _____

(b) Describe the severity of the disabling physical or mental impairment, including, if applicable, the phase of the disabling condition:

_____

3. Limitations. Explain how the disabling condition prevents the applicant from engaging in substantial gainful activity in any field of work by responding to Items **(a)** through **(e)** below, as relevant to the applicant's condition. Attach additional pages if more space is needed. In addition to what is required below, you may include any additional information that you believe would be helpful in understanding the applicant's condition, such as medications used to treat the condition, surgical and non-surgical treatments for the condition, etc.

(a) Limitations on sitting, standing, walking, or lifting: _____

(b) Limitations on activities of daily living: _____

(c) Residual functionality: _____

(d) Social/behavioral limitations, if any: _____

(e) Current Global Assessment Function Score (for psychiatric conditions): _____

Physician's Certification

- **I certify** that, in my best professional judgment, the applicant identified above is unable to engage in any substantial gainful activity in *any* field of work by reason of a medically determinable physical or mental impairment that **(1)** can be expected to result in death; or **(2)** has lasted for a continuous period of not less than 60 months; or **(3)** can be expected to last for a continuous period of not less than 60 months.
- **I understand** that an applicant who is currently able to engage in any substantial gainful activity in *any* field of work does not have a total and permanent disability as defined on this form.

I am a doctor of (check one) ☐ medicine ☐ osteopathy/osteopathic medicine.

I am legally authorized to practice in the state identified below and I have provided my professional license number below.

_____ _____

State Where Legally Authorized to Practice | Professional License Number (stamp is acceptable; subject to verification through state records)

_____ _____ _____

Physician's Signature (a signature stamp is not acceptable) | **Date (mm-dd-yyyy)** | Printed Name of Physician (first name, middle initial, last name)

_____ _____

Address (stamp is acceptable) | City, State, Zip Code

_____ _____ _____

Telephone | Fax | E-mail Address (Optional)

SECTION 5: DEFINITIONS

- If you have a **total and permanent disability**, this means that:

  (1) You are unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death, or that has lasted for a continuous period of not less than 60 months, or that can be expected to last for a continuous period of not less than 60 months; **OR**

  (2) You are a veteran who has been determined by the VA to be **unemployable due to a service-connected disability**.

  IMPORTANT INFORMATION ABOUT THE DEFINITION OF "TOTAL AND PERMANENT DISABILITY":

  To demonstrate that you have a total and permanent disability in accordance with paragraph **(1)** of this definition, you must either **(a)** provide a copy of an SSA notice of award for SSDI or SSI benefits or an SSA Benefits Planning Query (BPQY) stating that your next scheduled disability review will be 5 to 7 years from the date of your last SSA disability determination, or **(b)** have a physician who is a doctor of medicine or osteopathy complete Section 4 of this application.

  To demonstrate that you have a total and permanent disability in accordance with paragraph **(2)** of this definition, you must provide documentation of a determination from the VA that you are unemployable due to a service-connected disability See page 1 of this form for more information on acceptable documentation.

  The above definition of "total and permanent disability" may differ from disability standards used by other federal agencies Except for certain individuals who have received SSA notices of award for SSDI or SSI benefits, as explained above, or for certain veterans, a disability determination by another federal or state agency does not establish your eligibility for a discharge of your loan(s) and/or TEACH Grant service obligation due to a total and permanent disability.

- **Substantial gainful activity** means a level of work performed for pay or profit that involves doing significant physical or mental activities, or a combination of both.
- A **discharge of a loan** due to a total and permanent disability cancels your obligation (and, if applicable, an endorser's obligation) to repay the remaining balance on your Direct Loan, FFEL, and/or Perkins Loan program loans. A **discharge of a TEACH Grant service obligation** cancels your obligation to complete the teaching service that you agreed to perform as a condition for receiving a TEACH Grant.
- The **post-discharge monitoring period** begins on the date we grant a discharge of your loan(s) or TEACH Grant service obligation and lasts for three years. If you fail to meet certain conditions at any time during or at the end of the post-discharge monitoring period, we will reinstate your obligation to repay your loan(s) or complete your TEACH Grant service. See Section 6 for more information. **Note to Veterans:** The post-discharge monitoring period does not apply if you are a veteran who receives a discharge based on a determination from the VA that you are unemployable due to a service-connected disability.
- The **William D. Ford Federal Direct Loan (Direct Loan) Program** includes Federal Direct Stafford/Ford Loans (Direct Subsidized Loans), Federal Direct Unsubsidized Stafford/Ford Loans (Direct Unsubsidized Loans), Federal Direct PLUS Loans (Direct PLUS Loans), and Federal Direct Consolidation Loans (Direct Consolidation Loans).
- The **Federal Family Education Loan (FFEL) Program** includes Federal Stafford Loans (both subsidized and unsubsidized), Federal Supplemental Loans for Students (SLS), Federal PLUS Loans, and Federal Consolidation Loans.
- The **Federal Perkins Loan (Perkins Loan) Program** includes Federal Perkins Loans, National Direct Student Loans (NDSL), and National Defense Student Loans (Defense Loans).
- The **Teacher Education Assistance for College and Higher Education (TEACH) Grant Program** provides grants to students who agree to teach full time for at least four years in high-need fields in low-income elementary or secondary schools as a condition for receiving the grant funds. If a TEACH Grant recipient does not complete the required teaching service within eight years after completing the program of study for which the TEACH Grant was received, the TEACH Grant funds are converted to a Direct Unsubsidized Loan that the grant recipient must repay in full, with interest, to the U.S. Department of Education.
- The **holder** of your FFEL Program loan(s) may be a lender, a guaranty agency, or the U.S. Department of Education. The holder of your Perkins Loan Program loan(s) may be a school you attended or the U.S. Department of Education. The holder of your Direct Loan Program loan(s) and/or your TEACH Grant Agreement to Serve (if you received a TEACH Grant) is the U.S. Department of Education. Your loan holder may use a servicer to handle billing and other matters related to your loan. The term "holder" as used on this application means either your loan holder or, if applicable, your loan servicer.
- The term **"state"** for purposes of the physician's certification in Section 4 (the physician must be licensed to practice in a state) includes the 50 United States, the District of Columbia, American Samoa, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.
- A **representative** is a member of your family, your attorney, a law firm or legal aid society, or another individual or organization authorized to act on your behalf in connection with your total and permanent disability discharge application.

SECTION 6: DISCHARGE PROCESS / ELIGIBILITY REQUIREMENTS / TERMS AND CONDITIONS FOR DISCHARGE (continues on next page)

APPLYING FOR DISCHARGE (ALL APPLICANTS):

1. **Submission of discharge application.** After you submit your completed discharge application and any required documentation to us, we will send you a notice that will:
   - Acknowledge receipt of your application;
   - Explain the process for our review of total and permanent disability discharge applications; and
   - Inform you that your loan holders will suspend collection activity or continue the previous suspension of collection activity on your loans while we review your application for discharge (you are not required to make any payments on your loans during this period).
2. **Consequences of failure to submit discharge application.** If you do not submit an application for total and permanent disability discharge to us within 120 days of notifying us that you intend to submit an application, collection activity will resume on your loans, and your loan holder may capitalize any unpaid interest that accrued during the 120-day period. This means that the unpaid interest will be added to the principal balance of your loans, and interest will then be charged on the increased loan principal amount. However, if you have a FFEL Program loan and the loan holder is a guaranty agency, or if you have a Federal Perkins Loan, unpaid interest will not be capitalized at the end of the 120-day period.

SECTION 6: DISCHARGE PROCESS / ELIGIBILITY REQUIREMENTS / TERMS AND CONDITIONS FOR DISCHARGE (continued)

DISCHARGE PROCESS FOR VETERANS WHO HAVE BEEN DETERMINED BY THE VA TO BE UNEMPLOYABLE DUE TO A SERVICE-CONNECTED DISABILITY:

1. **Our review of your discharge application.** We will review the documentation from the VA to determine if you are totally and permanently disabled as described in paragraph **(2)** of the definition of "total and permanent disability" in Section 5 of this application.
2. **Determination of eligibility or ineligibility for discharge.** If we determine that you are totally and permanently disabled, you will be notified that your loans and/or TEACH Grant service obligation has been discharged. The discharge will be reported to nationwide consumer reporting agencies, and any loan payments received on your loan on or after the effective date of the determination by the VA that you are unemployable due to a service-connected disability will be refunded to the person who made the payments.

   If we determine that you are **not** totally and permanently disabled, you will be notified of that determination. The notification will include:

   - The reason or reasons for the denial of your discharge application;
   - An explanation that your loans are due and payable to the loan holder under the terms of the promissory note that you signed and that your loans will return to the status they were in at the time you applied for a total and permanent disability discharge;
   - An explanation that your loan holder will notify you of the date you must resume making payments on your loans; and
   - An explanation that if you applied for a discharge of a TEACH Grant service obligation, you must comply with all terms and conditions of your TEACH Grant Agreement to Serve.

   The notification will also explain your ability to request reconsideration of this determination or to submit a new discharge application:

   - You may request that we re-evaluate your discharge application if, within 12 months of the date of the notification from us that you are ineligible for discharge, you provide us with additional documentation from the VA that supports your eligibility for discharge (you do not have to submit a new application); or
   - If the documentation from the VA does not indicate that you are unemployable due to a service-connected disability, you may reapply for discharge under the "Discharge Process For All Other Applicants," as described below (you must submit a new application with the required documentation from the SSA or a physician's certification in Section 4).

DISCHARGE PROCESS FOR ALL OTHER APPLICANTS:

1. **Our review of your discharge application.** If you submit a discharge application supported by an award of benefits notice from the SSA or an SSA Benefits Planning Query (BPQY), we will review the SSA notice of award (or BPQY) to determine if it meets the requirements described in Section 2, Item 2 of this form. If you submit a discharge application supported by a physician's certification in Section 4 of this application, we will review the physician's certification and any accompanying documentation to determine if you are totally and permanently disabled as described in paragraph **(1)** of the definition of "total and permanent disability" in Section 5 of this application. We may also contact your physician for additional information, or may arrange for an additional review of your condition by an independent physician at our expense. Based on the results of this review, we will determine your eligibility for discharge.

   If we determine during our review of your application that you received a Direct Loan or Perkins Loan program loan, or a TEACH Grant before the date we received the SSA notice of award (or BPQY) or before the date the physician certified your application in Section 4, and a disbursement of that loan or grant is made after that date, but before we have granted a discharge, we will suspend processing of your discharge request until you ensure that the full amount of the disbursement is returned to the loan holder or (for a TEACH Grant) to us.

   If you apply for a total and permanent disability discharge and we determine as part of its review that a new Direct Loan or Perkins Loan program loan or a new TEACH Grant was made to you on or after the date we received the SSA notice of award (or BPQY) or the date the physician certified your application in Section 4, and before the date we grant a discharge, we will deny your discharge request. Collection will resume on your loans and you will again be responsible for complying with the terms and conditions of your TEACH Grant Agreement to Serve.
2. **Determination of eligibility or ineligibility for discharge.** If we determine that you are totally and permanently disabled, we will notify you that a discharge has been approved, and that you will be subject to a post-discharge monitoring period for three years beginning on the discharge date. The notification of discharge will explain the terms and conditions under which we will reinstate your obligation to repay your loan or to complete your TEACH service, as described in Item 3, below. The discharge will be reported to nationwide consumer reporting agencies, and any loan payments that were received after the date we received the SSA notice of award for SSDI or SSI benefits (or BPQY) or after the date the physician certified your discharge application will be returned to the person who made the payments.

   If we determine that you are **not** totally and permanently disabled, we will notify you of that determination. The notification will include:

   - The reason or reasons for the denial of your discharge application;
   - An explanation that your loans are due and payable to the loan holder under the terms of the promissory note that you signed and that your loans will return to the status that would have existed if your total and permanent disability discharge application had not been received;
   - An explanation that your loan holder will notify you of the date you must resume making payments on your loans;
   - An explanation that if you applied for a discharge of a TEACH Grant service obligation, you must comply with all terms and conditions of your TEACH Grant Agreement to Serve;
   - An explanation that you are not required to submit a new total and permanent disability discharge application if, within 12 months of the date of our notification to you that you are ineligible for discharge, you provide additional information regarding your disabling condition that supports your eligibility for discharge, and you request that we re-evaluate your discharge application; and
   - An explanation that if you do not request re-evaluation of your prior discharge application within 12 months of the date of our notification of ineligibility for discharge, and you still wish to have us re-evaluate your eligibility for a total and permanent disability discharge, you must submit a new total and permanent disability discharge application to us.
   - If you request a re-evaluation of your total and permanent disability discharge application or submit a new total and permanent disability discharge application, as described above, your request must include new information regarding your disabling condition that was not provided to us in connection with your prior application for discharge.

SECTION 6: DISCHARGE PROCESS / ELIGIBILITY REQUIREMENTS / TERMS AND CONDITIONS FOR DISCHARGE (continued)

3. Post-discharge monitoring period. If you are granted a discharge, we will monitor your status during the 3-year post-discharge monitoring period that begins on the date the discharge is granted. We will reinstate the requirement for you to repay your loans and/or complete your TEACH Grant service if, at any time during or at the end of the post-discharge monitoring period, you:

- Receive annual earnings from employment that exceed the poverty guideline amount (see **Note** below) for a family of two in your state, regardless of your actual family size;
- Receive a new loan under the Direct Loan Program or the Perkins Loan Program, or a new TEACH Grant;
- Receive a disbursement of a Direct Loan Program or Perkins Loan Program loan or a TEACH Grant that was initially disbursed prior to your discharge date and you fail to ensure that the disbursement is returned to the loan holder or (for a TEACH Grant) to us within 120 days of the disbursement date; or
- Receive a notice from the SSA indicating that you are no longer disabled or that your continuing disability review will no longer be the 5- to 7-year period indicated in the SSA notice of award for SSDI or SSI benefits or BPQY.

During the 3-year post-discharge monitoring period, you (or your representative) must:

- Promptly notify us of any changes in your address or telephone number;
- Promptly notify us if your annual earnings from employment exceed the poverty guideline amount for a family of two in your state (see **Note** below), regardless of your actual family size;
- Upon request, provide us with documentation of your annual earnings from employment, on a form that we will provide; and
- Promptly notify us if you receive a notice from the SSA indicating that you are no longer disabled or that your continuing disability review will no longer be the 5- to 7-year period indicated in the SSA notice of award for SSDI or SSI benefits or BPQY (after you had been previously determined to be disabled by the SSA, were receiving SSDI or SSI benefits, and had a continuing disability review period of 5 to 7 years or more from the date of your last SSA disability determination).

Note: The poverty guideline amounts are updated annually and may be obtained at **http://aspe.hhs.gov/poverty**. We will notify you of the current poverty guideline amounts during each year of the post-discharge monitoring period.

4. Reinstatement of obligation to repay discharged loans or complete discharged TEACH Grant service obligation. If you do not meet the requirements described above in Item 3 at any time during or at the end of the post-discharge monitoring period, we will reinstate your obligation to repay your loans and/or to complete your TEACH Grant service. If your loans are reinstated, you will be responsible for repaying your loans to us in accordance with the terms of your promissory note(s). Your loans will be returned to the status that would have existed if we had not received your total and permanent disability discharge application. However, you will not be required to pay interest on your loans for the period from the date of the discharge until the date your repayment obligation was reinstated. We will be your loan holder. If your TEACH Grant service obligation is reinstated, you will again be subject to the requirements of your TEACH Grant Agreement to Serve. If you do not meet the terms of that agreement and the TEACH Grant funds you received are converted to a Direct Unsubsidized Loan, you must repay that loan in full, and interest will be charged from the date(s) that the TEACH Grant funds were disbursed.

If your obligation to repay your loans or to complete your TEACH Grant service is reinstated, we will notify you of the reinstatement. This notification will include:

- The reason or reasons for the reinstatement;
- For loans, an explanation that the first payment due date on the loan following the reinstatement will be no earlier than 60 days following the date of the notification of reinstatement; and
- Information on how you may contact us if you have questions about the reinstatement, or if you believe that your obligation to repay a loan or complete TEACH Grant service was reinstated based on incorrect information.

SECTION 7: ELIGIBILITY REQUIREMENTS TO RECEIVE FUTURE LOANS OR TEACH GRANTS

FOR VETERANS WHO RECEIVE A TOTAL AND PERMANENT DISABILITY DISCHARGE BASED ON A DETERMINATION BY THE VA THAT THEY ARE UNEMPLOYABLE DUE TO A SERVICE-CONNECTED DISABILITY:

If you are a veteran who is granted a **discharge** based on a determination that you are totally and permanently disabled as described in paragraph **(2)** of the definition of "total and permanent disability" in Section 5 of this application, you are not eligible to receive future loans under the Direct Loan Program or the Perkins Loan Program, or future TEACH Grants, unless:

- You obtain a certification from a physician that you are able to engage in substantial gainful activity; and
- You sign a statement acknowledging that the new loan or TEACH Grant service obligation cannot be discharged in the future on the basis of any injury or illness present at the time the new loan or TEACH Grant is made, unless your condition substantially deteriorates so that you are again totally and permanently disabled.

FOR ALL OTHER INDIVIDUALS WHO RECEIVE A TOTAL AND PERMANENT DISABILITY DISCHARGE:

If you are granted a **discharge** based on a determination that you are totally and permanently disabled in accordance with paragraph **(1)** of the definition of "total and permanent disability" in Section 5 of this application, you are not eligible to receive future loans under the Direct Loan Program or the Perkins Loan Program, or future TEACH Grants, unless:

- You obtain a certification from a physician that you are able to engage in substantial gainful activity;
- You sign a statement acknowledging that the new loan or TEACH Grant service obligation cannot be discharged in the future on the basis of any injury or illness present at the time the new loan or TEACH Grant is made, unless your condition substantially deteriorates so that you are again totally and permanently disabled; and

If you request a Direct Loan Program or Perkins Loan Program loan, or a new TEACH Grant, within three years of the date that a previous loan or TEACH Grant was discharged, you resume payment on the previously discharged loan or acknowledge that you are once again subject to the terms of the TEACH Grant Agreement to Serve before receiving the new loan.

SECTION 8: IMPORTANT NOTICES

Privacy Act Notice. The Privacy Act of 1974 (5 U.S.C. 552a) requires that the following notice be provided to you:

The authorities for collecting the requested information from and about you are §421 *et seq.*, §451 *et seq.*, §461 *et seq.*, and §420L *et seq.* of the Higher Education Act of 1965, as amended (the HEA) (20 U.S.C. 1071 *et seq.*, 20 U.S.C. 1087a *et seq.*, 20 U.S.C. 1087aa *et seq.*, and 20 U.S.C. 1070g *et seq.*) and the authorities for collecting and using your Social Security Number (SSN) are §§428B(f) and 484(a)(4) of the HEA (20 U.S.C. 1078-2(f) and 1091(a)(4)) and §31001(i)(1) of the Debt Collection Improvement Act of 1996 (31 U.S.C. 7701(c)). Participating in the Federal Family Education Loan (FFEL) Program, the William D. Ford Federal Direct Loan (Direct Loan) Program, the Federal Perkins Loan (Perkins Loan) Program, and/or the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program and giving us your SSN are voluntary, but you must provide the requested information, including your SSN, to participate.

The principal purposes for collecting the information on this form, including your SSN, are to verify your identity, to determine your eligibility to receive a FFEL, Direct Loan, and/or Perkins Loan program loan or a TEACH Grant, to receive a benefit on a loan (such as a deferment, forbearance, discharge, or forgiveness) or a discharge of a TEACH Grant service obligation, to permit the servicing of your loan(s) or TEACH Grant(s), and, if it becomes necessary, to locate you and to collect and report on your loan(s) if your loan(s) become delinquent or in default. We also use your SSN as an account identifier and to permit you to access your account information electronically.

The information in your file may be disclosed, on a case-by-case basis or under a computer matching program, to third parties as authorized under routine uses in the appropriate systems of records notices.

For a loan or for a TEACH Grant that has not been converted to a Direct Unsubsidized Loan, the routine uses of the information that we collect about you include, but are not limited to, its disclosure to federal, state, or local agencies, to institutions of higher education, and to third party servicers to determine your eligibility to receive a loan or a TEACH Grant, to investigate possible fraud, and to verify compliance with federal student financial aid program regulations.

In the event of litigation, we may send records to the Department of Justice, a court, adjudicative body, counsel, party, or witness if the disclosure is relevant and necessary to the litigation. If this information, either alone or with other information, indicates a potential violation of law, we may send it to the appropriate authority for action. We may send information to members of Congress if you ask them to help you with federal student aid questions. In circumstances involving employment complaints, grievances, or disciplinary actions, we may disclose relevant records to adjudicate or investigate the issues. If provided for by a collective bargaining agreement, we may disclose records to a labor organization recognized under 5 U.S.C. Chapter 71. Disclosures may be made to our contractors for the purpose of performing any programmatic function that requires disclosure of records. Before making any such disclosure, we will require the contractor to maintain Privacy Act safeguards. Disclosures may also be made to qualified researchers under Privacy Act safeguards.

For a loan, including a TEACH Grant that has been converted to a Direct Unsubsidized Loan, the routine uses of this information also include, but are not limited to, its disclosure to federal, state, or local agencies, to private parties such as relatives, present and former employers, business and personal associates, to creditors, to financial and educational institutions, and to guaranty agencies to verify your identity, to determine your program eligibility and benefits, to permit making, servicing, assigning, collecting, adjusting, or discharging your loan(s), to enforce the terms of the loan(s), to investigate possible fraud and to verify compliance with federal student financial aid program regulations, to locate you if you become delinquent in your loan payments or if you default, or to verify whether your debt qualifies for discharge or cancellation. To provide default rate calculations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal, state or local agencies. To provide financial aid history information, disclosures may be made to educational institutions. To assist program administrators with tracking refunds and cancellations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal or state agencies. To provide a standardized method for educational institutions to efficiently submit student enrollment status, disclosures may be made to guaranty agencies or to financial and educational institutions. To counsel you in repayment efforts, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal, state, or local agencies.

Paperwork Reduction Notice. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a currently valid OMB control number. Public reporting burden for this collection of information is estimated to average 0.5 hours (30 minutes) per response, including the time for reviewing instructions, searching existing data resources, gathering and maintaining the data needed, and completing and reviewing the information collection. Individuals are obligated to respond to this collection to obtain a benefit in accordance with 34 CFR 674.61(b) or (c), 34 CFR 682.402(c)(2) or (c)(9), 34 CFR 685.213(b) or (c), and 34 CFR 686.42(b). Send comments regarding the burden estimate(s) or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20210-4537, or e-mail ICDocketMgr@ed.gov and reference OMB Control Number 1845-0065. **IMPORTANT: Do NOT return the completed Discharge Application to this address**. **If you return the completed form to this address, it will delay the processing of your application.**

If you have comments or concerns regarding the status of *your individual submission* of this form, contact the U.S. Department of Education at 1-888-303-7818.

LOAN DISCHARGE APPLICATION: FALSE CERTIFICATION (ABILITY TO BENEFIT)

OMB No. 1845-0058
Form Approved
Exp. Date 08/31/2017

William D. Ford Federal Direct Loan (Direct Loan) Program
Federal Family Education Loan (FFEL) Program

WARNING: Any person who knowingly makes a false statement or misrepresentation on this form or on any accompanying document is subject to penalties that may include fines, imprisonment, or both, under the U.S. Criminal Code and 20 U.S.C. 1097.

SECTION 1: BORROWER IDENTIFICATION

Please enter or correct the following information.

☐ **Check this box if any of your information has changed.**

SSN __ __ __ - __ __ - __ __ __ __

Name _____

Address _____

City, State, Zip Code _____

Telephone – Primary _____

Telephone – Alternate _____

E-mail (optional) _____

SECTION 2: ABILITY TO BENEFIT INFORMATION

1. You are applying for this loan discharge as a:
- ☐ Student borrower – Skip to Item 4.
- ☐ Parent borrower – Continue to Item 2.

2. Student Name (Last, First, MI):

_____

3. Student SSN:

__ __ __ - __ __ - __ __ __ __

4. Did you (or, for a parent PLUS borrower, the student) attend a postsecondary school prior to July 1, 2012?
- ☐ Yes – Skip to Item 6.
- ☐ No – Continue to Item 5.

5. Were you (or, for a parent PLUS borrower, the student), prior to July 1, 2012, officially registered at a postsecondary school, and scheduled to attend?
- ☐ Yes – Continue to Item 6.
- ☐ No – You are not eligible for this discharge.

6. Provide the following information about the postsecondary school referenced in Item 4 or 5:

a. School Name:

_____

b. School Address (street, city, state, zip code):

_____

_____

7. On what date did you (or, for a parent PLUS borrower, the student) begin attendance or register at the postsecondary school in Item 4 or 5?

_____

8. Is the postsecondary school in Item 6 the same school that you attended when you received the loan(s) you are requesting be discharged?
- ☐ Yes – Skip to Item 11.
- ☐ No – Continue to Item 9.

9. School Name:

_____

10. School Address (street, city, state, zip code):

_____

_____

11. Dates of attendance at the school:

_____ to _____

12. Name of program of study that you (or, for a parent PLUS borrower, the student) were enrolled in when you received the loan(s) you are requesting be discharged:

_____

13. Did you (or, for a parent PLUS borrower, the student) have a high school diploma or General Education Development (GED) credential while enrolled?
- ☐ Yes – You are not eligible for this discharge.
- ☐ No – Continue to Item 14.

14. Did you (or, for a parent PLUS borrower, the student) receive a GED before completing the program?

☐ Yes ☐ No

15. When did you first enroll in a postsecondary school?

_____

Borrower Name: _____ **Borrower SSN:** _ _ _ - _ _ - _ _ _ _

SECTION 2: ABILITY TO BENEFIT INFORMATION (CONTINUED)

16. Before you (or, for a parent PLUS borrower, the student) were admitted to the school, did the school give an entrance examination?

- ☐ Yes – Continue to Items 17 – 20.
- ☐ No – Skip to Item 22.
- ☐ Don't Know – Skip to Item 22.

17. Give the date of the test if you know it:

_____

18. Give the name of the test if you know it:

_____

19. Give the score on the test if you know it:

_____

20. Did anything appear improper about the way the test was given or scored?

- ☐ Yes – Continue to Items 21 – 22.
- ☐ No – Skip to Item 22.

21. Explain in detail what appeared improper:

_____

_____

22. Provide the following about anyone who can support your statement:

a. Name: _____

b. Address (street, city, state, zip code):

_____

_____

c. Telephone number:

_____

23. Did you (or, for a parent PLUS borrower, the student) complete a developmental or remedial program at the school?

- ☐ Yes – Continue to Items 24 – 27.
- ☐ No – Skip to Item 28.
- ☐ Don't Know – Skip to Item 28.

24. Provide the name of the program:

_____

25. Provide the dates of the program:

_____ to _____

26. Provide the courses you took in the program:

_____

_____

27. Provide the grades you earned in the program:

_____

_____

28. Did you (or, for a parent PLUS borrower, the student) successfully complete 6 credits or 225 clock hours of coursework that applied toward a program offered by the school before you received a Direct Loan or FFEL Program loan to pay for attendance in this program?

- ☐ Yes – You are not eligible for this discharge.
- ☐ No – Continue to Item 29.
- ☐ Don't Know – Continue to Item 29.

29. Did the holder of your loan receive any money back (a refund) from the school on your behalf?

- ☐ Yes – Continue to Items 30 – 31.
- ☐ No – Skip to Item 32.
- ☐ Don't Know – Skip to Item 32.

30. What was the amount of the refund?

$ _____

31. Explain why the money was refunded:

_____

32. Did you (or, for a parent PLUS borrower, the student) make any monetary claim with, or receive any payment from, the school or any third party (see definition in Section 6) in connection with enrollment or attendance at the school?

- ☐ Yes – Continue to Items 33 – 35.
- ☐ No – Sign and date the form in Section 3. Submit this form to the loan holder in Section 7.
- ☐ Don't Know – Sign and date the form in Section 3. Submit this form to the loan holder in Section 7.

33. Provide the following about the party with whom the claim was made or from whom payment was received:

a. Name: _____

b. Address (street, city, state, zip code):

_____

_____

c. Telephone number:

_____

34. What is the amount and the status of the claim?

a. Amount: _____

b. Status: _____

35. What was the amount of any payment received? If none, write "none".

$ _____

Sign and date the form in Section 3. Submit this form to the loan holder in Section 7.

Borrower Name: _____ **Borrower SSN:** _ _ _ - _ _ - _ _ _ _

SECTION 3: BORROWER CERTIFICATIONS, ASSIGNMENT, AND AUTHORIZATION

- **I certify** that—
  1. I have read and agree to the terms and conditions for loan discharge, as specified in Section 5.
  2. Under penalty of perjury, all of the information I have provided on this form and in any accompanying documentation is true and accurate to the best of my knowledge and belief.
- **I hereby assign and transfer** to the U.S. Department of Education (the Department) any right to a refund on the amount discharged that I may have from the school identified in Section 2 of this form and/or any owners, affiliates, or assignees of the school, and from any third party that may pay claims for a refund because of the actions of the school, up to the amount discharged by the Department on my loan(s).
- **I authorize** the loan holder to which I submit this request (and its agents or contractors) to contact me regarding my request or my loan(s), including repayment of my loan(s), at the number that I provide on this form or any future number that I provide for my cellular telephone or other wireless device using automated telephone dialing equipment or artificial or prerecorded voice or text messages.

Borrower's Signature _____ **Date** _____

SECTION 4: DEFINITIONS

- The **William D. Ford Federal Direct Loan (Direct Loan) Program** includes Federal Direct Stafford/Ford (Direct Subsidized) Loans, Federal Direct Unsubsidized Stafford/Ford (Direct Unsubsidized) Loans, Federal Direct PLUS (Direct PLUS) Loans, and Federal Direct Consolidation (Direct Consolidation) Loans.
- The **Federal Family Education Loan (FFEL) Program** includes Federal Stafford Loans (both subsidized and unsubsidized), Federal Supplemental Loans for Students (SLS), Federal PLUS Loans, and Federal Consolidation Loans.
- The **holder** of your Direct Loan Program loan(s) is the U.S. Department of Education (the Department). The holder of your FFEL Program loan(s) may be a lender, a guaranty agency, or the Department. Your loan holder may use a servicer to handle billing and other communications related to your loans. References to "your loan holder" on this form mean either your loan holder or your servicer.
- **Loan discharge** due to false certification of ability to benefit cancels your obligation (and any endorser's obligation, if applicable) to repay the remaining portion on a Direct Loan or FFEL Program loan, and qualifies you for reimbursement of any amounts paid voluntarily or through forced collection on the loan. For consolidation loans, only the amounts of the underlying loans that were used to pay for the program of study listed in Section 2 will be considered for discharge. The loan holder reports the discharge to all credit reporting agencies to which the holder previously reported the status of the loan.
- The **student** refers to the student for whom a parent borrower obtained a Direct PLUS Loan or Federal PLUS Loan.
- **Third party** refers to any entity that may provide reimbursement for a refund owed by the school, such as a State or other entity offering a tuition recovery program or a holder of a performance bond.

SECTION 5: TERMS AND CONDITIONS FOR LOAN DISCHARGE BASED ON FALSE CERTIFICATION

- You are only eligible for this form of discharge if you received the loan on which you are requesting discharge on or after January 1, 1986.
- By signing this form, you are agreeing to provide, upon request, testimony, a sworn statement, or other documentation reasonably available to you that demonstrates to the satisfaction of the Department or its designee that you meet the qualifications for loan discharge based on false certification, or that supports any representation that you made on this form or any accompanying documents.
- By signing this form, you are agreeing to cooperate with the Department or the Department's designee in any enforcement action related to this application.
- This application may be denied, or your discharge may be revoked, if you fail to provide testimony, a sworn statement, or documentation upon request, or if you provide testimony, a sworn statement, or documentation that does not support the material representation that you have made on this form or on any accompanying documents.

SECTION 6: INSTRUCTIONS FOR COMPLETING THE FORM

When completing this form, type or print using dark ink. Enter dates as month-day-year (mm-dd-yyyy). Use only numbers. Example: February 10, 2014 = 02-10-2014. If you need more space to answer any of the items, continue on separate sheets of paper and attach them to this form. Indicate the number of the Item(s) you are answering and include your name and Social Security Number (SSN) on the top of pages 2 and 3 and on all attached pages. **Return the completed form and any attachments to the address shown in Section 7.**

SECTION 7: WHERE TO SEND THE COMPLETED FORM

Return the completed form and any required documentation to: (If no address is shown, return to your loan holder.)	If you need help completing this form, call: (If no telephone number is shown, call your loan holder.)

SECTION 8: IMPORTANT NOTICES

Privacy Act Notice. The Privacy Act of 1974 (5 U.S.C. 552a) requires that the following notice be provided to you:

The authorities for collecting the requested information from and about you are §421 et seq. and §451 et seq. of the Higher Education Act of 1965, as amended (20 U.S.C. 1071 et seq. and 20 U.S.C. 1087a et seq.) and the authorities for collecting and using your Social Security Number (SSN) are §§428B(f) and 484(a)(4) of the HEA (20 U.S.C. 1078-2(f) and 1091(a)(4)) and 31 U.S.C. 7701(b). Participating in the William D. Ford Federal Direct Loan (Direct Loan) Program or the Federal Family Education Loan (FFEL) Program and giving us your SSN are voluntary, but you must provide the requested information, including your SSN, to participate.

The principal purposes for collecting the information on this form, including your SSN, are to verify your identity, to determine your eligibility to receive a loan or a benefit on a loan (such as a deferment, forbearance, discharge, or forgiveness) under Direct Loan and/or FFEL Programs, to permit the servicing of your loan(s), and, if it becomes necessary, to locate you and to collect and report on your loan(s) if your loan(s) becomes delinquent or defaults. We also use your SSN as an account identifier and to permit you to access your account information electronically.

The information in your file may be disclosed, on a case-by-case basis or under a computer matching program, to third parties as authorized under routine uses in the appropriate systems of records notices. The routine uses of this information include, but are not limited to, its disclosure to federal, state, or local agencies, to private parties such as relatives, present and former employers, business and personal associates, to consumer reporting agencies, to financial and educational institutions, and to guaranty agencies in order to verify your identity, to determine your eligibility to receive a loan or a benefit on a loan, to permit the servicing or collection of your loan(s), to enforce the terms of the loan(s), to investigate possible fraud and to verify compliance with federal student financial aid program regulations, or to locate you if you become delinquent in your loan payments or if you default. To provide default rate calculations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to state agencies. To provide financial aid history information, disclosures may be made to educational institutions. To assist program administrators with tracking refunds and cancellations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal or state agencies. To provide a standardized method for educational institutions to efficiently submit student enrollment statuses, disclosures may be made to guaranty agencies or to financial and educational institutions. To counsel you in repayment efforts, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal, state, or local agencies.

In the event of litigation, we may send records to the Department of Justice, a court, adjudicative body, counsel, party, or witness if the disclosure is relevant and necessary to the litigation. If this information, either alone or with other information, indicates a potential violation of law, we may send it to the appropriate authority for action. We may send information to members of Congress if you ask them to help you with federal student aid questions. In circumstances involving employment complaints, grievances, or disciplinary actions, we may disclose relevant records to adjudicate or investigate the issues. If provided for by a collective bargaining agreement, we may disclose records to a labor organization recognized under 5 U.S.C. Chapter 71. Disclosures may be made to our contractors for the purpose of performing any programmatic function that requires disclosure of records. Before making any such disclosure, we will require the contractor to maintain Privacy Act safeguards. Disclosures

may also be made to qualified researchers under Privacy Act safeguards.

Paperwork Reduction Notice. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1845-0058. Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain or retain a benefit (34 CFR 682.402(e)(3), or 685.215(c)). If you have comments or concerns regarding the status of your individual submission of this form, **contact your loan holder(s) (see Section 7) directly.**

LOAN DISCHARGE APPLICATION: FALSE CERTIFICATION (DISQUALIFYING STATUS)

OMB No. 1845-0058
Form Approved
Exp. Date 08/31/2017

William D. Ford Federal Direct Loan (Direct Loan) Program
Federal Family Education Loan (FFEL) Program

WARNING: Any person who knowingly makes a false statement or misrepresentation on this form or on any accompanying document is subject to penalties that may include fines, imprisonment, or both, under the U.S. Criminal Code and 20 U.S.C. 1097.

SECTION 1: BORROWER IDENTIFICATION

Please enter or correct the following information.

☐ **Check this box if any of your information has changed.**

SSN __ __ __ - __ __ - __ __ __ __

Name _____

Address _____

City, State, Zip Code _____

Telephone – Primary _____

Telephone – Alternate _____

E-mail (optional) _____

SECTION 2: DISQUALIFYING STATUS INFORMATION

To qualify for a loan discharge based on false certification due to a disqualifying status you (or, for a parent PLUS borrower, the student) must have been unable—at the time the school originated or certified your loan—to meet the **legal requirements for employment** in your state of residence (or, for a parent PLUS borrower, the student's state of residence) in the occupation for which the program of study was intended.

1. You are applying for this loan discharge as a:

☐ Student borrower – Skip to Item 4.
☐ Parent borrower – Continue to Item 2.

2. Student Name (Last, First, MI):

_____

3. Student SSN:

__ __ __ - __ __ - __ __ __ __

4. School Name:

_____

5. School Address (street, city, state, zip code):

_____

_____

6. Dates of attendance at the school:

_____ to _____

7. Name of the program of study that you (or, for a parent PLUS borrower, the student) were enrolled in when the school certified or originated the loan that you are requesting to have discharged:

_____

8. Indicate your disqualifying status by checking the appropriate box(es) below:

☐ Age
☐ Physical condition
☐ Mental condition
☐ Criminal record
☐ Other (specify): _____

9. You must provide documentation to prove that you (or, for a parent PLUS borrower, the student) had the disqualifying status indicated in Item 8. You must also document the state legal requirements for employment that you (or, for a parent PLUS borrower, the student) could not meet. Provide a citation to the specific state law or regulation below, or attach a copy of the law or regulation to your application.

_____

_____

10. Before certifying or originating the loan, did the school ask you (or, for a parent PLUS borrower, the student) if the disqualifying status in Item 8 existed?

☐ Yes – Skip to Item 12.
☐ No – Continue to Item 11.
☐ Don't Know – Continue to Item 11.

Borrower Name: _____ **Borrower SSN:** _ _ _ - _ _ - _ _ _ _

SECTION 2: DISQUALIFYING STATUS INFORMATION (CONTINUED)

11. Did you (or, for a parent PLUS borrower, the student) inform the school of the disqualifying status before the loan was certified or originated?

- ☐ Yes
- ☐ No

12. Did you (or, for a parent PLUS borrower, the student) make any monetary claim with, or receive any payment from, the school or any third party (see definition in Section 5) in connection with enrollment or attendance at the school?

- ☐ Yes – Continue to Item 13.
- ☐ No – Skip to Item 16.
- ☐ Don't Know – Skip to Item 16.

13. Provide the following about the party with whom the claim was made or from whom payment was received:

a. Name: _____

b. Address (street, city, state, zip code):

_____

_____

c. Telephone number:

_____

14. What is the amount and the status of the claim?

a. Amount: $ _____

b. Status: _____

15. What was the amount of any payment received? If none, write "none".

$ _____

16. Did the holder of your loan receive any money back (a refund) from the school on your behalf?

- ☐ Yes – Continue to Items 17-18.
- ☐ No – Sign and date the form in Section 3. Submit the form and documentation to the loan holder in Section 7.
- ☐ Don't Know – Sign and date the form in Section 3. Submit the form and documentation to the loan holder in Section 7.

17. What was the amount of the refund?
$ _____

18. Explain why the money was refunded:

_____

_____

_____

Sign and date the form in Section 3. Submit the form and documentation to the loan holder in Section 7.

SECTION 3: BORROWER CERTIFICATIONS, ASSIGNMENT, AND AUTHORIZATION

- **I certify** that—
  1. I have read and agree to the terms and conditions for loan discharge, as specified in Section 6.
  2. Under penalty of perjury, all of the information I have provided on this form and in any accompanying documentation is true and accurate to the best of my knowledge and belief.
- **I hereby assign and transfer** to the U.S. Department of Education (the Department) any right to a refund on the amount discharged that I may have received from the school identified in Section 2 of this form and/or from any owners, affiliates, or assignees of the school, and from any third party that may pay claims for a refund because of the actions of the school, up to the amount discharged by the Department on my loan(s).
- **I authorize** the loan holder to which I submit this request (and its agents or contractors) to contact me regarding my request or my loan(s), including repayment of my loan(s), at the number that I provide on this form or at any future number that I provide for my cellular telephone or other wireless device using automated telephone dialing equipment or artificial or prerecorded voice or text messages.

Borrower's Signature _____ **Date** _____

SECTION 4: INSTRUCTIONS FOR COMPLETING THE FORM

When completing this form, type or print using dark ink. Enter dates as month-day-year (mm-dd-yyyy). Use only numbers. Example: February 10, 2014 = 02-10-2014. If you need more space to answer any of the items, continue on separate sheets of paper and attach them to this form. Indicate the number of the Item(s) you are answering and include your name and Social Security Number (SSN) on page 2 and all attached pages. **Return the completed form and any attachments to the address shown in Section 7.**

SECTION 5: DEFINITIONS

- The **William D. Ford Federal Direct Loan (Direct Loan) Program** includes Federal Direct Stafford/Ford (Direct Subsidized) Loans, Federal Direct Unsubsidized Stafford/ Ford (Direct Unsubsidized) Loans, Federal Direct PLUS (Direct PLUS) Loans, and Federal Direct Consolidation (Direct Consolidation) Loans.
- The **Federal Family Education Loan (FFEL) Program** includes Federal Stafford Loans (both subsidized and unsubsidized), Federal Supplemental Loans for Students (SLS), Federal PLUS Loans, and Federal Consolidation Loans.
- The **holder** of your Direct Loan Program loan(s) is the Department. The holder of your FFEL Program loan(s) may be a lender, a guaranty agency, or the Department. Your loan holder may use a servicer to handle billing and other communications related to your loans. References to "your loan holder" on this form mean either your loan holder or your servicer.
- **Loan discharge** due to false certification (disqualifying status) cancels your obligation (and any endorser's obligation, if applicable) to repay the remaining portion on a Direct Loan or FFEL Program loan, and qualifies you for reimbursement of any amounts paid voluntarily or through forced collection on the loan. For consolidation loans, only the amount of the underlying loans that were used to pay for the program of study listed in Section 2 will be considered for discharge. The loan holder reports the discharge to all credit reporting agencies to which the holder previously reported the status of the loan and removes any adverse credit history previously associated with the loan.
- The **student** refers to the student for whom a parent borrower obtained a Direct PLUS Loan or Federal PLUS Loan.
- **Program of study** means the instructional program leading to a degree or certificate in which you (or, for parent PLUS borrowers, the student) were enrolled.
- **Origination and certification** are steps in a school's processing of a loan. In the Direct Loan Program, a loan is **originated** when the school creates an electronic loan origination record after determining that the borrower meets all loan eligibility requirements. In the FFEL Program, a loan is **certified** when the school signs a loan application or submits an electronic loan record to the lender or guaranty agency after determining that the borrower meets all loan eligibility requirements.
- **Third party** refers to any entity that may provide reimbursement for a refund owed by the school, such as a State or other entity offering a tuition recovery program or a holder of a performance bond.

SECTION 6: TERMS AND CONDITIONS FOR LOAN DISCHARGE BASED ON FALSE CERTIFICATION

- You are only eligible for this form of discharge if you received the loan on which you are requesting discharge on or after January 1, 1986.
- By signing this form, you are agreeing to provide, upon request, testimony, a sworn statement, or other documentation reasonably available to you that demonstrates to the satisfaction of the Department or its designee that you meet the qualifications for loan discharge based on false certification (disqualifying status), or that supports any representation that you made on this form or on any accompanying documents.
- By signing this form, you are agreeing to cooperate with the Department or the Department's designee in any enforcement action related to this application.
- This application may be denied, or your discharge may be revoked, if you fail to provide testimony, a sworn statement, or documentation upon request, or if you provide testimony, a sworn statement, or documentation that does not support the material representation that you have made on this form or on any accompanying documents.

SECTION 7: WHERE TO SEND THE COMPLETED FORM

Return the completed form and any documentation to:
(If no address is shown, return to your loan holder.)

If you need help completing this form, call:
(If no telephone number is shown, call your loan holder.)

SECTION 8: IMPORTANT NOTICES

Privacy Act Notice. The Privacy Act of 1974 (5 U.S.C. 552a) requires that the following notice be provided to you: The authorities for collecting the requested information from and about you are §421 et seq. and §451 et seq. of the Higher Education Act of 1965, as amended (20 U.S.C. 1071 et seq. and 20 U.S.C. 1087a et seq.) and the authorities for collecting and using your Social Security Number (SSN) are §§428B(f) and 484(a)(4) of the HEA (20 U.S.C. 1078-2(f) and 1091(a)(4)) and 31 U.S.C. 7701(b). Participating in the William D. Ford Federal Direct Loan (Direct Loan) Program or the Federal Family Education Loan (FFEL) Program and giving us your SSN are voluntary, but you must provide the requested information, including your SSN, to participate.

The principal purposes for collecting the information on this form, including your SSN, are to verify your identity, to determine your eligibility to receive a loan or a benefit on a loan (such as a deferment, forbearance, discharge, or forgiveness) under the Direct Loan and/or Direct Loan Programs, to permit the servicing of your loan(s), and, if it becomes necessary, to locate you and to collect and report on your loan(s) if your loan(s) becomes delinquent or defaults. We also use your SSN as an account identifier and to permit you to access your account information electronically.

The information in your file may be disclosed, on a case-by-case basis or under a computer matching program, to third parties as authorized under routine uses in the appropriate systems of records notices. The routine uses of this information include, but are not limited to, its disclosure to federal, state, or local agencies, to private parties such as relatives, present and former employers, business and personal associates, to consumer reporting agencies, to financial and educational institutions, and to guaranty agencies in order to verify your identity, to determine your eligibility to receive a loan or a benefit on a loan, to permit the servicing or collection of your loan(s), to enforce the terms of the loan(s), to investigate possible fraud and to verify compliance with federal student financial aid program regulations, or to locate you if you become delinquent in your loan payments or if you default. To provide default rate calculations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to state agencies. To provide financial aid history information, disclosures may be made to educational institutions. To assist program administrators with tracking refunds and cancellations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal or state agencies. To provide a standardized method for educational institutions to efficiently submit student enrollment statuses, disclosures may be made to guaranty agencies or to financial and educational institutions. To counsel you in repayment efforts, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal, state, or local agencies.

In the event of litigation, we may send records to the Department of Justice, a court, adjudicative body, counsel, party, or witness if the disclosure is relevant and necessary to the litigation. If this information, either alone or with other information, indicates a potential violation of law, we may send it to the appropriate authority for action. We may send information to members of Congress if you ask them to help you with federal student aid questions. In circumstances involving employment complaints, grievances, or disciplinary actions, we may disclose relevant records to adjudicate or investigate the issues. If provided for by a collective bargaining agreement, we may disclose records to a labor organization recognized under 5 U.S.C. Chapter 71. Disclosures may be made to our contractors for the purpose of performing any programmatic function that requires disclosure of records. Before making any such disclosure, we will require the contractor to maintain Privacy Act safeguards. Disclosures may also be made to qualified researchers under Privacy Act safeguards.

Paperwork Reduction Notice. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1845-0058. Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain or retain a benefit (34 CFR 682.402(e)(3), or 685.215(c)). If you have comments or concerns regarding the status of your individual submission of this form, **contact your loan holder(s) (see Section 7) directly.**

LOAN DISCHARGE APPLICATION: FALSE CERTIFICATION (UNAUTHORIZED SIGNATURE/PAYMENT)

OMB No. 1845-0058
Form Approved
Exp. Date 08/31/2017

William D. Ford Federal Direct Loan (Direct Loan) Program
Federal Family Education Loan (FFEL) Program

WARNING: Any person who knowingly makes a false statement or misrepresentation on this form or on any accompanying document is subject to penalties that may include fines, imprisonment, or both, under the U.S. Criminal Code and 20 U.S.C. 1097.

SECTION 1: BORROWER IDENTIFICATION

Please enter or correct the following information.

☐ **Check this box if any of your information has changed.**

SSN __ __ __ - __ __ - __ __ __ __

Name _____

Address _____

City, State, Zip Code _____

Telephone – Primary _____

Telephone – Alternate _____

E-mail (optional) _____

SECTION 2: UNAUTHORIZED SIGNATURE/PAYMENT INFORMATION

This form is not to be used for allegations of identity theft.

1. You are applying for this loan discharge as a:

☐ Student borrower – Skip to Item 4.
☐ Parent borrower – Continue to Item 2.

2. Student Name (Last, First, MI):

_____

3. Student SSN:
__ __ __ - __ __ - __ __ __ __

4. School Name:

_____

5. School Address (street, city, state, zip code):

_____

_____

6. Dates of attendance at the school:
_____ to _____

7. Which document(s) was signed without your authorization?

a. ☐ Loan application
b. ☐ Promissory note
c. ☐ Master promissory note
d. ☐ Combined application/promissory note
e. ☐ Loan check
f. ☐ Electronic funds transfer authorization
g. ☐ Master check authorization

8. Did you (or, for a parent PLUS borrower, the student) ever receive any money from the school, or did the school ever reduce the amount of money that you (or, for a parent PLUS borrower, the student) owed to the school?

☐ Yes – Continue to Item 9.
☐ No – Skip to Item 11.
☐ Don't Know – Skip to Item 11.

9. On what date did the school return money or reduce the amount owed?

_____

10. What amount did the school return or by what amount did the school reduce the amount owed?

$ _____

11. How did you (or, for a parent PLUS borrower, the student) pay the tuition and fees owed to the school?

_____

_____

12. Provide the following about the school employee or other person associated with the school who signed your name on the document(s) identified in Item 7. Write "Don't Know" if you do not know the name/ position of the person:

a. Name: _____

b. Position: _____

Borrower Name: _____ **Borrower SSN:** _ _ _ - _ _ - _ _ _ _

SECTION 2: UNAUTHORIZED SIGNATURE/PAYMENT INFORMATION (CONTINUED)

13. Explain the circumstances under which the school employee or other person associated with the school identified in Item 12 signed your name on the documents identified in Item 7:

_____

_____

14. Did you (or, for a parent PLUS borrower, the student) make any monetary claim with, or receive any payment from, the school or any third party (see definition in Section 5) in connection with enrollment or attendance at the school?

- ☐ Yes – Continue to Item 15.
- ☐ No – Skip to Item 18.
- ☐ Don't Know – Skip to Item 18.

15. Provide the following about the party with whom the claim was made or from whom payment was received:

a. Name: _____

b. Address (street, city, state, zip code):

_____

_____

c. Telephone number:

_____

16. What is the amount and the status of the claim?

a. Amount: $ _____

b. Status: _____

17. What was the amount of any payment received? If none, write "none". $ _____

18. Did the holder of your loan receive any money back (a refund) from the school on your behalf?

- ☐ Yes – Continue to Item 19.
- ☐ No – Sign and date the form in Section 3. Submit this form with documentation of your signature to the loan holder in Section 7.
- ☐ Don't Know – Sign and date the form in Section 3. Submit this form with documentation of your signature to the loan holder in Section 7.

19. What was the amount of the refund?
$ _____

20. Explain why the money was refunded:

_____

_____

Sign and date the form in Section 3. Submit this form with documentation of your signature to the loan holder in Section 7.

Documentation of your signature is required. You must attach documents containing four other samples of your signature. At least two of these samples must show that your signatures were made within one year before or after the date of the documents on which someone else signed your name. Examples of documents include cancelled checks, tax returns, and driver's licenses. If you do not provide these samples, you cannot be considered for a loan discharge.

SECTION 3: BORROWER CERTIFICATIONS, ASSIGNMENT, AND AUTHORIZATION

- **I certify** that—
  1. I am applying for a discharge of my Direct Loan or FFEL Program loan(s) because the loan application, promissory note, combined application/promissory note, loan disbursement check, electronic funds transfer authorization, or master check authorization was not authorized for the reasons stated in this form.
  2. I did not sign any of the documents I selected in Section 2, Item 7.
  3. I have read and agree to the terms and conditions for loan discharge, as specified in Section 6.
  4. Under penalty of perjury, all of the information I have provided on this form and in any accompanying documentation is true and accurate to the best of my knowledge and belief.
- **I hereby assign and transfer** to the U.S. Department of Education (the Department) any right to a refund on the amount discharged that I may receive from the school identified in Section 2 of this form and/or from any owners, affiliates, or assignees of the school, and from any third party that may pay claims for a refund because of the actions of the school, up to the amount discharged by the Department on my loan(s) **.**
- **I authorize** the loan holder to which I submit this request (and its agents or contractors) to contact me regarding my request or my loan(s), including repayment of my loan(s), at the number that I provide on this form or at any future number that I provide for my cellular telephone or other wireless device using automated telephone dialing equipment or artificial or prerecorded voice or text messages.

Borrower's Signature _____ **Date** _____

SECTION 4: INSTRUCTIONS FOR COMPLETING THE FORM

When completing this form, type or print using dark ink. Enter dates as month-day-year (mm-dd-yyyy). Use only numbers. Example: February 10, 2014 = 02-10-2014. If you need more space to answer any of the items, continue on separate sheets of paper and attach them to this form. Indicate the number of the Item(s) you are answering and include your name and Social Security Number (SSN) on page 2 and all attached pages. **Return the completed form and any attachments to the address shown in Section 7.**

SECTION 5: DEFINITIONS

- The **William D. Ford Federal Direct Loan (Direct Loan) Program** includes Federal Direct Stafford/Ford (Direct Subsidized) Loans, Federal Direct Unsubsidized Stafford/Ford (Direct Unsubsidized) Loans, Federal Direct PLUS (Direct PLUS) Loans, and Federal Direct Consolidation (Direct Consolidation) Loans.
- The **Federal Family Education Loan (FFEL) Program** includes Federal Stafford Loans (both subsidized and unsubsidized), Federal Supplemental Loans for Students (SLS), Federal PLUS Loans, and Federal Consolidation Loans.
- The **holder** of your Direct Loan Program loan(s) is the Department. The holder of your FFEL Program loan(s) may be a lender, a guaranty agency, or the Department. Your loan holder may use a servicer to handle billing and other communications related to your loans. References to "your loan holder" on this form mean either your loan holder or your servicer.
- **Unauthorized signature** means that the school, without the borrower's authorization, signed the borrower's name on the loan application or promissory note.
- **Unauthorized payment** means that the school, without the borrower's authorization, endorsed the borrower's loan check or signed the borrower's authorization for electronic funds transfer or master check, and did not give the loan proceeds to the borrower or apply the loan proceeds to charges owed by the student to the school.
- **Loan discharge** due to an unauthorized signature on a loan application or promissory note cancels your obligation (and any endorser's obligation, if applicable) to repay the remaining portion on a Direct Loan or FFEL Program loan, and qualifies you for reimbursement of any amounts paid voluntarily or through forced collection on the loan. Loan discharge due to an unauthorized signature on a loan check, electronic funds transfer authorization, or master check authorization applies only to the amount of the unauthorized payment. For consolidation loans, only the amount of the underlying loans associated with the document listed in Section 2, Item 7 will be considered for discharge. The loan holder reports the discharge to all credit reporting agencies to which the holder previously reported the status of the loan and removes any adverse credit history previously associated with the loan.
- The **student** refers to the student for whom a parent borrower obtained a Direct PLUS Loan or Federal PLUS Loan.
- **Third party** refers to any entity that may provide reimbursement for a refund owed by the school, such as a State or other entity offering a tuition recovery program or a holder of a performance bond.

SECTION 6: TERMS AND CONDITIONS FOR LOAN DISCHARGE BASED ON FALSE CERTIFICATION

- You are only eligible for this form of discharge if you received the loan on which you are requesting discharge on or after January 1, 1986.
- By signing this form, you are agreeing to provide, upon request, testimony, a sworn statement, or other documentation reasonably available to you that demonstrates to the satisfaction of the Department or its designee that you meet the qualifications for loan discharge based on false certification, or that supports any representation that you made on this form or any accompanying documents.
- By signing this form, you are agreeing to cooperate with the Department or the Department's designee in any enforcement action related to this form.
- This application may be denied, or your discharge may be revoked, if you fail to provide testimony, a sworn statement, or documentation upon request, or if you provide testimony, a sworn statement, or documentation that does not support the material representation that you have made on this form or on any accompanying documents.

SECTION 7: WHERE TO SEND THE COMPLETED FORM

Return the completed form and any documentation to: (If no address is shown, return to your loan holder.)	If you need help completing this form, call: (If no telephone number is shown, call your loan holder.)

SECTION 8: IMPORTANT NOTICES

Privacy Act Notice. The Privacy Act of 1974 (5 U.S.C. 552a) requires that the following notice be provided to you:

The authorities for collecting the requested information from and about you are §421 et seq. and §451 et seq. of the Higher Education Act of 1965, as amended (20 U.S.C. 1071 et seq. and 20 U.S.C. 1087a et seq.) and the authorities for collecting and using your Social Security Number (SSN) are §§428B(f) and 484(a)(4) of the HEA (20 U.S.C. 1078-2(f) and 1091(a)(4)) and 31 U.S.C. 7701(b). Participating in the William D. Ford Federal Direct Loan (Direct Loan) Program or the Federal Family Education Loan (FFEL) Program and giving us your SSN are voluntary, but you must provide the requested information, including your SSN, to participate.

The principal purposes for collecting the information on this form, including your SSN, are to verify your identity, to determine your eligibility to receive a loan or a benefit on a loan (such as a deferment, forbearance, discharge, or forgiveness) under the Direct Loan and/or FFEL Programs, to permit the servicing of your loan(s), and, if it becomes necessary, to locate you and to collect and report on your loan(s) if your loan(s) becomes delinquent or defaults. We also use your SSN as an account identifier and to permit you to access your account information electronically.

The information in your file may be disclosed, on a case-by-case basis or under a computer matching program, to third parties as authorized under routine uses in the appropriate systems of records notices. The routine uses of this information include, but are not limited to, its disclosure to federal, state, or local agencies, to private parties such as relatives, present and former employers, business and personal associates, to consumer reporting agencies, to financial and educational institutions, and to guaranty agencies in order to verify your identity, to determine your eligibility to receive a loan or a benefit on a loan, to permit the servicing or collection of your loan(s), to enforce the terms of the loan(s), to investigate possible fraud and to verify compliance with federal student financial aid program regulations, or to locate you if you become delinquent in your loan payments or if you default. To provide default rate calculations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to state agencies. To provide financial aid history information, disclosures may be made to educational institutions. To assist program administrators with tracking refunds and cancellations, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal or state agencies. To provide a standardized method for educational institutions to efficiently submit student enrollment statuses, disclosures may be made to guaranty agencies or to financial and educational institutions. To counsel you in repayment efforts, disclosures may be made to guaranty agencies, to financial and educational institutions, or to federal, state, or local agencies.

In the event of litigation, we may send records to the Department of Justice, a court, adjudicative body, counsel, party, or witness if the disclosure is relevant and necessary to the litigation. If this information, either alone or with other information, indicates a potential violation of law, we may send it to the appropriate authority for action. We may send information to members of Congress if you ask them to help you with federal student aid questions. In circumstances involving employment complaints, grievances, or disciplinary actions, we may disclose relevant records to adjudicate or investigate the issues. If provided for by a collective bargaining agreement, we may disclose records to a labor organization recognized under 5 U.S.C. Chapter 71. Disclosures may be made to our contractors for the purpose of performing any programmatic function that requires disclosure of records. Before making any such disclosure, we will require the contractor to maintain Privacy Act safeguards. Disclosures may also be made to qualified researchers under Privacy Act safeguards.

Paperwork Reduction Notice. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1845-0058. Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain or retain a benefit (34 CFR 682.402(e)(3), or 685.215(c)). If you have comments or concerns regarding the status of your individual submission of this form, **contact your loan holder(s) (see Section 7) directly.**

483 B.R. 871
United States Bankruptcy Court,
E.D. Wisconsin.

In re Maurice WASHINGTON, Debtor.

No. 11–30250–svk.
|
Dec. 11, 2012.

Synopsis
Background: Chapter 13 debtor objected to late proof of claim filed by creditor on behalf of United States Department of Education.

[Holding:] The Bankruptcy Court, Susan V. Kelley, J., held that allowance of late-filed claim was warranted.

Objection overruled.

West Headnotes (2)

[1] **Bankruptcy** Extension of Time;Excuse for Delay

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2900 Extension of Time;Excuse for Delay
51k2900(1) In general

Bankruptcy statute addressing allowance of claims, together with bankruptcy rules, generally prohibits the filing of late claims in Chapter 13 cases, except under specific circumstances. 11 U.S.C.A. § 502(b)(9); Fed.Rules Bankr.Proc.Rules 3002(c), 9006(b)(3), 11 U.S.C.A.

1 Cases that cite this headnote

[2] **Bankruptcy** Lack or insufficiency of notice
Constitutional Law Bankruptcy

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2900 Extension of Time;Excuse for Delay
51k2900(2) Lack or insufficiency of notice
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4478 Bankruptcy

Consistent with due process requirements, allowance of creditor's untimely proof of claim for nondischargeable student loan debt was warranted, even though, pursuant to statute, discharge would not apply to its claim, where creditor did not have notice of debtor's Chapter 13 filing until after claims bar date had expired, creditor promptly filed proof of claim upon learning of case, and prejudice to creditor, from waiting five years for entry of discharge to collect on its claim, outweighed prejudice to other creditors of allowing claim, given nature of debtor's income, which consisted of retirement and disability payments. U.S.C.A. Const.Amend. 5; 11 U.S.C.A. §§ 502(b)(9), 523(a)(3); Fed.Rules Bankr.Proc.Rules 3002(c), 9006(b)(3), 11 U.S.C.A.

7 Cases that cite this headnote

Attorneys and Law Firms

***872** John A. Foscato, Green Bay, WI, for Debtor.

MEMORANDUM DECISION ON TRUSTEE'S OBJECTION TO CLAIM NUMBER 16

SUSAN V. KELLEY, Bankruptcy Judge.

The Chapter 13 trustee objected to the proof of claim filed by the Great Lakes Educational Loan Services, Inc., on behalf of the United States Department of Education (the "Creditor") because the claim was filed late. The claims bar date was December 26, 2011, and the Creditor filed its proof of claim on July 31, 2012. The Creditor admits that the claim was late, but explains that it did not have notice of the bankruptcy case. The Creditor's lack of notice of the Chapter 13 case is undisputed—the Debtor's schedules and list of creditors do not list the Creditor, and the Debtor did not notify the Creditor of his pending Chapter 13 case until after the claims bar date expired. When the Creditor learned of the case, it promptly filed a proof of claim. In response to the Trustee's Objection, the Creditor cites *In re Tarbell,* 431 B.R. 826 (Bankr.W.D.Wis.2010), in which Judge Martin held that due process and equitable considerations allow the late filing of a claim when it is clear that the creditor had no notice of the Chapter 13 case in time to file a proof of claim. The Trustee urges the Court to follow *In re Wright,* 300 B.R. 453 (Bankr.N.D.Ill.2003), strictly applying the claims deadline.

[1] Bankruptcy Code § 502(b)(9), together with Bankruptcy Rule 3002(c) and Rule 9006(b)(3), generally prohibit the filing of late claims in chapter 13 cases, except under specific circumstances not applicable here. The provisions reflect "Congress' intent to create an absolute bar date for filing claims in Chapter 13 cases." *In re Jensen,* 333 B.R. 906, 909 (Bankr.M.D.Fla.2005). "Indeed, the bar date for proofs of claim implemented by Section 502 and Rule 3002(c) is characterized as a strict statute of limitations." *In re Brooks,* 370 B.R. 194, 197 (Bankr.C.D.Ill.2007). *But see In re Unroe,* 937 F.2d 346, 350 (7th Cir.1991) ("A statute of limitation cannot be adjusted either before or after it expires. Here, Congress's approval of an extendable deadline, *see* Bankr.R. 3002(c), distinguishes the bar date from a statute of limitation, indicating that the court's equitable power includes authorization of late-filed claims.").

The Seventh Circuit Court of Appeals has not directly decided whether a court can permit a creditor who has no notice of a Chapter 13 case to file a late claim, although it has issued a trio of decisions touching on the issue. The first case, *Wilkens v. Simon Bros., Inc.,* 731 F.2d 462 (7th Cir.1984), recognized that the weight of authority treats the Chapter 13 claims bar date as mandatory and immutable, but also that a minority of courts have exercised their equitable powers to enlarge the time for filing a proof of claim, given sufficient cause. Under this view, an equitable extension of time can be granted "(1) if the fraud of a debtor prevents the timely filing by a creditor; (2) the creditor fails to receive notice of the proceedings; or (3) ***873** other extraordinary circumstances arise." *Id.* at 464. In *Wilkens,* the debtor scheduled the claim, the creditor participated in the case, but the attorney relocated his office and filed the claim late. The *Wilkens* court held that a late filing necessitated by the negligence of a creditor's attorney did not fall within one of the equitable exceptions for a late proof of claim.

Next, in *In re Unroe,* 937 F.2d 346 (7th Cir.1991), the Seventh Circuit considered an untimely amendment to a timely proof of claim and allowed the amendment in the exercise of the bankruptcy judge's discretion. The court recognized that the result may have been different if the "late claim [had] been unscheduled or exceeded the amount in the plan, in which cases the prejudice to the debtor and other creditors would have been more severe." *Id.* at 351. Moreover, the *Unroe* court stated: "We leave for another case the question whether a judge in equity could permit an entirely new claim filed out of time." *Id.* at 350.

Finally, in *In re Greenig,* 152 F.3d 631 (7th Cir.1998), the court rebuffed a creditor's attempt to file a late claim when the creditor was listed in the plan as having an allowed claim, and the creditor clearly had notice of the bankruptcy case in time to file a claim. The Court of Appeals noted that absent an exception listed in Rule 3002(c), the bar date for filing a claim in a Chapter 13 case is absolute. [1] The court went on to say: " 'Lack of notice' is not one of the delineated exceptions. It may seem unjust at first glance that a creditor who receives no notice of bankruptcy proceedings would be bound by the 90–day rule, **but this is not an issue in this case and we therefore need not examine it.**" *Id.* at 634 n. 5 (emphasis added).

In *Greenig,* the Seventh Circuit pointed to three cases as "instructive" on this issue. *Id.* The first case, *In re Edwards,* 962 F.2d 641 (7th Cir.1992), involved a bankruptcy sale free and clear of liens, with the liens attaching to the proceeds of the sale. A bank held the first mortgage, and a dairy co-op held the second mortgage in the amount of $19,000. There was about $8,000 remaining after payment of the first mortgage, but the notice of the sale was defective, and the co-op did not learn of the sale until a year later. The co-op sought to set aside the sale and asserted that its mortgage on the property was superior to the interest of the bona fide purchaser of the property and the purchaser's bank. This argument failed, with the Court of Appeals noting: "If purchasers at judicially approved sales of property of a bankrupt estate, and their lenders, cannot rely on the deed that they receive at the sale, it will be difficult to liquidate bankrupt estates at positive prices." *Id.* at 643. The court concluded: "The law balances the competing interests but weights the balance heavily in favor of the bona fide purchaser." *Id.* Moreover, the court noted: "[A]pplication of this rule to this case appears to work no great hardship.... [The co-op] suffered only a trivial loss of interest ... as a result of the failure to notify it of the sale." *Id.* at 645. Also, the co-op did not display "such diligence and zeal in the matter as to cause us to question the benefits of having a strict rule in favor of the bona fide purchaser at the bankruptcy sale." *Id.* at 645–46.

The lesson from *Edwards* does not necessarily compel disallowance of the Creditor's claim here. Allowing the claim would not prejudice any bona fide purchaser or ***874** even any other creditor. The Court can conceive of a case where allowing a late Chapter 13 claim would harm other unsecured creditors, such as if the creditors were forced to refund dividends to the Trustee, in order to share with the tardy claimant. No such prejudice exists in this case, as unsecured creditors have not begun to receive their dividends. Moreover, the Creditor here unquestionably was diligent in protecting its rights—as soon as it learned of the bankruptcy, it filed a claim. And, unlike in *Edwards,* the inability to file a late claim will hurt both the Debtor and the Creditor. Under Bankruptcy Code §§ 1328(a)(2) and 523(a)(3), the discharge does not include the debt owed to a creditor whose claim is not scheduled and who does not have notice of the bankruptcy. Moreover, the claim in this case is a nondischargeable student loan that will continue to accrue interest during the life of the plan. *See In re Johnson,* 446 B.R. 921 (Bankr.E.D.Wis.2011) (low percentage payment on student loan claim resulted in claim that was actually higher after five-year plan). It is in the Debtor's interest to have the Creditor share in the plan payments in order to reduce the Debtor's obligations to the Creditor.

And the Creditor is harmed by the delay in exercising its rights to collect on its claim. The Debtor's Plan is not projected to be completed until November 2016. The Debtor will be five years older, and any number of obstacles may impair his ability to pay the Creditor at that time. According to the Debtor's Schedules, the Debtor is unemployed, and his income consists of pension or retirement income and long term disability. Although the Creditor can seek and obtain relief from the stay, it is not likely that the relief will be granted to the extent it would interfere with the Debtor's ability to make plan payments. And it is questionable whether the Creditor could garnish the Debtor's retirement and disability income in any event, unlike the opportunity for voluntary payments presented by a Chapter 13 plan. If *Edwards* is instructive

in the consideration of whether to disallow the Creditor's claim, the Court concludes that application of the *Edwards* rationale to this case does not result in disallowance of the late-filed claim.

The second "instructive" case is *In re Schultz Mfg. & Fabricating Co.,* 956 F.2d 686 (7th Cir.1992). In that case, the Seventh Circuit analyzed whether certain individuals had standing to appeal a sale order. The court said that only a "person aggrieved" has such standing, and that the prerequisites to being a person aggrieved are attendance and objection at a bankruptcy court proceeding. *Id.* at 690. However, these prerequisites are excused if the party did not receive proper notice of the proceedings; "In that case, the requirements of due process outweigh those of judicial efficiency and certainty." *Id.* (quotations and citations omitted). *Schultz* suggests that the Creditor's claim in this case should be allowed, not disallowed, to protect the Creditor's due process rights.

The final case that the *Greenig* court cites is *In re Global Precious Metals, Inc.,* 143 B.R. 204 (Bankr.N.D.Ill.1992), a Chapter 7 case in which only 10 of the debtor's 220 creditors were listed on the Schedules. After the claims bar date expired, the trustee sought to permit the late filing of claims by the unscheduled creditors. Despite contrary rulings by the Sixth Circuit and the District Court for the Northern District of Illinois, the bankruptcy court refused to allow the late-filed claims. Disagreeing with the other courts' holdings that failure to allow the late claim was a denial of due process, the bankruptcy court held that Bankruptcy Code § 726(a)(2)(C), which allows creditors to ***875** participate in the distribution scheme if they did not have notice of the bankruptcy, vitiates due process concerns. *Id.* at 206. Of course, this provision does not apply in Chapter 13 cases and provides no similar solace here.

The *Global Precious Metals* court added that § 501(c)—authorizing the trustee or debtor to file a proof of claim on behalf of a claimant—provided due process. The bankruptcy court signaled that filing claims on behalf of the unscheduled creditors would have been more appropriate than the trustee's attempt to extend the bar date.

The bankruptcy court also mentioned § 523(a)(3), excepting unscheduled claims from the debtor's discharge, but this provision would not apply in the context of a corporate Chapter 7 case like *Global Precious Metals. See* 11 U.S.C. § 727(a)(1) (discharge shall be granted unless the debtor is not an individual). Moreover, at the time of the *Global Precious Metals* and *Greenig* decisions, that provision would not have offered any relief to an unscheduled creditor in a Chapter 13 case. Under the version of § 1328(a)(2) in effect prior to BAPCPA, a Chapter 13 discharge could include debts that were nondischargeable under § 523(a)(3). As aptly stated by the district court in *In re Cole,* 146 B.R. 837, 841 (D.Colo.1992), "While the court's analysis in *Global Precious Metals* is helpful in connection with a case proceeding under Chapter 7, it is not persuasive in the Chapter 13 context."

Admittedly, in this post-BAPCPA case, § 523(a)(3) would apply, and the Chapter 13 discharge does not include the claim of an unscheduled creditor with no notice of the bankruptcy case in time to file a proof of claim. But this discharge exception provides considerably less comfort in a five-year Chapter 13 case than in a Chapter 7 liquidation. The discharge in a Chapter 7 case can be issued as quickly as four months after the petition is filed.[2] Here, the Debtor is scheduled to complete his Plan in November 2016, and the Debtor's age and income status will impede the Creditor's ability to pursue the Debtor at that time. The *Greenig* court's citation of *Global Precious Metals* as instructive on the issue of allowing late-filed Chapter 13 proofs of claim is open to discussion, as two of the three examples of how due process is afforded did not apply in Chapter 13 and the third (filing a claim on behalf of unscheduled creditors by the trustee) would rarely, if ever, happen in a Chapter 13 case. While there may be some incentive for the debtor to file a late proof of claim for a nondischargeable debt, there is no reason for the Chapter 13 trustee to do so. And, as the court noted in *In re Cole,* 146 B.R. at 842, § 501(c) is permissive, not mandatory, and "gives scant protection to a creditor who fails to file a proof of claim because it was deprived of notice." In this case, the guidance derived from *Global Precious Metals* comes up short in supplying due process and fairness to the Creditor.

The Creditor implied at the hearing that Judge Martin's *Tarbell* decision is the only authority allowing a Chapter 13 creditor without notice of the bar date to file a proof of claim. But *Tarbell* itself cites several cases awarding the same

relief, including *In re Anderson,* 159 B.R. 830 (Bankr.N.D.Ill.1993) (late claim allowed where filings failed to disclose true identity of debtor); ***876** *In re Yoder,* 758 F.2d 1114 (6th Cir.1985); *In re Intaco Puerto Rico, Inc.,* 494 F.2d 94 (1st Cir.1974); *In re Harbor Tank Storage Co.,* 385 F.2d 111 (3d Cir.1967); and *In re Dodd,* 82 B.R. 924 (N.D.Ill.1987). Numerous other courts have ruled the same way. In *In re Harris,* 447 B.R. 254, 257 (Bankr.W.D.Ark.2011) (quotation and citations omitted), the court surveyed the legal landscape and concluded: "[T]he majority of those courts [who rely on a strict interpretation] have recognized, on separate theories, the authority of a bankruptcy court to allow late claims when adequate notice of the bankruptcy proceeding is not provided to allow the filing of timely claims." The Bankruptcy Appellate Panel for the First Circuit explained:

> Strict application of the Rule 3002 deadline for filing claims assumes that the creditor has received this prescribed notice; late filed claims may be permitted in cases where notice to the creditor was materially deficient or misleading. *See In re Collier,* 307 B.R. 20, 25 (Bankr.D.Mass.2004) (citations omitted); *see also U.S. v. Cardinal Mine Supply,* 916 F.2d 1087, 1089–92 (6th Cir.1990); 4 K. Lundin, Chapter 13 Bankruptcy, § 290.1 (Supp. 2002).

Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 508 (1st Cir. BAP 2005). The District Court for the Northern District of Illinois also concluded that the strict bar date of Rule 3002 implies or assumes that the creditor had notice of the bankruptcy case:

> Nonetheless, implicit in the strict time requirements of the bankruptcy rules is the assumption that a creditor has received notice of the bankruptcy petition. The basic principles of due process—notice and the opportunity to be heard—require no less. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 [70 S.Ct. 652, 94 L.Ed. 865] (1950); *New York v. New York, New Haven and Hartford Railroad, Co.,* 344 U.S. 293, 297 [73 S.Ct. 299, 97 L.Ed. 333] (1953). Indeed, courts which have faced a situation similar to the instant dispute have found that the debtor must demonstrate that notice has been provided before the Rules' time limits may be enforced. *See e.g. In re Yoder,* 758 F.2d 1114, 1118 (6th Cir.1985); *In re Wm. B. Wilson Mfg. Co.,* 59 B.R. 535, 538–39 (Bankr.W.D.Tex.1986). The court believes these holdings correctly and persuasively state the law.

In re Dodd, 82 B.R. 924, 928 (N.D.Ill.1987); *see also Chapman v. Charles Schwab & Co. (In re Chapman),* 265 B.R. 796, 809–11 (Bankr.N.D.Ill.2001) (authorizing late-filed claim in Chapter 13 case when creditor had no notice of bar date). The Court in *In re Collier,* 307 B.R. 20, 25 (Bankr.D.Mass.2004), explained that the purpose of a bar date is to provide the debtor and creditors with finality and swift distributions. Recognizing the difference between a Chapter 11 bar date (which may be extended on grounds of excusable neglect) and the inflexible Chapter 13 bar date, the *Collier* court noted:

> Federal Rule of Bankruptcy Procedure 3002(c) mandates that, subject to express exceptions, a proof of claim in a Chapter 13 case must be filed within 90 days after the first date set for the Section 341 meeting of creditors. The Bankruptcy Appellate Panel of the First Circuit held in *In re Aboody* that "excusable neglect" is not a valid basis to allow proofs of claim beyond the Rule 3002(c) time restrictions in Chapter 13 cases. 223 B.R. 36 (1st Cir. BAP 1998). Inherent in the strict time restrictions of Rule 3002(c), however, is the assumption that a creditor has received notice. *In re Roberts,* 98 B.R. 664, 666 (Bankr.D.Vt.1989). While *Aboody* provides shelter for the Chapter 13 debtor, the debtor ***877** may not take advantage of such shelter at the expense of creditors' due process rights.

Id.

[2] The Creditor here did not have notice of the Chapter 13 filing until after the claims bar date expired. The line of cases stating that enforcement of the strict deadline assumes that the creditor had notice are much more akin to this case than are the line of cases cited by *In re Wright.* Due process and fairness to the Creditor require notice and dictate that this Court adopt the reasoning of these cases.

The discharge exception in § 523(a)(3), although applicable here, does not mean that the Creditor will not suffer harm if the claim is not allowed. The nature of the Debtor's income as retirement and disability payments strongly suggests that the Creditor will be unduly prejudiced by waiting five years for entry of the Chapter 13 discharge to collect on its claim. In this case, it is apparent that (1) the Creditor did not receive notice of the Chapter 13 case until after the claims bar date expired; (2) upon learning of the case, the Creditor promptly filed a proof of claim; and (3) the prejudice to the Creditor of disallowing the claim outweighs the prejudice to the other creditors of allowing the claim. Under these circumstances, the Court should allow the Creditor's untimely filed proof of claim. The Court overrules the Chapter 13 trustee's objection to the Creditor's proof of claim. An Order to this effect will be entered contemporaneously with this Decision.

All Citations

483 B.R. 871, 288 Ed. Law Rep. 330

Footnotes

1 *Greenig* was a Chapter 12 case, but the applicable Rule is the same in Chapter 12 and Chapter 13.

2 The discharge is generally granted within a day or two after the deadline to object to discharge passes. Under Bankruptcy Rule 4004, this deadline is 60 days after the § 341 meeting of creditors, and, in most cases, the meeting is held no fewer than 21 and no more than 40 days after the petition is filed. Fed. R. Bankr.P.2003(a).

431 B.R. 826
United States Bankruptcy Court,
W.D. Wisconsin.

In re Bruce TARBELL, Debtor.

No. 09–12570.
|
April 16, 2010.

Synopsis

Background: Following expiration of the deadline for governmental units to file proofs of claim, motion was made to extend the time for the Internal Revenue Service (IRS), which had been omitted from Chapter 13 debtor's creditor list and had never received notice of his bankruptcy filing, to file a proof of claim.

Holdings: The Bankruptcy Court, Robert D. Martin, J., held that:

[1] the bankruptcy rule governing computing and extending time could not be the basis for the court to alter the deadline for filing proofs of claim, but

[2] because the IRS had no notice of the bankruptcy, it could file a late claim in this case.

So ordered.

West Headnotes (5)

[1] Bankruptcy Time for Filing

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2897.1 In general

As a general matter, late-filed claims are completely barred in a Chapter 13 case.

5 Cases that cite this headnote

[2] Bankruptcy Time for Filing

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2897.1 In general

Governmental units, like the Internal Revenue Service (IRS), have 180 days after the meeting of creditors to file a proof of claim. Fed.Rules Bankr.Proc.Rule 3002(c)(1), 11 U.S.C.A.

Cases that cite this headnote

[3] **Bankruptcy** Extension of Time;Excuse for Delay

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2900 Extension of Time;Excuse for Delay
51k2900(1) In general

Deadline for governmental units to file a proof of claim is "set in stone," meaning that it cannot be extended by the bankruptcy court except as allowed by the bankruptcy rule governing the filing of proofs of claim or interest. Fed.Rules Bankr.Proc.Rules 3002, 3002(c)(1), 9006, 11 U.S.C.A.

2 Cases that cite this headnote

[4] **Bankruptcy** Extension of Time;Excuse for Delay

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2900 Extension of Time;Excuse for Delay
51k2900(1) In general

Bankruptcy rule governing computing and extending time could not be the basis for the bankruptcy court to alter the deadline for filing proofs of claim where the Internal Revenue Service (IRS) had not requested an extension of time before the 180-day period ran. Fed.Rules Bankr.Proc.Rules 3002(c)(1), 9006, 11 U.S.C.A.

Cases that cite this headnote

[5] **Bankruptcy** Lack or insufficiency of notice

51 Bankruptcy
51VII Claims
51VII(D) Proof;Filing
51k2897 Time for Filing
51k2900 Extension of Time;Excuse for Delay
51k2900(2) Lack or insufficiency of notice

Internal Revenue Service (IRS) would be allowed to file a late claim, despite having failed to request an extension of the deadline for filing proofs of claim before the 180-day period ran, where the IRS had been omitted from Chapter 13 debtor's creditor list and had never received notice of the bankruptcy filing. Fed.Rules Bankr.Proc.Rules 3002(c)(1), 9006, 11 U.S.C.A.

3 Cases that cite this headnote

Attorneys and Law Firms

***827** Vicki L. Schleisner, Janesville, WI, for Debtors.

MEMORANDUM DECISION

ROBERT D. MARTIN, Bankruptcy Judge.

Tarbell, a chapter 13 debtor, omitted the IRS from his creditor list filed on April 22, 2009. When he filed his remaining schedules and plan on May 20, he forgot to submit a supplemental list. Accordingly, the IRS never received notice of the filing, and their proof of claim deadline passed on October 19, 2009. Tarbell had chosen chapter 13 in large part to pay this tax claim, which totals about $14,000. When Tarbell realized the IRS had been omitted, his counsel contacted the IRS, which offered to file a late claim if the court allowed it. The trustee opposed the motion to extend time to file a claim.

[1] As a general matter, late-filed claims are completely barred in a chapter 13 case. *See,* Keith Lundin, Chapter 13 Bankruptcy, § 290–3 (3d ed.). Section 502(a)(9) of the Bankruptcy Code provides that, if there is an objection to a claim, "the court shall allow such claim ... except to the extent that ... proof of such claim is not timely filed." While 11 U.S.C. § 726(a)(2)(C) provides that a late-filed claim in chapter 7 is instead subordinated to timely claims, there is no similar saving provision in chapter 13 cases.

[2] **[3]** **[4]** Governmental units, like the IRS, have 180 days after the meeting of creditors to file a proof of claim. Fed. R. Bankr.Proc. 3002(c)(1). This deadline is "set in stone." *See,* Ginsberg & Martin on Bankruptcy, § 10.06[A] (5th ed.). That is, it cannot be extended by the court under Federal Rule of Bankruptcy Procedure 9006(c), except as Rule 3002 allows. Rule 3002, in turn, provides for an extension only if the governmental unit requested an extension before the 180–day period ran. ***828** The IRS did not do so here. Accordingly, the IRS's claim is untimely, and the court cannot use Rule 9006 to alter the deadline.

[5] Many courts have, however, extended the time for a creditor to file a proof of claim in a chapter 13 case either under the equitable power of 11 U.S.C. § 105 or given due process considerations. This relief has most commonly been awarded when, as here, the creditor had no notice of the bankruptcy. *See, In re Anderson,* 159 B.R. 830 (Bankr.N.D.Ill.1993) (late claim allowed where filings failed to disclose true identity of debtor); *In re Yoder,* 758 F.2d 1114 (6th Cir.1985); *In re Intaco Puerto Rico, Inc.,* 494 F.2d 94 (1st Cir.1974); *In re Harbor Tank Storage Co.,* 385 F.2d 111 (3rd Cir.1967). Courts within this circuit have previously followed such an approach. *See, In re Anderson, supra; In re Dodd,* 82 B.R. 924 (N.D.Ill.1987); *but see, In re Wright,* 300 B.R. 453 (Bankr.N.D.Ill.2003) (concluding that plain language of the Code barred late-filed claims despite due process concerns). Courts allowing late-filed claims have coalesced around the rationale that the time limits in the Code implicitly assume that notice has been given. This rationale is both persuasive and consistent with this Court's prior actions in *In re Sage,* Case No. 03–17563. In *Sage,* the court allowed the IRS to file a late claim where it first received notice of a chapter 13 filing after the claims bar date had passed.

The IRS may file a late claim in this case. It may be so ordered.

All Citations

431 B.R. 826

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re
Myron K. Johnson and
Shevelle A. Johnson,
Debtors.

Chapter 13
Case No. 13-35426-svk

MEMORANDUM DECISION ON TRUSTEE'S OBJECTION TO CLAIM NO. 15 FILED BY PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

In this case, the Trustee urges the Court to reconsider its ruling in *In re Washington,* 483 B.R. 871 (Bankr. E.D. Wis. 2012), allowing a late-filed proof of claim in a Chapter 13 case for a creditor without notice. After careful consideration, the Court grants the Trustee's request.

Myron and Shevelle Johnson (the "Debtors") filed a Chapter 13 petition on November 27, 2013. (ECF No. 1.) In their bankruptcy schedules, the Debtors listed the United States Department of Education and ECMC as their only student loan creditors. (*Id.* at 21, 24.) The bar date for creditors to file a claim was April 10, 2014. On July 31, 2015, Pennsylvania Higher Education Assistance Agency ("PHEAA"), filed a proof of claim for $87,349.73. (Claim No. 15.) PHEAA was not listed in the Debtors' schedules and did not receive notice of the claims bar date until after the bar date expired.[1]

The Chapter 13 Trustee objected to PHEAA's late-filed claim, and the parties have filed briefs. Unsurprisingly, PHEAA relies on the decision in *Washington,* in which I allowed a late-filed student loan claim based on due process considerations and the implication that the claims deadline in Bankruptcy Rule 3002 only applies to creditors who have received notice of the claims bar date. 483 B.R. at 876. In *Washington*, the Court cited a number of cases supporting the holding, including *In re Tarbell*, 431 B.R. 826 (Bankr. W.D. Wis. 2010); *Vicenty v. San*

[1] In September 2015, PHEAA transferred the student loan to ECMC. (ECF No. 84.) This transfer to a creditor with notice of the bar date does not affect PHEAA's lack of notice at the time it filed the Claim.

Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493 (B.A.P. 1st Cir. 2005); and *In re Dodd,* 82 B.R. 924 (N.D. Ill. 1987). Since *Washington*, the Supreme Court decided *Law v. Siegel*, 134 S. Ct. 1188 (2014), the Seventh Circuit Court of Appeals issued *In re Pajian*, 785 F.3d 1161 (7th Cir. 2015), and my colleague, Judge Halfenger, analyzed the issue in *In re Phillips*, No. 14-29453, 2015 Bankr. LEXIS 3315 (Bankr. E.D. Wis. Sept. 30, 2015). All of these cases and further study of the due process issue support reconsideration of the position taken in *Washington*.

In *Law v. Siegel*, the Supreme Court emphasized that the equitable powers of the bankruptcy courts must be exercised within the confines of the Bankruptcy Code. 134 S. Ct. at 1194. The Court cited *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 24-25 (2000), in which the Supreme Court stated: "Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides."

The applicable Code section in this case is § 502(b)(9), which states that one reason to disallow a claim is if "proof of such claim is not timely filed." Section 502(b)(9) goes on to allow "tardily filed" claims under sections of the Bankruptcy Code not applicable here, or "under the Federal Rules of Bankruptcy Procedure." Bankruptcy Rule 3002(c) imposes a proof of claim deadline in Chapter 13 cases of 90 days after the first date set for the § 341 meeting of creditors, and Bankruptcy Rule 9006(b)(3) does not permit enlargement of that deadline except to the extent stated in Rule 3002. None of the exceptions in Rule 3002 apply here; there is no exception to the bar date for creditors who have not received notice of the bankruptcy. Accordingly, a strict application of the relevant Code and Rule provisions without an equitable gloss requires disallowance of PHEAA's tardy claim.

In *Pajian*, the Seventh Circuit Court of Appeals construed the claims filing deadline in Rule 3002 and found it applicable to secured as well as unsecured creditors. 785 F.3d 1161. The court's discussion strongly suggests a strict construction of the Rule, based on the plain language as well as policy considerations. For example, the Seventh Circuit noted:

> Requiring all creditors to file claims by the same date allows the debtor to craft and finalize a Chapter 13 plan without the concern that other creditors might swoop in at the last minute and upend a carefully constructed repayment schedule. If we held otherwise, secured creditors could wreak havoc on the ability of the debtor and the bankruptcy court to assemble and approve an effective plan. Each tardy filing from a secured creditor would likely require the debtor to file a modified plan, which would have to be served on all interested parties and considered by the court. All this would often lead to disruptive delays in plan confirmation hearings and would ultimately hinder the bankruptcy court's ability to manage its docket.

785 F.3d at 1164.

The same considerations militate against crafting equitable exceptions to permit late-filed claims. In this case, allowance of PHEAA's $87,000 claim could upset the confirmed plan or possibly force creditors who have received distributions to disgorge them, so that PHEAA can share in the plan payments.

In *Phillips*, the U.S. Department of Education did not have notice of the claims bar date in time to file a claim, and the Chapter 13 trustee objected to the Department's late-filed claim. 2015 Bankr. LEXIS 3315. Declining to craft an equitable exception to the Rule 3002 deadline based on *Law v. Siegel*, Judge Halfenger addressed the argument that disallowing the claim deprived the Department of due process. He first questioned whether the United States was a "person" entitled to due process protection.[2] *Id.* at *5. Even assuming the government was so-

[2] Although the government does not have a constitutional right to due process, courts have instead held that "fundamental fairness" requires adequate notice to governmental entities. *See, e.g., In re Hairopoulos*, 118 F.3d 1240, 1245 n.3 (8th Cir. 1997) (collecting cases).

entitled, Judge Halfenger determined that the deadline in Rule 3002 "does not offend the due process clause because it does not work a deprivation of property without adequate process." *Id.*

This conclusion is correct because an unscheduled creditor in a Chapter 13 case does not suffer the discharge of its debt. Section 1328(a)(2) provides that a Chapter 13 discharge does not include debts specified by § 523(a)(3); that section excludes from discharge debts that are not listed or scheduled in time for the creditor to file a timely proof of claim. Rather than the ability to file a claim and share in the plan distributions, it is the discharge of the debt without effective notice that violates the Fifth Amendment. For example, in *In re XO Commc'ns., Inc.*, 301 B.R. 782, 791-92 (Bankr. S.D.N.Y. 2003), the court explained:

> Before a debtor can obtain a discharge of a claim in bankruptcy, however, the Due Process Clause of the Fifth Amendment dictates that a debtor's creditors receive notice of the debtor's bankruptcy case and applicable bar date so that creditors have an opportunity to make any claims they may have against the debtor's estate. *See generally In re Drexel Burnham Lambert Group Inc.*, 151 B.R. 674, 679 (Bankr. S.D.N.Y. 1993) (noting that the Fifth Amendment protects against deprivation of life, liberty or property, without due process of law. A claim against the bankruptcy estate constitutes property within the meaning of the Amendment and cannot be forfeited through proceedings lacking in due process.).

(emphasis supplied; internal quotations and parentheticals omitted).

In this case, PHEAA's unscheduled claim will not be forfeited because it will not be discharged.[3] Therefore, PHEAA's due process rights are not denied by the disallowance of its late-filed claim. The automatic stay does serve to hamper PHEAA's collection rights, and, in *Washington*, I was concerned about the prejudice to the creditor caused by the potential five-year delay in collecting its claim. However, "it is a fundamental bankruptcy principle that Code

[3] This issue arises often in Chapter 11 cases in which plan confirmation can act as a discharge of claims; numerous courts have held that due process requires that a creditor receive notice of the bar date for filing claims and notice of the confirmation hearing. Lacking that notice the creditor is not bound by the plan and its claim is not discharged. *See, e.g., Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("the discharge of a claim without reasonable notice . . . is violative of the fifth amendment"); *In re Arch Wireless*, 332 B.R. 241, 253 (Bankr. D. Mass. 2005) (collecting cases).

provisions that delay the exercise of the creditor's remedies are not, per se unconstitutional, even with respect to the property of rights of secured creditors." *In re Shaffer*, 2014 Bankr. LEXIS 4585, *4-5 n. 2 (Bankr. E.D. Pa. Nov. 3, 2014). The lesson of these cases is that the delay caused by the application of the automatic stay during the term of the Chapter 13 plan does not violate the creditor's constitutionally protected property rights.

This Court also expressed skepticism in *Washington* that the unscheduled student loan creditor could obtain relief from stay to avoid the delay and immediately begin collection proceedings. 483 B.R. at 874. I have reconsidered that proposition as well. As the court noted in *In re Blakely*, 440 B.R. 443, 445-46 (Bankr. E.D. Va. 2010), "An unscheduled creditor may be granted relief from the stay. This may affect the ability of the debtor to complete a chapter 13 plan. It may cause the plan to fail. Both are considerations, but should be evaluated in relation to the creditor body as a whole and the debtor's knowledge of the omission." A debtor's failure to schedule a creditor in time to file a proof of claim, thereby preventing the creditor from participating in the bankruptcy case, constitutes cause for granting the creditor relief from the stay. *See In re Wrobel*, 197 B.R. 289, 296 (Bankr. N.D. Ill. 1996) ("Denial of the stay modification would be especially inequitable in light of the fact that the Debtor conspicuously failed to give notice of her Current Chapter 13 to the State Court and Datlow until her first State Court appearance after the deadline for filing claims had passed."); *In re Wright*, 300 B.R. 453, 466 (Bankr. N.D. Ill. 2003) (discussing "cause" for relief from stay and observing that "The Seventh Circuit has instructed that relief is appropriate when 'equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems.'" *IBM v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 735 (7th Cir. 1991).).

Here, the Debtors failed to schedule an $87,000 student loan debt, and they proposed a plan stating that "Claim [sic] subject to 11 U.S.C. §523(a)(8) shall be treated as if current during the plan and at the completion of the plan shall be non-dischargeable and deemed current." (ECF No. 2 at 6.) The Court recently construed the same provision for student loan creditors in another plan and found it ambiguous and unenforceable. *See In re Stevens*, No. 14-33862, 2015 Bankr. LEXIS 4180 (Bankr. E.D. Wis. Dec. 14, 2015). These facts suggest that, unlike in *Washington*, cause may well exist to grant PHEAA relief from stay.

In sum, the Court should not exercise equitable powers to allow PHEAA's late claim in contravention of express provisions of the Bankruptcy Code and Rules. And enforcing the claims bar date for an unscheduled creditor without notice in a Chapter 13 case does not violate the creditor's due process rights, because the creditor's claim will not be discharged. To avoid waiting to collect its claim until the Chapter 13 plan is completed, among other remedies, PHEAA can seek relief from the stay, and strong precedent exists for granting that relief.

The Court will issue a separate order sustaining the Trustee's objection and disallowing PHEAA's proof of claim.

Dated: January 8, 2016

By the Court:

Susan V. Kelley
Chief U.S. Bankruptcy Judge