



AMERICAN
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Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer Issues Potpourri: What's New, What's Trending, and What Isn't Trending that Should Be!

Hon. Tiffany P. Geyer, Moderator

U.S. Bankruptcy Court (M.D. Fla.) | Orlando

Gregory A. Champeau

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Chapter 13 Standing Trustee (M.D. Fla.) | Tampa

Gavin N. Stewart

Stewart Legal Group P.L. | Tampa, Fla.

Guy A. Van Baalen

U.S. Trustee's Office | Tampa, Fla.



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ALEXANDER L. PASKAY Memorial Bankruptcy Seminar

FEB 15-16, 2024 | THE WESTIN TAMPA WATERSIDE | TAMPA, FL






Consumer Issues Potpourri

What's new!

What's trending?

What isn't trending....
and really should be?



				
<p>Hon. Tiffany Geyer U.S. Bankruptcy Judge M.D. Florida Orlando</p>	<p>Gregory A. Champeau Champeau Law Naples, FL</p>	<p>Gavin Stewart Stewart Legal Group, P.L. Tampa, FL</p>	<p>Guy A. Van Baalen Assistant U.S. Trustee M.D. Florida</p>	<p>Kelly Remick Chapter 13 Standing Trustee M.D. Florida Tampa</p>



What's New!

- Virtual 341 Meetings (not that new anymore)
- Important Updates for Chapter 13 Practice
- Partial Claim Mortgages
- Student Loan Discharge- A New Frontier!
- Merchant Cash Advances in Consumer Cases

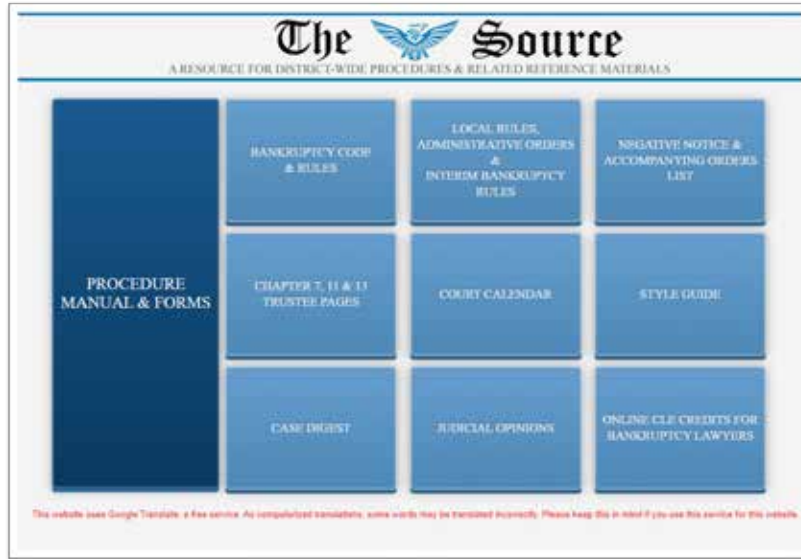
Virtual 341 Meetings

Chapter 7, 12, and 13 cases filed after September 1, 2023

- ☐ Transition to virtual meetings during the pandemic helped avoid disruption to case administration.
- ☐ Greater debtor attendance (thus fewer continuances).
- ☐ Creditor participation improved.
- ☐ Stakeholders saw substantial time and cost savings.
- ☐ Video meetings allow for debtor identification, credibility determinations and decorum. (Let's talk about decorum for a few minutes...)

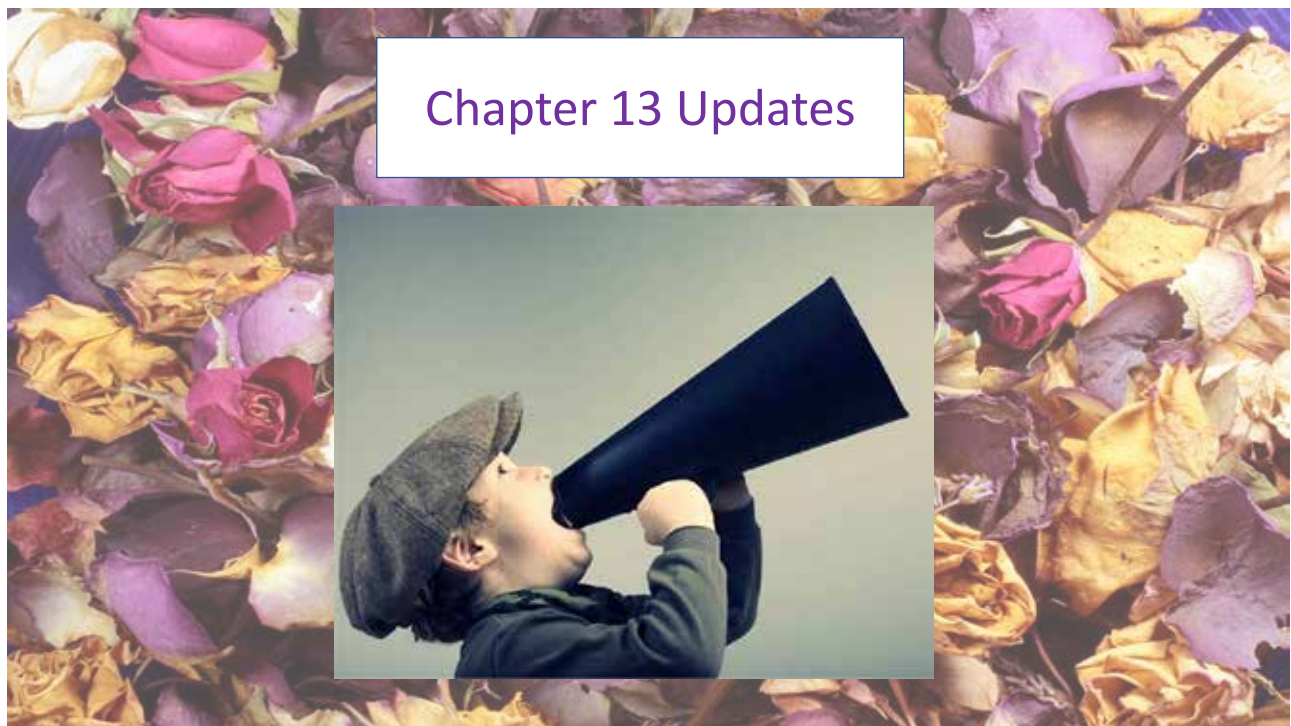
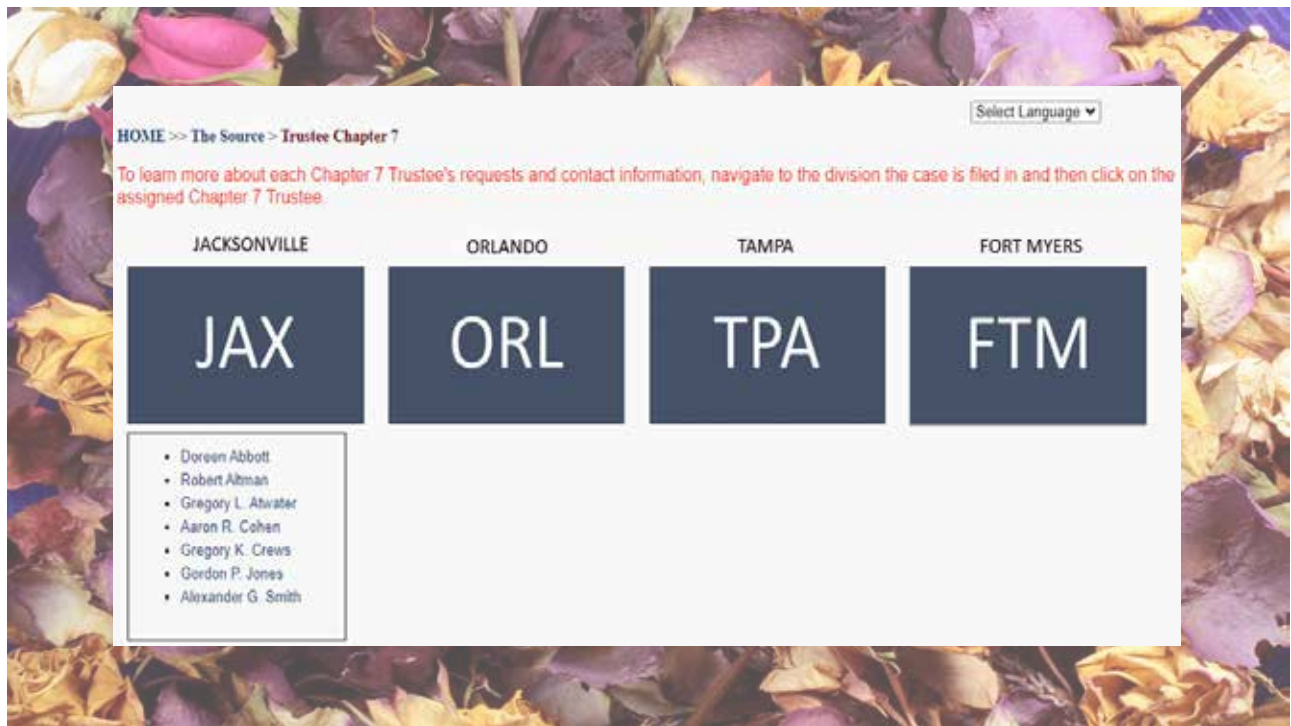
- ☐ All section 341(a) Meetings of Creditors for Chapter 7, 12 and 13 cases are conducted by Zoom.
- ☐ Debtors are generally expected to appear at their virtual Meeting by video.
 - If the debtor does not have access to internet or an electronic device with a camera, they should join the Meeting by audio only as the trustee may permit a debtor to participate by telephone on a case-by-case basis.
 - If the debtor is experiencing trouble connecting by video, they should join by audio and let the trustee know they were unable to join by video.
 - If a creditor or other interested party is unable to join by video, they can join by audio only.
 - Unless permitted by the trustee, telephonic appearance by the debtor will likely result in the rescheduling of their Meeting to another date or time.
- ☐ There are three ways to join a Zoom meeting.
 - Zoom application (required for smartphone)
 - Zoom website
 - Audio only

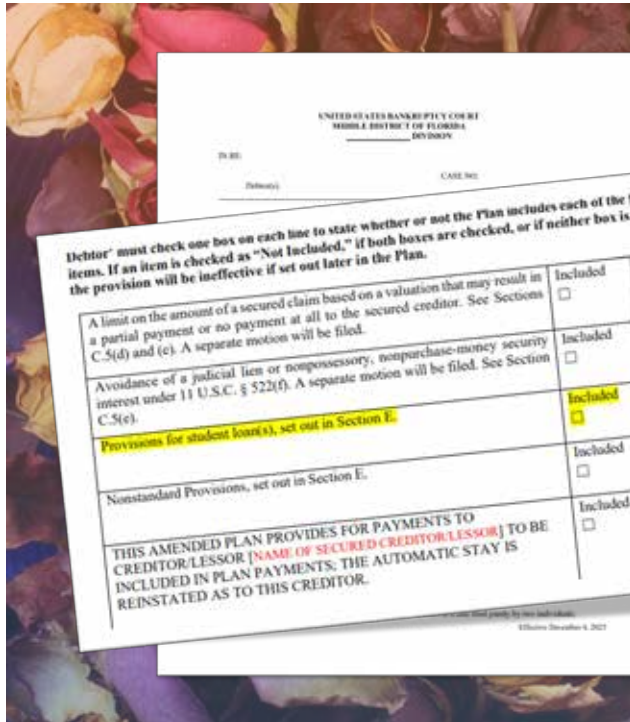
May the Source be with you!



HOME → The Source → Trustee Chapter 13 Select Language ▼

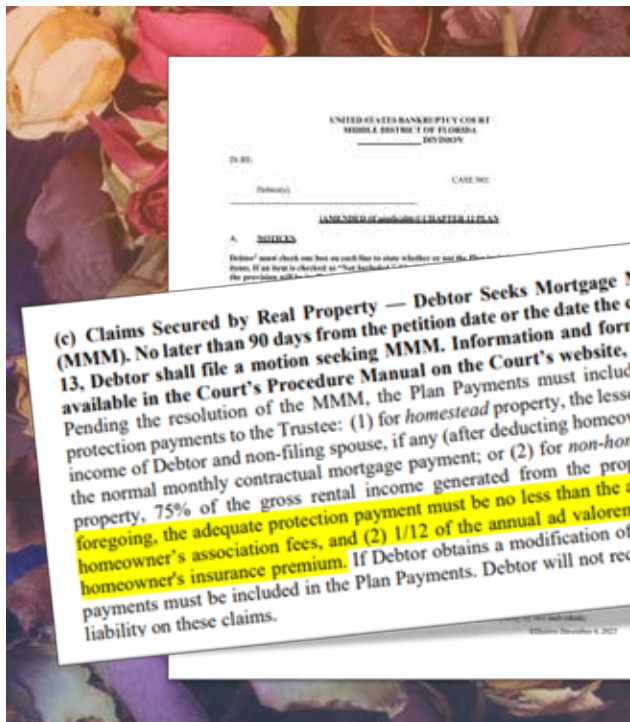
FORT MYERS	JACKSONVILLE	ORLANDO	TAMPA
FTM	JAX	ORL	TPA
Jon M. Waage, Chapter 13 Standing Trustee	Douglas W. Neway, Chapter 13 Standing Trustee	Laurie K. Weatherford, Chapter 13 Standing Trustee	Kelly Remick, Chapter 13 Standing Trustee
ZOOM 341 MEETING INFORMATION FOR USE BEGINNING OCTOBER 1, 2023	ZOOM 341 MEETING INFORMATION FOR USE BEGINNING OCTOBER 1, 2023	ZOOM 341 MEETING INFORMATION FOR USE BEGINNING OCTOBER 1, 2023	ZOOM 341 MEETING INFORMATION FOR USE BEGINNING OCTOBER 1, 2023
GO TO ZOOM US/JON ENTER MEETING ID 578 762 2687 AND PASSCODE 8548227471 OR CALL (941) 258-3502	GO TO ZOOM US/DON ENTER MEETING ID 961 266 1512 AND PASSCODE 9142684613 OR CALL (904) 658-1930	GO TO ZOOM US/LORI ENTER MEETING ID 536 996 6373 AND PASSCODE 3958355040 OR CALL (321) 758-1669	GO TO ZOOM US/KELLY ENTER MEETING ID 678 206 0445 AND PASSCODE 9833067429 OR CALL (813) 586-4522
P.O. Box 25001 Bradenton, FL 34206-5001	P.O. Box 4308 Jacksonville, FL 32201	P.O. Box 3450 Winter Park, FL 32790	P.O. Box 89948 Tampa, FL 33680
Office Inquiry Email: info@tampa13.com	Creditor Inquiry Email: creditors@ch13jax.com	Email: info@ch13orl.com	Office Inquiry Email: mail@ch13tampa.com
Phone: (941) 747-4044	Pro Se Debtor Communication	Phone: (407) 648-8841	Phone: (813) 586-4522





Section A - Student Loans

Check box added on first page to indicate that student loans are provided for in Section E, Nonstandard Provisions.



Section 5(c) - MMM

Pending resolution of MMM, adequate protection payments must be sufficient to provide for:

- HOA fees;
- property taxes; and
- homeowner's insurance.

Section 5(g) – Secured Claims

Applies to:

- secured claims being paid through the plan under § 1322(b)(2);
- claims secured by debtor's principal residence being paid through the plan under § 1322(c)(2).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
DEBTOR(S): _____ CASE NO.: _____

IN RE: _____

CHAPTER 13 PLAN

A. **NOTICE**

Debtors must check one box on each line to state whether or not the Plan includes each of the following items. If an item is checked as "Not Included," it both triggers an objection to the Plan and the provisions will be inapplicable if approved.

(g) Claims Secured by Real or Personal Property to be Paid with Interest Through the Plan Under 11 U.S.C. § 1322(b)(2) and § 1322(c)(2) (for claims secured by Debtor's principal residence that mature during the Plan). The following secured claims will be paid in full under the Plan with interest at the rate stated below.

Last Four Digits of Acct. No.	Creditor	Collateral Description/ Address	Claim Amount	Payment Through Plan	Interest Rate

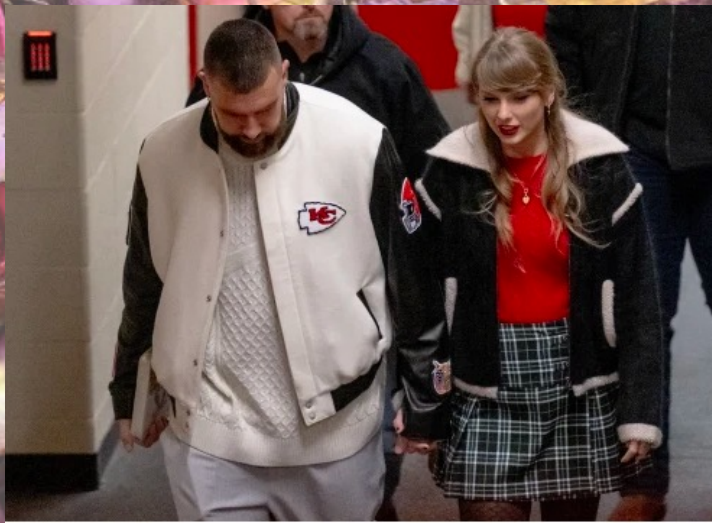
Continuation of "Debtors" schedule and will be both of the Debtor's in a case filed jointly by two individuals.
Effective December 9, 2017

Order Confirming Plan

Revisions are largely stylistic and include a re-ordering of the paragraphs to more closely track the Chapter 13 process.

- ☐ Paragraph 11 – provides that Debtor's timely Plan Payments to the Trustee are deemed to be paid contractually on time as to secured creditors **if their payments are included in Plan Payments.**
- ☐ Paragraphs 11-15 – clarify the disallowance of claims and distributions by the Trustee.
- ☐ Paragraphs 22-23 – clarify the process for the refund of undisbursed plan payments if the case is dismissed or converted to another chapter (including Chapter 12) and the deadline for filing administrative expense claims, including claims by Debtor's attorney for fees **if they seek payment from the Chapter 13 Trustee.**
- ☐ Paragraph 9 – clarifies the Debtor's duty to disclose changes in financial circumstances and assets.
- ☐ The "Appendix" (relating to the filing of tax returns and payment of taxes) has been deleted.

What's Trending?



Mortgage Modification Mediation numbers are down... but are Partial Claim Mortgage numbers going up? (Also, what is a Partial Claim Mortgage...)

What is a Partial Claim Mortgage?

- ☐ Partial Claim Mortgage – A zero interest subordinate lien that is attached to the property post-modification approval.
 - Funded by HUD and are only available for FHA/VA loans.
 - Typically, the lender removes the arrearage from the main loan/first mortgage and secures it with a new, subordinate mortgage on the property.
 - No monthly payments are required, and the balance is typically due at maturity, sale, or refinance.

Incorporating Partial Claim Mortgages into Chapter 13 Cases

- ☐ Motions to Approve Loan Modification
 - Must describe the agreement in full and complete detail.
 - Attach a complete copy of the Partial Claim Mortgage, Note and other required documents.
- ☐ Impact of incurring “new” debt (or is it really “new” debt)?
- ☐ Creditors should amend their claims to update the arrearage status.
- ☐ Amended or Modified Plan to address the new status of the loan.

Lien Stripping?

- ❑ The lien is placed on the property post-petition.
- ❑ Depending on value of collateral, can a debtor dismiss the case and refile to strip the lien?
 - If so, the process would result in a dischargeable unsecured claim.
 - All bankruptcy filings must be filed in good faith.

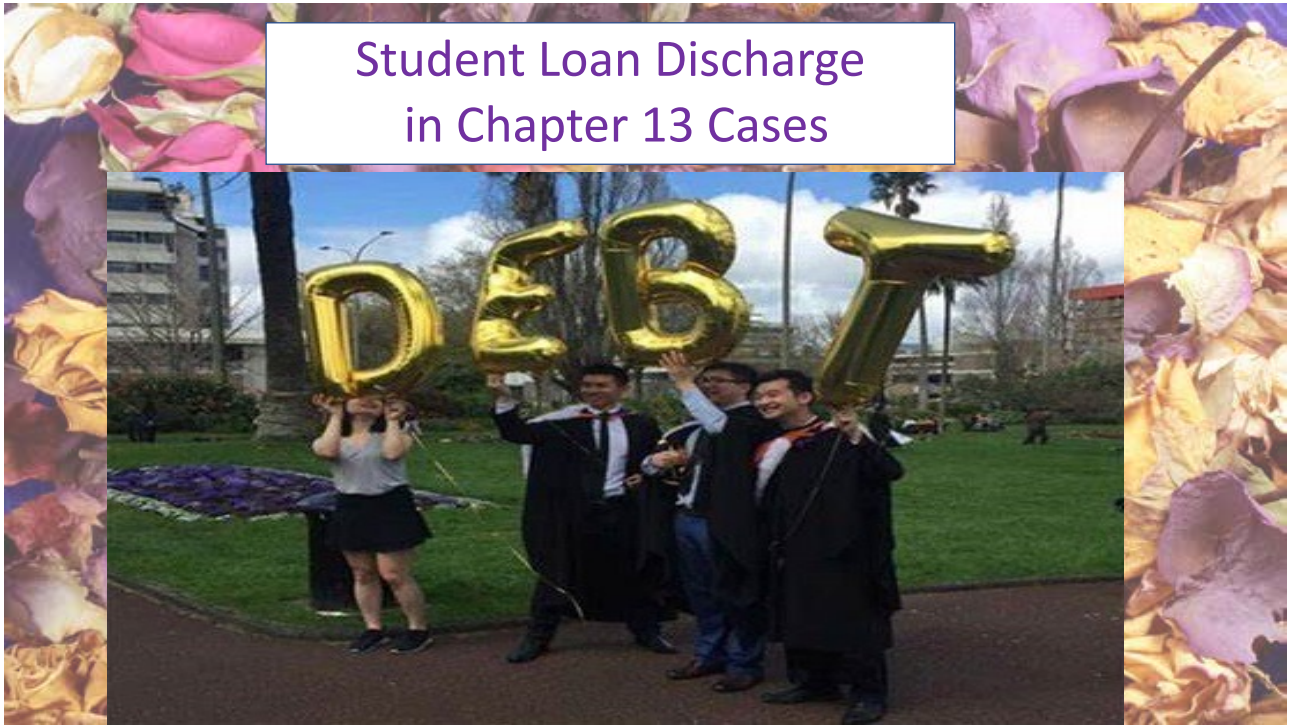
Mortgage
Modification
Mediation...
Trending down?

- ☐ Timing of MMM Motion
- ☐ Portal Communication
- ☐ Document Submission
- ☐ Setting Mediation
- ☐ Outcome of Mediation

What isn't Trending...
That Really Should Be?



Student Loan Discharge in Chapter 13 Cases



Student Loan Problems

- Approximately 45 million Americans owing more than \$1.7 trillion
- 92% are federal student loans
- Second largest type of consumer debt after mortgages

Student Loans in General

Types of Loans

- Direct Subsidized and Unsubsidized Loans
- PLUS Loans
 - Graduate PLUS and Parent PLUS
- Direct Consolidation Loans
- Federal Family Education Loan (FFEL)
 - Stafford
 - Consolidation
- Perkins
- Private Loans



• National Student Loan Data System – NSLDS

Database – Department of Education

www.StudentAid.gov

Student Loan Repayment Plans

□ Based on loan balance

- Standard
- Graduated Repayment
- Extended Repayment

□ Based on debtor's income (Income Driven Repayment Plans – IDR's)

- ❖ Saving on Valuable Education (SAVE) **NEW**
Formerly – Revised Pay as You Earn Repayment Plan (REPAYE) Subsidized payments, balance doesn't grow
- ❖ Pay as You Earn (PAYE)
- ❖ Income-Based Repayment Plan (IBR)
- ❖ Income Contingent Repayment Plan (ICR)
- Income Sensitive Repayment Plan (ISR)

• = No forgiveness

❖ = Provides forgiveness

- ❑ Why is it important to deal with student loans in bankruptcy?
- ❑ In a Chapter 13 bankruptcy, the Department of Education, its Guaranty Agencies and Student Loan Servicers place all student loans in **administrative forbearance**
- ❑ This means no collection actions are taken but interest continues to accrue
- ❑ Example: \$100,000 of student loans at 8% interest will grow to \$148,984.57 at the end of a 60-month Chapter 13 Plan.
- ❑ The “fresh start” becomes a “false start”.
- ❑ Student loan crisis mirrored Great Recession mortgage crisis

Attorneys Must Stay Up to Date on Changes in Law and Its Practice

Rule 4-1.1 – COMPETENCE

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

R. Regulating Fla. Bar 4-1.1

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject.

R. Regulating Fla. Bar 4-1.1 cmt. (The Florida Bar Jan. 8, 2024).

In 1998, Congress amended Section 523 of the U.S. Bankruptcy Code to allow for student loans to be discharged based on an undue hardship test.

The **Brunner Test** is the most commonly used test to assess undue hardship.

Debtors are required to prove three key elements to qualify for a student loan discharge:

1. Present inability to repay the student loans while maintaining a minimal standard of living;
2. Circumstances surrounding present inability to pay likely to persist for a significant portion of the loan's repayment period; and
3. Past good-faith efforts to try to repay the loans.

Some jurisdictions use the **Totality of Circumstances Test** which looks to:

- The debtor's past, present and reasonably reliable future financial resources;
- A calculation of the debtor's and their dependents' reasonably necessary living expenses; and
- Any other relevant facts and circumstances unique to the case that prevent repayment while maintaining a minimal standard of living notwithstanding discharge of other prepetition debts.



GOOD
NEWS!

“We’re from the government.
We’re here to help.”



November 17, 2022

Department of Justice and Department of Education introduced new guidance that provides objective standards under which all undue hardship cases are to be reviewed.

- ☐ An adversary proceeding still needs to be filed.
- ☐ The Brunner Test and the Totality of Circumstances test are still utilized.
- ☐ A new attestation form is completed which includes critical information to allow the DOJ and DOE to determine if the debtor meets the guidance's objective standards for the undue hardship test.
- ☐ The guidance simplifies the process and evaluates the debtor's present, future and past financial circumstances.
- ☐ Although the statute requiring undue hardship has not changed, the guidance shows how to assess the standards and provides benchmark data that clearly defines whether the student loan debtor faces undue hardship in repaying their loan.
- ☐ Within the first 10 months, 632 student borrowers had filed cases to wipe out their loans.
- ☐ In a November 2023 press release from the DOJ, a full or partial discharge has been issued in 99% of cases in which courts have entered judgments or orders to date.

A few questions from the Attestation Form In Support of Request for Stipulation Conceding Dischargeability of Student Loans...

[Updated August 2023]

6. The current monthly payment on such loan[s] is _____. The loan[s] are scheduled to be repaid in _____ [month and year] [OR] ☐ My student loan[s] went into default in _____ [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending _____, where I was pursuing a _____ degree with a specialization in _____.

8. In _____ [month and year], I completed my course of study and received a _____ degree. [OR] In _____ [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a _____. My employer's name and address is _____ [OR] ☐ I am not currently employed.

Scope and Limits of the Guidance

- Process only for settlement
- Not binding on the DOJ and DOE if case is to be litigated
- Does not create enforceable rights or court authority.
- **Only** applies to the DOJ as holder or guarantor of loans. (Direct Loans, FFELP and Perkins).
 - Does not apply to Private Loans.
- Prospective application – Cases pending as of and filed after November 17, 2022.

New Fees

Admin order adds:

- \$1,500 fee for Student Loan Modification (SLM);
- a \$250 yearly fee for recertifying SLMs for debtors with Income Driven Repayment Plans;
- third-party providers' fees for portal and document preparation for MMMs and SLMs.

c. \$1,500 – For representation of a debtor in SLM. If the Debtor obtains an Income Driven Repayment Plan ("IDR Plan"), the attorney may charge up to \$250 per year for services in connection with the recertification of the IDR Plan.

d. third-party providers' fees in connection with portals and document preparation for MMM and SLM.

Southern District of Florida

- ☐ Had 4 student loan adversary cases pending on 11/17/2022
 - 3 cases resolved through attestation process for full discharge
 - 1 case settled for \$5,000 due to debtor's high income
- ☐ Have seen 2 new student loan cases that are going through the attestation process
- ☐ Have the highest full discharge rate

District of Minnesota

- ☐ District with the most filed student loan adversary cases since the implementation of the guidance
- ☐ Has 30 student loan cases pending with 14 cases having submitted attestation forms

Districts with over 5 pending student loan cases

- ☐ District of Colorado
- ☐ Middle District of Florida
- ☐ Eastern District of New York
- ☐ Eastern District of Tennessee

“Unofficial” Middle District of FL Statistics

Statistics for Federal Student Loan Discharge Cases Filed in Bankr. M.D. Fla. 2020 to Present

Student Loan Discharge Cases Filed in 2020	8
Student Loan Discharge Cases Filed in 2021	3
Student Loan Discharge Cases Filed from 1/1/22 through 11/16/22	7
Student Loan Discharge Cases Filed from 11/17/22 to present (post-Attestation)	42
# of Pending Cases in Attestation Process	35
Cases Resolved Through Attestation Process With Total Discharge	4
Cases Resolved Through Attestation Process With Partial Discharge	1
Cases Resolved Through Attestation Process Without Partial or Total Discharge (Dismissal)	3
% of Cases Resolved Through Attestation Process Where Debtor Received Total or Partial Discharge	62.50%

Case Studies (Go M.D. Fla.!!!)

❖ *In re Dale*, Case No. 6:23-ap-00001-LVV (filed by Branson Law on January 16, 2023; agreed final judgment entered on September 6, 2023) (University of Phoenix graduate, age 60, employed as customer service representative) (“*For Dale, in addition to her lawyer, she credits God for opening up the doors to her debt forgiveness.*”) <https://www.newsweek.com/woman-cleared-student-loan-debt-bankruptcy-forgiveness-1867424>

❖ *In re Zauzner*, Case No. 8:22-ap-00081-CPM (filed by Pro Se Debtors on April 29, 2022; Order Finding Undue Hardship entered on January 19, 2024) (Both debtors experienced fraud from schools and financial hardship due to Covid 19.)

Case Studies (Go M.D. Fla.!!!)

❖ *In re Keefer*, Case No. 3:22-ap-00035-BAJ (filed by Pro Se Debtor on July 9, 2022; Order Granting Joint Motion for Finding of Undue Hardship and Entry of Summary Judgment entered January 10, 2024) (Debtor suffers from mental illness and was determined to be disabled and unable to work by the Social Security Administration.)

❖ *In re Eckard*, Case No. 6:22-ap-00100-GER (filed by Sheryl Zust on December 22, 2022; agreed final judgment entered on September 21, 2023) (Student loan debt for unfinished law school is discharged due to undue hardship; Student loan incurred for completed degree in Social Work is not discharged.)

Merchant Cash Advance Claims in Chapter 13



- ☐ What is an MCA?
- ☐ Is it a Loan or Sale of Assets?
- ☐ What does that mean for Consumer Practitioners?



November 17, 2022

**GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN
BANKRUPTCY LITIGATION**

I. Introduction

This memorandum provides guidance (Guidance) to Department of Justice (Department) attorneys regarding requests to discharge student loans in bankruptcy cases. Developed in coordination with the Department of Education (Education), this Guidance will enhance consistency and equity in the handling of these cases. In accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if three conditions are satisfied: (1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan.

To assist the Department attorney in evaluating each of these factors, a debtor will typically be asked to provide relevant information to the government by completing an attestation form (Attestation). The Attestation requests information about the debtor's income and expenses to enable the Department attorney to evaluate the debtor's present ability to pay. The Attestation also seeks information that will help the Department attorney evaluate the other two factors. In the following sections, this Guidance provides more detail about the Attestation that a debtor will be asked to complete, and how the information provided in the Attestation will be considered by the Department attorney. In Appendix A, this Guidance provides a sample attestation form. In addition, in Appendix B, this Guidance provides a concrete example of how a debtor's request for discharge of a student loan will be evaluated.

II. Objectives of the Guidance and Education's Role in Supporting Discharge Cases

In cases where a debtor seeks the discharge of a student loan in bankruptcy, the Department shares with Education the responsibility to represent the interests of the United States in accord with existing law and in the interests of justice. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases. To fulfill that responsibility, Department attorneys should stipulate to facts necessary to demonstrate undue hardship and recommend discharge where the debtor provides information in the Attestation (or otherwise during the adversary proceeding) that satisfies the elements of the analysis below. Some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an

adversary proceeding. This Guidance is intended to redress these concerns so that discharges are sought and received when warranted by the facts and law. In addition, Department attorneys are expected to consult proactively with Education to evaluate the specific circumstances of each case.

In collaborating in the preparation of this Guidance, the Department and Education have sought to promote three goals in particular:

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

Education is committed to supporting Department attorneys handling these cases. Department attorneys should expect that, for each adversary proceeding, Education will provide to the Department attorney a record of the debtor's account history, loan details, and—where available—educational history, which the Department attorney will share with the debtor. This information will be provided with the Education litigation report.

The Department attorney is expected to consult with Education in each case; consultation includes sharing the completed Attestation and conferring on an appropriate course of action. In its initial litigation report, Education will advise on matters including whether it has data relating to the presumptions in this Guidance regarding assessment of future circumstances and whether it considers the debtor made good faith efforts to repay their student loans. This process will ensure the final decision is informed by Education's experience administering student loans and its role as creditor. Once the Department attorney reaches a recommendation in accordance with this Guidance, the Department attorney shall submit their recommendation or approval, as appropriate, along with Education's recommendation, under the standard procedures applicable in that attorney's component.

III. Applicable Law

Under Section 523(a)(8) of the Bankruptcy Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan “would impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010) (“the bankruptcy court must make an independent determination of undue hardship . . . even if the creditor fails to object or appear in the adversary proceeding.”).¹ This inquiry is undertaken through a formal adversary proceeding in the bankruptcy court. *United Student Aid Funds*, 559 U.S. at 263-64; Fed. R. Bankr. P. 7001(6). The parties in that proceeding may stipulate to the existence of certain facts and recommend that the bankruptcy court find, based on such facts, that repayment of the student loan would cause the debtor an undue hardship.

The most common framework for assessing undue hardship is the so-called *Brunner* test, emanating from *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor’s financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396.

Other courts have employed a “totality of circumstances” test (Totality Test) to determine whether repayment of student loan debt would cause an undue hardship. *See, e.g., In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). The Totality Test looks to: (1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and their dependents’ reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*

This Guidance applies in both *Brunner* and Totality Test jurisdictions. Courts have recognized the *Brunner* and Totality Tests “consider similar information—the debtor’s current and prospective financial situation in relation to the educational debt and the debtor’s efforts at repayment.” *In re Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *see also In re Jespersen*, 571

¹ Section 523(a)(8) requires the debtor to demonstrate an undue hardship to discharge nearly all federal student loans, excluding Health Education Assistance Loans, as well as private education loans that meet the definition of qualified education loans under the Internal Revenue Code. *See* 26 U.S.C. § 221(d)(1).

F.3d 775, 779 (8th Cir. 2009).² Both tests require assessment of the debtor’s income and reasonable expenses to determine whether the debtor has the present and future ability to maintain a “minimal standard of living” while making student loan payments. *See, e.g., In re Hurst*, 553 B.R. 133, 137 (B.A.P. 8th Cir. 2017) (“[I]f the debtor’s reasonable financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.”) (citing *In re Jespersen*, 571 F.3d at 779). Finally, both tests direct the court to review the debtor’s past efforts at repayment. *In re Polleys*, 356 F.3d at 1309; *see also In re Bronsdon*, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

IV. Discussion of the Applicable Factors

As explained above, consideration of student loan debt discharge requires an evaluation of a debtor’s present, future, and past financial circumstances. This Guidance offers a framework for Department attorneys to apply each of these factors.

With respect to the first factor, the Guidance relies upon the Internal Revenue Service Collection Financial Standards (the IRS Standards) to assess whether a debtor can presently maintain a “minimal standard of living” if required to repay student loan debt. In particular, the Department attorney is advised to use the IRS Standards to evaluate a debtor’s expenses, and then to compare those expenses to the debtor’s income, to determine whether the debtor has a present ability to pay the loan.

With respect to the second factor, the Guidance uses presumptions for determining whether inability to repay is likely to persist in the future. The Guidance recognizes, however, that even in the absence of such presumptions a debtor may be able to establish that their inability to pay will continue in the future.

With respect to the third factor, the Guidance identifies certain objective criteria that evidence a borrower’s good faith. In addition, the Guidance discusses how to evaluate a debtor’s

² The Eighth Circuit has described the Totality Test as “less restrictive” than the *Brunner* framework, *In re Long*, 322 F.3d at 554, but it has also recognized that the distinction between the standards “may not be that significant.” *Jespersen*, 571 F.3d at 779 n.1, 782. *See, e.g., In re Long*, 322 F.3d at 554-55 (“Simply put, if the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor’s present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor’s financial position”); *see also Jespersen*, 571 F.3d at 782 (the totality approach also requires consideration of “evidence of a less than good faith effort to repay . . . student loan debts”). The Guidance does not supersede applicable case law in the circuits. Department attorneys should advance the principles and goals described in this Guidance consistent with that case law.

payment history and decision to participate in an income-driven repayment plan, and clarifies that neither of these factors are dispositive evidence where other evidence of good faith exists.

Finally, the Guidance also provides direction to Department attorneys regarding the treatment of a debtor's assets and the availability of partial discharge.

The Attestation provided with this Guidance will assist in the assembly of the information needed to assess these factors.³ Department attorneys are expected to review completed Attestations in consultation with Education.

A. Assessment of Present Circumstances

The first factor relevant to whether a student loan debtor can meet the statutory undue hardship standard requires the debtor to prove an inability to presently maintain “a minimal standard of living” while making student loan payments. To address this factor, the Department attorney should complete two steps. First, the Department attorney should use the IRS Standards to determine the debtor's “allowable” expenses. Second, the attorney should compare those allowable expenses to the debtor's income to determine whether the debtor has income after expenses with which to make student loan payments. If the debtor's allowable expenses exceed their gross income, this element of the analysis is satisfied. If the debtor's financial circumstances changed since filing the initial bankruptcy petition, the Department attorney can look to the debtor's actual financial circumstances when making an undue hardship determination. *Cf. In re Walker* 650 F.3d 1227, 1232 (8th Cir. 2011).

1. Assessment of the Debtor's Expenses

The Attestation solicits expense information from debtors in categories corresponding to the IRS Standards, particularly the portions of the IRS Standards described as “National and Local Standards” and “Other Necessary Expenses.”⁴ The IRS Standards are a useful guide to assess a debtor's expenses for purposes of the “minimal standard of living” inquiry. Use of these standards will ensure more consistent and equitable treatment of debtors seeking discharge. The IRS has established and updated the IRS Standards to determine appropriate collection actions where taxpayers have outstanding unpaid tax obligations. The IRS Standards evaluate what

³ As discussed in more detail below, the Attestation requires a debtor to present information relevant to the Department attorney's analysis in an efficient, organized manner. If the debtor's satisfaction of the requirements for discharge are clearly demonstrated by the complaint or other facts available outside the Attestation, then upon verification of those facts, a Department attorney may recommend discharge without requiring that the debtor complete the Attestation.

⁴ Links to the IRS Standards are found at <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards>.

expenses are “necessary to provide for a taxpayer’s health and welfare[.]”⁵ or, as described in the IRS Collection Manual, “the *minimum* a taxpayer and family needs to live.”⁶ Courts have recognized the IRS Standards as useful objective criteria in assessing “undue hardship” under Section 523(a)(8). *See, e.g., In re O’Hearn*, 339 F.3d 559, 565 (7th Cir. 2003); *In re Cota*, 298 B.R. 408, 415 (Bankr. D. Ariz. 2003). The IRS Standards list certain expenses (the National and Local Standards) for which they provide a recommended maximum allowance, but also recognize other potential expenses (Other Necessary Expenses) that are potentially necessary for an individual’s health and welfare.

Allowance of Expenses in National Standard Categories: The IRS National Standards consist of tables of allowable expense amounts in the following categories: food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous. Where the debtor’s expenses are below the amount allowed under the IRS National Standards, no further inquiry into the debtor’s actual expense amount is needed and the debtor is allowed the full National Standards amount. If a debtor’s reported expenses exceed the IRS National Standard amount, a debtor’s reasonable explanation for why particular actual expenses exceed the standard should be considered carefully by the Department attorney, in consultation with Education, and may be accepted if allowing the additional expenses is warranted by the debtor’s circumstances and would comport with a “minimal standard of living.”⁷

Allowance of Expenses in Local Standards Categories: The Local Standards provide expense standards for the categories of housing, utilities, and transportation. Unlike the expenses in the National Standards category, for the Local Standards categories, the Department attorney should limit the debtor to their *actual* expenses. To the extent such expenses do not exceed the amount prescribed in the Local Standards for the debtor’s location and household size, Department attorneys should consider the debtor’s actual expenses in these categories to be consistent with a minimal standard of living and treat such amount as allowed. If the debtor’s actual expense exceeds the Local Standards amount, Department attorneys should generally limit the debtor’s allowable expense to the standard amount. However, as with those expenses categorized as National Standards expenses, the Department attorney should, in consultation

⁵ IRS, *Collection Financial Standards*, <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards>.

⁶ IRS, Internal Revenue Manual: Part 5.15.1.8 (July 24, 2019), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108264304 (emphasis added).

⁷ The decision whether to allow expenses in excess of the National and Local Standards will necessarily be fact-intensive, but allowable excess expenses could, for example, include specific health-related costs, costs for special dietary needs, unique commuting requirements, or other needs of the debtor or dependents.

with Education, carefully consider and accept a debtor's reasonable explanation for the need for the additional expenses.

Allowance of Other Necessary Expenses: The IRS Standards recognize "Other Necessary Expenses" in addition to the National and Local Standards expenses. The Attestation requests that debtors list expenses in these "Other Necessary Expense" categories. For example, the IRS Standards allow expenses for alimony and child support payments if they are court-ordered and actually being paid, as well as for baby-sitting, day care, nursery and preschool costs where reasonable and necessary. These Other Necessary Expenses are consistent with a "minimal standard of living," so long as they are necessary and reasonable in amount.⁸

Allowance for Reasonable Expenses Not Incurred: In addition to the comparison of expenses and income described above, Department attorneys should also recognize there may be circumstances in which a debtor's actual expenditures fall below the expenses required to maintain a minimal standard of living and to meet basic needs. For example, a debtor may be living in housing that the debtor is not paying for (e.g., the debtor is staying with a family member) or living in substandard or overcrowded housing but should not be required to remain there indefinitely. Likewise, a debtor may be forgoing spending on childcare, dependent care, technology, or healthcare that would otherwise be expenses one would reasonably expect to maintain a minimal living standard. A simple comparison of present expenses and income could unduly assess the debtor's financial situation against a standard that is below a minimal standard of living. In such circumstances, it would be inappropriate to conclude a debtor possesses income with which to make student loan payments and ignore the debtor's actual living standard. To address these situations, the Attestation provides an opportunity for a debtor to identify and explain expenses the debtor would incur if able to address needs that are unmet or insufficiently provided for. The Department attorney should use those projected expenses in assessing the debtor's present and future financial circumstances. Unless the amount of the projected expenses exceeds the Local Standards, it is not necessary to probe the debtor's calculation.

Appendix B includes specific examples of the recommended analysis of expenses.⁹

⁸ The Department attorney may consult the IRS Standards themselves to assist in determining whether these expenses are necessary to a debtor's minimal standard of living.

⁹ The Attestation process is intended to be distinct from the bankruptcy "means test," which is used to determine a debtor's eligibility for Chapter 7 relief. Although the means test also uses the IRS Standards as part of its calculation of a debtor's household disposable income for the purpose of establishing bankruptcy eligibility, courts have recognized that the means test is not a test of a "minimal standard of living." See *In re Miller*, 409 B.R. 299, 319–320 (Bankr. E.D. Pa. 2009) (means test not appropriate to determine whether the "undue hardship" standard is met) (citing *In re Savage*, 311 B.R. 835, 840 n.7 (1st Cir. B.A.P. 2004)). Moreover, the means test calculation differs from the Attestation in specific ways, including that (1) the means test (unlike

2. *Comparison of Expenses with the Debtor's Gross Income*

After determining the debtor's allowable household expenses using the National and Local Standards and Other Necessary Expenses, the Department attorney should compare the debtor's expenses to the debtor's household gross income. Gross income includes income from employment of the debtor and other household members, as well as unemployment benefits, Social Security benefits and other income sources. Debtors normally provide this information in the Schedule I filing. Where debtors filed this form less than 18 months prior to the adversary proceeding, the debtor may use the information on Schedule I to complete the Attestation. Where Schedule I was filed more than 18 months prior to the adversary proceeding or the debtor's circumstances have changed, the Attestation directs the debtor to provide the new income information.

Using the expense and income information provided in the Attestation, the Department attorney should determine whether the debtor possesses income with which to make student loan payments. If the debtor's allowable expenses exceed the debtor's income, the minimal standard of living requirement is satisfied and the debtor may be eligible for a student loan discharge, subject to consideration of the additional factors below. If, however, after considering the analysis described above, the debtor has sufficient discretionary income to make full student loan payments as required under their loan agreement, the debtor has not satisfied the test for undue hardship.¹⁰ Where a debtor's income allows for payment toward the student loan debt but in an amount insufficient to cover the required monthly student loan payment, the Department attorney

the Attestation) is required only for "consumer" debtors whose income exceeds a state "median," and (2) in practice, the means test often allows expenses regardless of their necessity to the debtor's basic or minimal standard of living, such as payments on multiple vehicles or for real property other than the debtor's residence.

¹⁰ Department attorneys are expected to consult with Education to determine the monthly repayment amount. Generally, where permitted in a given jurisdiction, the Department attorney should use the monthly payment amount due under a "standard" repayment plan for the student loan in question when determining whether the debtor has the ability to make payments. The standard repayment amount is the payment amount required to pay the student loan within the remaining term of the loan, as determined by Education. *See* 34 C.F.R. § 685.208. Where the account includes unpaid interest, Department attorneys should take care to ensure that the monthly payment amount would be sufficient to pay the loan obligation in full. Except as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator. Finally, where a student loan has been accelerated, whether based on a debtor's payment default or otherwise, the Department attorney should, following consultation with Education, determine the standard repayment amount either prior to default or as calculated if the loan were removed from default status.

should consider the potential for a partial discharge (discussed more fully in Section IV.E. below).

B. Assessment of Future Circumstances

The second factor for discharge is whether the debtor's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. This showing is required in both *Brunner* Test and Totality Test jurisdictions. See *In re Thomas*, 931 F.3d 449, 452 (5th Cir. 2019); *In re Long*, 322 F.3d at 554.

A presumption that a debtor's inability to repay debt will persist is to be applied in certain circumstances, including: (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential;¹¹ (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.¹² The Attestation is designed to identify any such circumstances, and it advises the debtor to disclose all of the circumstances applicable to their situation and not rely exclusively on a single presumptive basis for claiming a continuing inability to repay.

The presumptions identified in this Guidance are rebuttable. Although circumstances supporting rebuttal of a presumption will likely be uncommon, the Department attorney need not apply a particular presumption if the debtor's attestation nonetheless indicates a likely future ability to pay. Such a rebuttal must be based on concrete factual circumstances. Mere conjecture about the borrower's future ability is not enough. For example, the presumption in favor of a

¹¹ The debtor may, but is not required to, submit information from a treating physician indicating that the debtor suffers from a disability or chronic injury impacting their income potential, and when provided, that information should be considered carefully. The presumption may be applied even in the absence of a formal medical opinion.

Education offers Total and Permanent Disability (TPD) discharge for qualifying borrowers with certain severe disabilities. Because TPD discharge has its own requirements, the existence of that potential administrative relief generally should not foreclose the debtor from showing a future inability to pay. If, in the view of the Department attorney, the debtor may qualify for TPD discharge, the attorney can provide information to the debtor about the program. Finally, Education's denial of a TPD discharge request is not dispositive of the future circumstances analysis: a prior denial for TPD discharge only implies that Education determined the borrower is likely to have some ability to earn income at the time of the application based on the information provided and evaluation criteria in place, but does not otherwise suggest that the debtor's income is sufficient to service student loan debt or that future circumstances are likely to change.

¹² In the case of consolidation loans, the length of time the debtor has been in repayment includes periods in repayment on the original underlying loans.

debtor who failed to obtain a degree may be rebutted by evidence that the debtor has received employment offers with salaries significantly higher than their current income. In sum, a presumption may be rebutted by evidence that a debtor's future financial circumstances render them able to pay their outstanding debt.

The presumptions identified above are not the sole bases upon which a future inability to pay may be found. A debtor may attest to any facts the debtor believes are relevant to future inability to pay, and the Department attorney should review the Attestation to determine whether the facts presented by the debtor satisfy the standards for proof of likely persistence of inability to pay. A Department attorney may find, for example, that a debtor's financial circumstances are unlikely to improve in the future where the debtor has a significant history of unemployment, even if the debtor's unemployment does not meet the criteria for a presumption. A stipulation may also be appropriate, even absent a particular presumption, where the institution that granted the debtor's degree has closed, and that closure has inhibited a debtor's future earning capacity.¹³ Education has indicated that closure of a school after completion of the debtor's degree may affect a debtor's future ability to pay where the debtor incurs reputational harm from such closure or where the debtor's lack of access to records hampers employment efforts.¹⁴

C. Assessment of Good Faith

Whether a debtor has demonstrated good faith with regard to repayment of student loan debt depends upon the debtor's actions relative to their loan obligation.¹⁵ Good faith may be demonstrated in numerous ways and the good faith inquiry "should not be used as a means for courts" or Department attorneys "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. A debt should not be discharged if the debtor has "willfully contrive[d] a hardship in order to discharge student loans," *id.*, abused the student loan system, *In re Coco*, 335 Fed. App'x 224, 228-29 (3rd Cir. 2009), for example, by committing fraud in connection with obtaining the loans, or otherwise demonstrated a lack of interest in repaying the debt, *id.*

¹³ Education offers a loan discharge for students attending a school that closed while the borrower was in attendance or shortly after withdrawal. As with a TPD discharge, the availability of this administrative relief should have limited influence on the analysis discussed in this Guidance. Debtors may not receive the "closed-school" discharge for a range of reasons that do not implicate their financial status.

¹⁴ The presumptions discussed in this Guidance are intended to direct a Department attorney's assessment of the debtor's situation and do not shift any burden of proof in undue hardship litigation. Before the court in the adversary proceeding, the debtor retains the burden of proof on all elements of the undue hardship claim.

¹⁵ In discussing good faith, this Guidance intends to encompass satisfaction of both Prong Three of the *Brunner* test and good faith as considered under the Totality Test in evaluating the debtor's past efforts at repayment.

Where the debtor has taken at least one of the following steps and in the absence of countervailing circumstances as discussed below, the steps demonstrate good faith. We would normally expect the Department attorney to be able to determine the presence of any countervailing circumstances based on the information contained in the Attestation and provided by Education or that is publicly available.

Evidence of good faith: The following steps evidence good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDR plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

The good faith standard also assesses criteria such as “the debtor’s efforts to obtain employment, maximize income and minimize expenses.” *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (citing *In re O’Hearn*, 339 F.3d at 564); see, e.g., *In re Jespersen*, 571 F.3d at 780. A debtor’s handling of finances in a manner that suggests responsible management of their debts, including student loan debts, also suggests good faith. A debtor has minimized expenses if their expenses fall within the IRS Standards as discussed in this Guidance.¹⁶ Good faith can be satisfied where debtors’ personal or family obligations significantly reduce their employment opportunities or increase their expenses.” Issues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor’s family, community, and individual circumstances. Debtors may provide an explanation of those circumstances, and the Department attorney should weigh the explanation in consultation with Education.

Actual payment history and IDR enrollment: Department attorneys should consider the following two issues that frequently arise and deserve additional attention: a debtor’s actual payment history and a debtor’s enrollment or non-enrollment in an IDR. Department of Education studies have shown that the servicing of student loan debt has been plagued at times

¹⁶ By contrast, a debtor whose expenses exceed the IRS Standards should not be foreclosed from showing they have minimized expenses, and the Department attorney and Education should carefully assess any explanations debtors may provide for exceeding the standard expenses.

by administrative errors and dissemination of confusing and inaccurate information, and that these issues may have affected debtors' responses to their loan obligations. In addition, the Consumer Financial Protection Bureau has found that debtors have been wrongfully denied IDRPs and that monthly payments have been inaccurately calculated. *See* Consumer Financial Protection Bureau, *Supervisory Highlights* Fall 2022, Summer 2021, and Fall. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. *See* Consumer Financial Protection Bureau, *Supervisory Highlights*, Fall 2014 & Fall 2015. These problems have also given rise to a lack of trust by debtors in the repayment process. As a result, the good faith inquiry should not disqualify debtors who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful IDRPs, or a lack of adequate information or guidance. When considering a debtor's attempts to engage with their student loan, attorneys should look at the entire life of the loan rather than merely considering the recent history.

Department attorneys should consider payment history within the broader context of the debtor's financial means and personal circumstances. Where other evidence of good faith exists, including evidence that the debtor lacked financial means to pay or that the debtor made meaningful contact with Education or the servicer to explore repayment options, the failure to repay (or inconsistent or limited repayment) does not indicate a lack of good faith. In some circumstances, the Department of Education may not have records or have incomplete records about a debtor. The absence of ED data should not reduce the weight of the borrower's evidence.¹⁷

Department attorneys should also exercise caution in assessing IDRPs. IDRPs are intended to provide a means through which debtors may respond to difficult financial circumstances, and the model Attestation asks a debtor to identify if they enrolled in an IDRP and to offer an explanation if they did not. Where a debtor participated in an IDRPs, this factor is evidence of good faith.¹⁸

¹⁷ Between March 2020 and December 2022, borrowers were placed into an automatic COVID-related forbearance. The vast majority of borrowers remained in that forbearance for the duration of the period because it included a zero percent interest rate and eligibility toward IDRPs and PSLF forgiveness. Due to this extended period, many debtors may not have taken any action toward their loans. This period of inactivity is not evidence of bad faith and actions taken prior to March 2020 should not be discounted because they are not recent.

¹⁸ *See, e.g., In re Tingling*, 990 F.3d 304, 309 (2d Cir. 2021); *In re Krieger*, 713 F.3d 882, 884 (7th Cir. 2013); *In re Coco*, 2009 WL 1426757, at *228–229; *In re Mosko*, 515 F.3d at 323; *In re Barrett*, 487 F.3d 353, 363–64 (6th Cir. 2007); *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *In re Jespersen*, 571 F.3d at 782–83; *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2007); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005); *In re Bronsdon*, 435 B.R. at 802.

However, where a debtor has not enrolled in an IDRPs, the Department attorney should give significant weight to the fact that, as noted, Education has found widespread problems with IDRPs servicing. In particular, Education has advised that IDRPs have not always been administered in ways that have been effective for, or accessible to, student loan debtors. In some cases, borrowers may not have been aware of their IDRPs options. At times, servicers failed to inform borrowers about these options in favor of other repayment plans or nonpayment options like forbearance. Likewise, many schools have failed to advise prospective borrowers about IDRPs, despite being legally obligated to do so. *See* 20 U.S.C. § 1092(d). Thus, non-enrollment alone does not show a lack of good faith.

Where a debtor did not enroll in an IDRPs, the Department attorney is expected to look first to the debtor's Attestation response and to accept any reasonable explanation or evidence supporting the debtor's non-enrollment in an IDRPs. Acceptable explanations or evidence could include, for example:

- that the debtor was denied access to, or diverted or discouraged from using, an IDRPs, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDRPs;
- that the debtor had a plausible belief that an IDRPs would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRPs and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDRPs.

Where these explanations are based in part on contact or attempted contact with Education, servicers, or trusted third parties, they evidence good faith.

If a debtor provides an explanation that lacks sufficient detail or is not otherwise acceptable (or fails to provide any explanation), the debtor may still demonstrate good faith through other actions such as making payments, responding to outreach from a servicer or collector, enrolling in deferment or forbearance, making contact with Education or their servicer about their loan, or otherwise taking professional or financial steps that indicate a good-faith attempt to meet their loan obligations. In sum, we would expect Department attorneys not to oppose discharge for lack of good faith where there is a basis to conclude that the debtor's IDRPs non-enrollment was not a willful attempt to avoid repayment.

D. Consideration of a Debtor's Assets

A debtor's assets must also be considered in the undue hardship analysis. Department attorneys, however, should not give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being, and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship.¹⁹

The Attestation facilitates this inquiry by seeking information regarding the debtor's assets. It may be appropriate to suggest that a debtor consider liquidating an asset where the asset is unnecessary to the debtor's and dependents' support and welfare. Residential real property and funds in retirement accounts are often exempt from collection under federal or state exemption laws. Although the exempt status of property may not be dispositive of whether that property is necessary for a minimal standard of living, the Department attorney should be careful in considering such property in the undue hardship analysis. *In re Marcotte*, 455 B.R. 460, 471 (Bankr. D.S.C. 2011).²⁰ The Department recognizes that liquidating a primary residence or retirement account is an extreme measure and therefore requests to liquidate those assets should be exceptionally rare.

E. Partial Discharge.

Where appropriate and permissible under governing case law, Department attorneys may recognize the availability of partial discharge. Partial discharge occurs where the bankruptcy

¹⁹ The debtors' assets may be liquidated by a bankruptcy trustee to fund payments to creditors of the estate. Such property, if liquidated by the trustee, would not be available for the payment of student loan debt and thus should not be considered.

²⁰ The question of how exempt property should be considered under the "undue hardship" analysis has generated disagreement among courts. Generally, courts find that "the exempt character of an asset does not necessarily preempt its relevance to a hardship evaluation." *In re Armesto*, 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003); *see also In re Nys*, 446 F.3d at 947 (recognizing courts must consider availability of assets "whether or not exempt, which could be used to pay the loan"); *In re Gleason*, 2017 Bankr. LEXIS 3455, at *14 (Bankr. N.D.N.Y. Oct. 6, 2017) (allowing consideration of IRA or 401K account, regardless of exemption status). Other courts, however, have noted the necessity to weigh the policies underlying certain exemptions, for example, the homestead exemption in the debtor's residence, before considering such assets in assessing undue hardship. *Schatz v. Access Grp., Inc. (In re Schatz)*, 602 B.R. 411, 427-28 (1st Cir. B.A.P. 2019) (reversing bankruptcy court's treatment of exempt equity in homestead as dispositive of a lack of undue hardship). Notably, the *Schatz* opinion states that the bankruptcy court failed to make any finding whether the equity in the debtor's home could be liquidated without imposing an undue hardship on the debtor. *Id.* at 428.

court discharges a portion of the outstanding student loan debt while requiring payment of the remainder.²¹

Department attorneys may consider recommending partial discharge based upon a determination that the debtor has the ability to make some payments on the loan while maintaining a minimal standard of living, but an inability to make the full standard monthly repayment due. A partial discharge should not result in a remaining (undischarged) balance larger than what a debtor's discretionary income (as determined under the Prong One analysis) permits them to pay off in monthly payments over the remaining loan term. In practice, a full discharge is appropriate for debtors whose expenses are equal to or greater than their income where they meet the other elements of the analysis. Partial discharge may also be available to a debtor who is able to liquidate assets to pay a portion of the debt but remains unable to pay the remainder while maintaining a minimal standard of living. *See In re Stevenson*, 463 B.R. 586, 598-99 (Bankr. D. Mass. 2011); *In re Clavell*, 611 B.R. 504, 531-32 (Bankr. S.D.N.Y. 2020).

V. Procedures

Although the process for soliciting and reviewing the Attestation may vary from case to case, Department attorneys should generally observe the following procedures in soliciting Attestations.

A. **Submission of the Attestation**

Upon a debtor's commencement of an adversary proceeding seeking discharge pursuant to 11 U.S.C. § 523(a)(8), the Department attorney should provide a debtor the opportunity to complete and submit the Attestation. The Department attorney is encouraged to contact the debtor or debtor's counsel as soon as practicable after service of process in an adversary

²¹ Section 523(a)(8) is silent with respect to whether bankruptcy courts may discharge part of a student loan based on undue hardship. The concept, however, has been recognized by several courts of appeals. *See generally In re Miller*, 377 F.3d 616, 622 (6th Cir. 2004); *In re Saxman*, 325 F.3d 1168, 1173-1174 (9th Cir. 2003); *In re Alderete*, 412 F.3d at 1207; *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). In most jurisdictions where no circuit level authority exists, lower courts have permitted partial discharges. *See, e.g., In re Rumer*, 469 B.R. 553, 564 n.12 (Bankr. M.D. Pa. 2012) (recognizing majority rule is to allow partial discharges); *In re Gill*, 326 B.R. 611, 644 (Bankr. E.D. Va. 2005) (recognizing lower courts have generally allowed partial discharges); *but see, e.g., In re Conway*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013) (explaining that the general rule prevents discharging parts of individual loans). Prior to any partial discharge, a debtor must have established all elements necessary for an undue hardship determination. *See In re Saxman*, 325 F.3d at 1175; *Hemar Ins. Co. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003).

proceeding, advising the debtor of the opportunity to submit the Attestation for review by the United States. Any Attestation should be submitted by a debtor under oath by signing under penalty of perjury pursuant to 28 U.S.C. § 1746. The Attestation requests that a debtor provide documents corroborating the debtor's stated income (tax returns, or where appropriate, paystubs or other documents proving income). The Department attorney may seek additional evidence where necessary to support representations in the Attestation.

Education will provide debtors' account history and loan details to the Department and that information will be provided to the debtor with the Attestation form.

B. Time for Attestation

Ideally, the Department attorney would solicit the Attestation from the debtor at the outset of the case to permit early consideration whether to stipulate to facts relevant to undue hardship. The Department attorney is not required to impose any strict time limit for the Attestation.

C. Bankruptcy Court Authority

The Department attorney should advise debtors that although the United States may stipulate to facts relevant to undue hardship and recommend to the bankruptcy court that a finding of undue hardship is appropriate, the United States' position is not binding on the bankruptcy court, which will render its own determination whether a debtor has met the standard for an undue hardship discharge. Department attorneys and debtors should cooperate to file appropriate documents to enable the court to consider whether to issue an order to discharge student loan debt based upon undue hardship.

VI. Conclusion

The goal of this Guidance is to provide Department attorneys with a consistent and practical approach for handling student loan discharge litigation. Because of the fact-specific nature of such litigation, questions may arise about how the Guidance should be applied in particular cases. For assistance in interpreting and implementing the Guidance, Department attorneys are invited to contact the Commercial Litigation Branch, Corporate/Financial Litigation Section of the Civil Division.²²

²² This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.



US Department of Justice
United States Trustee Program

Instructions for Joining a Zoom § 341(a) Meeting of Creditors

All section 341(a) Meetings of Creditors (“Meeting”) for chapter 7, 12, and 13 cases are conducted virtually by Zoom. These instructions should be read in conjunction with the Best Practices for Debtors, Debtors’ Attorneys, and Other Parties in Interest for Attending Virtual § 341(a) Meetings of Creditors in Chapter 7, 12, and 13 Cases (“Best Practices”) which can be found at <https://www.justice.gov/ust/moc>.

ESSENTIAL REQUIREMENTS AND PREP

Zoom is a communications program used to hold online virtual meetings. To participate in a Zoom meeting, you will need an electronic device (smartphone, tablet, laptop, or desktop computer) with a camera, speakers, microphone, and Internet access.

- ◆ If you are using a smartphone the operating system (IOS or Android) will REQUIRE the Zoom application be downloaded to your device.
- ◆ If you are using a tablet, laptop, or desktop computer, you can either download the Zoom application or use the Zoom website.

To join the Meeting, participants will need the Meeting ID and Passcode, which can be found in section 7 of the Notice of Bankruptcy Case. Section 7 also contains the phone number required if joining by audio only. Additionally, this information can be found at <https://www.justice.gov/ust/moc>.

Debtors are generally expected to appear at their virtual Meeting by video:

- ◆ If a debtor is unable to appear at the virtual Meeting by video due to no access to Internet or to an electronic device with a camera, they should join the Meeting by audio only and let the trustee know they do not have the means necessary to join by video as the trustee may permit a debtor to participate by telephone on a case-by-case basis if the circumstances warrant.
- ◆ In the event a debtor is experiencing trouble connecting by video on the day of their Meeting, they should join the Meeting by audio only and let the trustee know they were unable to join by video.
- ◆ If a creditor or other interested party is unable to join by video, they can join by audio only.

Please note that telephonic appearances by the debtor will likely result in the rescheduling of their Meeting to another date or time in order to appear by video. This may be called a continued or adjourned meeting. The parties will use the same connection information that is contained in the Notice of Bankruptcy Case to connect to the continued or adjourned meeting, unless the trustee indicates otherwise. In the event you do not have the Notice of Bankruptcy Case, this information can be found at <https://www.justice.gov/ust/moc>.

Participants are encouraged to, at least one day before their scheduled Meeting, test Zoom and download the Zoom application, if applicable. To test Zoom, click the link or type into your web browser: <https://zoom.us/test>.



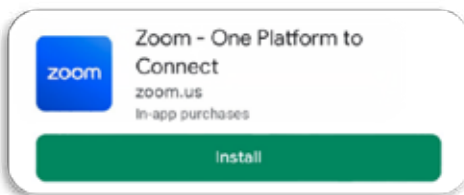
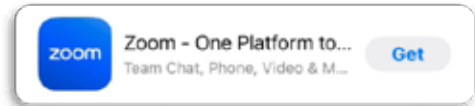
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DOWNLOADING THE ZOOM APPLICATION

If you already have the Zoom application downloaded or plan to join through the Zoom website, skip to the next section, [Joining a Zoom Meeting](#).

The free version of Zoom should meet all your needs to join the Meeting. Below states where to access and download the free Zoom application for your specific device.

On an iPhone or iPad: Go to the Apple App Store and search for “Zoom – One Platform to Connect”. Next, click “GET” to download and install the Zoom application.

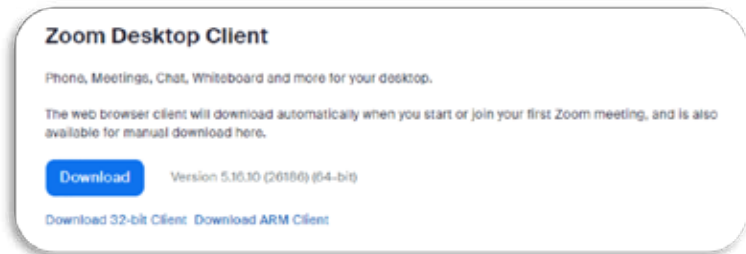


On an Android phone or tablet:

Go to the Google App Play Store and search for “Zoom – One Platform to Connect”. Next, click on “Install” to download and install the Zoom application.

On a desktop or laptop computer:

Using your web browser, go to the Zoom Download Center <https://zoom.us/download#client4meeting> and locate “Zoom Desktop Client”. Next, click the blue “Download” button and follow the prompts to install the Zoom application.



JOINING A ZOOM MEETING

There are three ways to join a Zoom meeting:

- ◆ [Zoom application](#) (required for smartphone)
- ◆ [Zoom website](#)
- ◆ [Audio only](#)

Detailed instructions for each option are provided below.



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Joining Through the Zoom Application (Required for Smartphone)

1. Open the Zoom application by clicking the “Zoom” icon.
2. Click on the blue “Join Meeting” button to open the Join Meeting screen.



3. On the Join Meeting screen enter:
 - a. The 10-digit “Meeting ID” found on the Notice of Bankruptcy Case.
 - b. “Your Name” (also referred to as Screen Name). If a name already appears (e.g., iPhone, Nickname, etc.), delete it from the field. **Note:** Be sure to enter your full name, so that the trustee can properly identify you.
 - c. Once this information is entered, click the blue “Join” button to prompt the Meeting Passcode screen.



Figure 1: Computer

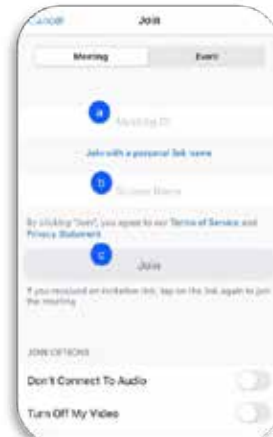


Figure 2: Smartphone and Tablet

4. On the Meeting Passcode screen enter:
 - a. The 10-digit “Passcode” found on the Notice of Bankruptcy Case.
 - b. Click on “Continue” or “Join Meeting”, depending on your device.



Figure 3: Computer



Figure 4: Smartphone and Tablet

5. Once this information is entered, you will then be able to read the FBI Investigates Bankruptcy Crimes screen.
 - a. Click on “Agree” to join the Meeting’s virtual waiting room.
6. You will remain in the Meeting’s virtual waiting room until the trustee admits you to the virtual meeting room. **Note:** Please be patient and remain connected as multiple Meetings may be scheduled for the same meeting time. The trustee may communicate with participants through the chat feature to notify them they are running behind.
 - a. If you joined by smartphone or tablet, you may receive a pop-up window that says “Zoom” Would Like to Send You Notifications, click “Don’t Allow”.



Instructions for Joining a Zoom § 341(a) Meeting of Creditors
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7. Once admitted to the virtual meeting room:
 - a. If you joined by smartphone or tablet, you may receive the following pop-up windows that say:
 - i. Would You Like to Use "Zoom" with Siri?, click "Don't Allow".
 - ii. To hear others please join audio, select "Wifi or Cellular Data".
 - iii. "Zoom" Would Like to Access the Microphone, click "OK".



- b. If you joined by computer, you may receive the "Choose ONE of the audio conference options" pop-up. Under "Computer Audio", click on the blue "Join with Computer Audio" button.



- c. Mute your audio by clicking the "microphone" icon, if not already muted. Note: Depending on your device, you may need to click on or touch the screen to access the meeting control icons. 
 - d. When the trustee calls your case unmute your microphone by clicking the "microphone" icon and start your video, by clicking the "camera" icon, if video is not already on.
 - i. If you joined by smartphone or tablet, you may receive a pop-up window that says "Zoom" Would Like to Access the Camera, click "OK".



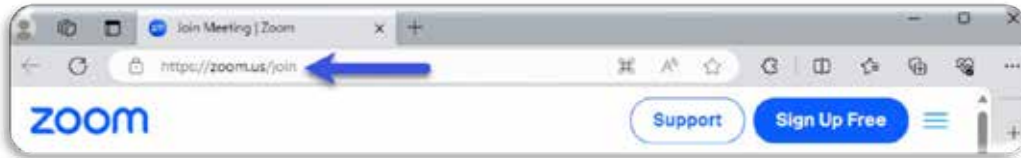
If you are unable to join by video, please see [Joining by Audio Only](#) below.



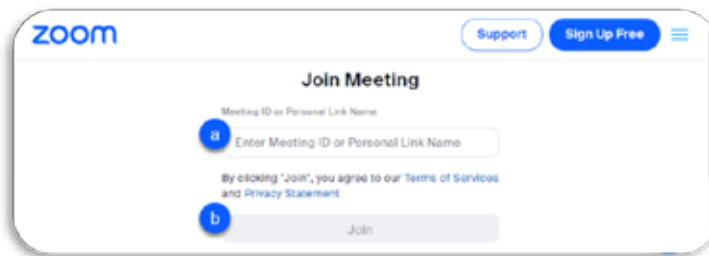
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Joining Through the Zoom Website (Not Available for Smartphones)

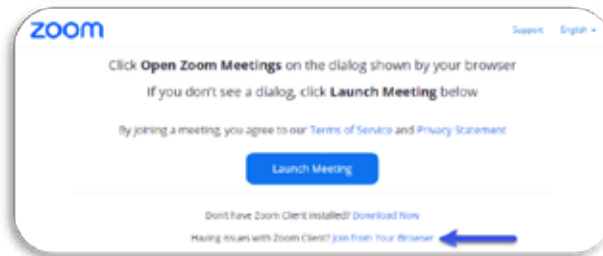
1. Open your web browser and in the search bar type [Zoom.us/join](https://zoom.us/join) followed by “Enter” or “go”, depending on your device, to open the Zoom Join Meeting screen.



2. On the Join Meeting screen enter:
 - a. The 10-digit “Meeting ID” found on the Notice of Bankruptcy Case.
 - b. Click the blue “Join” button to open the Launch Meeting screen.



3. From the Launch Meeting screen, click on the “Join from Your Browser” link at the bottom of the screen. **DO NOT CLICK ON THE BLUE “LAUNCH MEETING” BUTTON.**



4. Once you select join from your browser, you will then be able to read the FBI Investigates Bankruptcy Crimes screen.
 - a. Click on “Agree” to open the Meeting Info screen.

5. From the Meeting Info screen:

- a. Join Audio by clicking on the “headset” icon.
 - i. If you joined by tablet, you may receive a pop-up window that says “app.zoom.us” Would Like to Access the Microphone, click “Allow”.



Instructions for Joining a Zoom § 341(a) Meeting of Creditors
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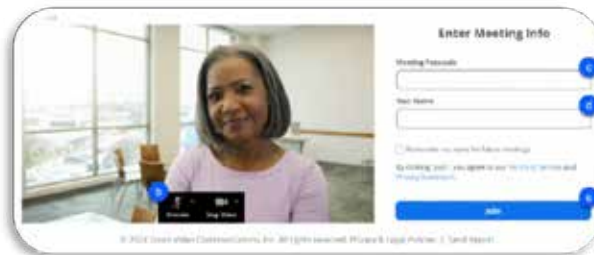
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- b. Once connected to audio the headset will change to a microphone. Mute your audio by clicking the “microphone” icon and start your video, by clicking the “camera” icon.

- i. If you joined by tablet, you may receive a pop-up window that says “app.zoom.us” Would Like to Access the Camera, click “Allow”.

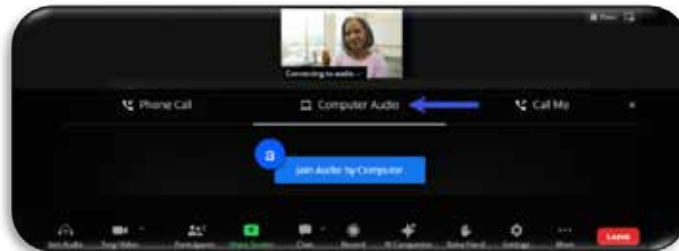


- c. Enter the 10-digit “Passcode” found on the Notice of Bankruptcy Case.
- d. Enter “Your Name”. If a name other than yours appears, delete it from the field. **Note: You must enter your full name so that the trustee can properly identify you.**
- e. Click the blue “Join” button to enter the Meeting’s virtual waiting room.



6. You will remain in the Meeting’s virtual waiting room until the trustee admits you to the virtual meeting room. **Note: Please be patient and remain connected as multiple Meetings may be scheduled for the same meeting time. The trustee may communicate with participants through the chat feature to notify them they are running behind.**

7. Once admitted to the virtual meeting room:
 - a. Whether you joined by computer or tablet, you may receive a pop-up to select your audio conference option. Under “Computer Audio”, click on the blue “Join Audio by Computer” button.



- b. Mute your audio by clicking the “microphone” icon, if not already muted.



- c. When the trustee calls your case, unmute your microphone, by clicking the “microphone” icon and start your video, by clicking the “camera” icon, if video is not already on.



If you are unable to join by video, please see [Joining by Audio Only](#) below.



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Joining by Audio Only

1. From your phone, call the phone number set out in section 7 of the Notice of Bankruptcy Case.
2. When prompted to enter the meeting password, from your keypad enter the Meeting Passcode found on the Notice of Bankruptcy Case, followed by #.
3. When prompted state your full name, followed by # to be placed in the Meeting's virtual waiting room. **Note: Please be patient and remain connected as multiple Meetings may be scheduled for the same meeting time.**
4. When admitted to the virtual meeting room, you will no longer hear hold music. Please mute your phone, by pressing *6.
5. When requested by the trustee, unmute your phone by pressing *6 and provide your first and last name.

*Tip: If needed, pressing *9 will raise your virtual hand so that the trustee can call on you.*

Understanding the Meeting Controls

Once admitted to the virtual meeting room, the meeting controls will assist you with participating in the Meeting. Displayed below are the controls that appear on a computer. The icons that you may need are described from left-to-right. **Note: Depending upon your device, the control icons may appear in a different order, either at the top or bottom of your screen, and may require that you click on or touch the screen for them to appear.**



- ◆ Audio (Microphone): You can join audio if not done so on the pre-meeting selection screens. Once audio is joined you can mute and unmute your audio device.
- ◆ Video (Camera): You can stop and start your video.
- ◆ Participants: Shows all the participants present in the Meeting.
- ◆ Share Screen/Share Content: This is controlled by the Meeting host (trustee) but when turned on can allow a participant to share their screen with all Meeting attendees, as needed. **Note: If joining by tablet through the Zoom website, this is not an available option.**
- ◆ Chat: Allows you to type text into a chat room that is only visible to the host (trustee) or co-host (trustee's assistant or hearing officer). **Note: On a smartphone or tablet this is found under the "More" icon.**
- ◆ Raise Hand: Allows a participant to virtually raise and lower their hand. When selected your hand will be displayed on the screen. **Note: On a smartphone or tablet this is found under the "More" icon.**
- ◆ Leave: Allows a participant to exit the virtual Meeting. If selected, a red "Leave Meeting" button will appear, requiring you to confirm that you want to leave the Meeting.



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TROUBLESHOOTING AND TIPS

- ◆ If you are using an external camera, microphone, or both, plug them in before opening the Zoom application.
- ◆ Only one microphone and speaker system should be active per physical location to avoid a loud screeching sound.
- ◆ Make sure your device is connected to power. Avoid using battery power only (e.g., laptops, etc.).
- ◆ Make sure your audio is turned on in Zoom and turned on and up on your device.
Audio: <https://support.zoom.us/hc/en-us/articles/7302459648397-Troubleshooting-audio-issues>
- ◆ Make sure your video is turned on in Zoom.
Video: <https://support.zoom.us/hc/en-us/articles/7246725403277-Troubleshooting-camera-issues-during-a-meeting>
- ◆ Trouble joining a Zoom meeting: <https://support.zoom.us/hc/en-us/articles/201362193>
- ◆ Learn how to use Zoom controls: <https://support.zoom.us/hc/en-us/articles/200941109-Participant-controls-in-a-meeting>
- ◆ The share-screen function may be used by participants to display documents, but permission must be requested from the Trustee during the Meeting.
Share your Screen: <https://support.zoom.us/hc/en-us/articles/201362153-Sharing-your-screen-or-desktop-on-Zoom>
- ◆ For additional Zoom support: <https://support.zoom.us/hc/en-us>

If having trouble with your Wi-Fi internet connection, try:

- ◆ Using a wired connection. If your internet router has an option for a wired connection, join with a wired option (a hard-wire Ethernet cable) versus a wireless connection.
- ◆ Bringing your laptop or device closer to your router or hot spot connection.
- ◆ Checking your bandwidth. You can check your bandwidth using a speed test such as <https://www.speedtest.net>.
For the list of required bandwidths for Zoom meetings go to <https://support.zoom.us/hc/en-us/articles/204003179-Zoom-Rooms-System-Requirements>.
- ◆ Closing other open applications. Zoom uses memory and processing from your computer and is not prioritized over other applications, therefore closing applications you do not need open will improve your Zoom experience (e.g., email notifications, chat messaging, etc.).
- ◆ Avoiding crowding your router. If possible, avoid sharing your internet service with others during the Meeting. If there are multiple devices (from other individuals) joined to your router or hotspot at least try to avoid video streaming which will affect bandwidth (e.g., Netflix, YouTube TV, etc.).

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[Updated August 2023]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE _____ DISTRICT OF _____

In re:)	
)	
)	Case No. _____
)	Chapter [7]
Debtors.)	
)	
_____)	
)	
)	
Plaintiff,)	Adversary Pro. _____
)	
v.)	
)	
UNITED STATES DEPARTMENT)	
OF EDUCATION, [et al.],)	
)	
Defendant[s].)	
_____)	

ATTESTATION OF [_____] IN SUPPORT
OF REQUEST FOR STIPULATION CONCEDING
DISCHARGEABILITY OF STUDENT LOANS

PLEASE NOTE: This Attestation should be submitted to the Assistant United States Attorney handling the case. It should not be filed with the court unless such a filing is directed by the court or an attorney.

I, [_____] , make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an “undue hardship” to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.

[Updated August 2023]

2. I reside at _____ [address], in _____ County,
_____ [state].

3. My household includes the following persons (including myself):

_____ [full name] _____ [age] _____ [self]
_____ [full name] _____ [age] _____ [relationship]
_____ [full name] _____ [age] _____ [relationship]
_____ [full name] _____ [age] _____ [relationship]
_____ [full name] _____ [age] _____ [relationship]
_____ [full name] _____ [age] _____ [relationship]

Questions four through eight request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney (“AUSA”) handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than one student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct and complete: YES ☐ NO ☐ No Information Provided ☐

[If you answered anything other than “YES,” you must answer questions five through eight].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is \$ _____.

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6. The current monthly payment on such loan[s] is _____. The loan[s] are scheduled to be repaid in _____ [month and year] [OR] ☐ My student loan[s] went into default in _____ [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending _____, where I was pursuing a _____ degree with a specialization in _____.

8. In _____ [month and year], I completed my course of study and received a _____ degree. [OR] In _____ [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a _____. My employer's name and address is _____ [OR] ☐ I am not currently employed.

II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

A. Household Gross Income

11. My current monthly household **gross** income from all sources is \$ _____.¹

This amount includes the following monthly amounts:

¹ "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case, including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

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_____ my **gross** income from employment (if any)
 _____ my unemployment benefits
 _____ my Social Security Benefits
 _____ my _____
 _____ my _____
 _____ my _____
 _____ **gross** income from employment of other members of household
 _____ unemployment benefits received by other members of household
 _____ Social Security benefits received by other members of household
 _____ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

☐ Includes a monthly average of the gross income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

☐ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

☐ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members:

13. In addition, I have submitted _____ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

[Updated August 2023]

B. Monthly Expenses

14. My current monthly household expenses do/do not exceed the amounts listed below based on the number of people in my household for the following categories:

(a) Living Expenses²

- | | | |
|------|---|---|
| i. | My expenses for food
\$466 (one person)
\$777 (two persons)
\$936 (three persons)
\$1123 (four persons) | do exceed <input type="checkbox"/> do not exceed <input type="checkbox"/> |
| ii. | My expenses for housekeeping supplies
\$47 (one person)
\$80 (two persons)
\$85 (three persons)
\$90 (four persons) | do exceed <input type="checkbox"/> do not exceed <input type="checkbox"/> |
| iii. | My expenses for apparel & services
\$96 (one person)
\$145 (two persons)
\$207 (three persons)
\$252 (four persons) | do exceed <input type="checkbox"/> do not exceed <input type="checkbox"/> |
| iv. | My expenses for (non-medical) personal
care products and services
\$43 (one person)
\$78 (two persons)
\$91 (three persons)
\$97 (four persons) | do exceed <input type="checkbox"/> do not exceed <input type="checkbox"/> |
| v. | My miscellaneous expenses (not included
elsewhere on this Attestation)
\$189 (one person)
\$309 (two persons)
\$381 (three persons)
\$431 (four persons) | do exceed <input type="checkbox"/> do not exceed <input type="checkbox"/> |
| vi. | My total expenses in these categories
\$841 (one person) | do exceed <input type="checkbox"/> do not exceed <input type="checkbox"/> |

² The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards “National Standards” and “Local Standards” for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

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\$1389 (two persons)
\$1700 (three persons)
\$1993 (four persons in household)
Add \$356 per each additional member if more than four in household.

If you answered that your total expenses for any of the categories (i) through (v) exceed the applicable amount listed in those categories, and you would like the AUSA to consider your additional expenses for any such categories as necessary, you may list the total expenses for any such categories and explain the need for such expenses here. (You do not need to provide any additional information if you answered that your total expenses did not exceed the applicable amount listed in subsection (vi)).

(b) Uninsured medical costs:

My uninsured, out of pocket medical costs do exceed ☐ do not exceed ☐

\$79 (per household member under 65)
\$154 (per household member 65 or older)

If you answered that your uninsured, out of pocket medical costs exceed the listed amounts for any household member, and you would like the AUSA to consider such additional expenses as necessary, you may list the household member's total expenses and explain the need for such expenses here.

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.]³

³ Forms 122A-2 and 122C-2 are referred to collectively here as the "Means Test." If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in

[Updated August 2023]

15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security \$ _____
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts \$ _____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required
as a condition of your employment? YES ☐ / NO ☐

iii. Union dues \$ _____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance \$ _____
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy
covering your life? YES ☐ / NO ☐

v. Court-ordered alimony and child support \$ _____
[You may refer to line 19 of the Means Test or Schedule I, line 5]

vi. Health insurance \$ _____
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than
yourself and your family members? YES ☐ / NO ☐

vii. Other payroll deductions
\$ _____
\$ _____
\$ _____

other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

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(b) Housing Costs⁴

- i. Mortgage or rent payments \$ _____
- ii. Property taxes (if paid separately) \$ _____
- iii. Homeowners or renters insurance
(if paid separately) \$ _____
- iv. Home maintenance and repair
(average last 12 months' amounts) \$ _____
- v. Utilities (include monthly gas, electric
water, heating oil, garbage collection,
residential telephone service,
cell phone service, cable television,
and internet service) \$ _____

(c) Transportation Costs

- i. Vehicle payments (itemize per vehicle) \$ _____
- ii. Monthly average costs of operating vehicles
(including gas, routine maintenance,
monthly insurance cost) \$ _____
- iii. Public transportation costs \$ _____

(d) Other Necessary Expenses

- i. Court-ordered alimony and child support payments \$ _____
(if not deducted from pay)
[You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]
- ii. Babysitting, day care, nursery and preschool costs \$ _____
[You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8]⁵

Explain the circumstances making it necessary
for you to expend this amount:

⁴ You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).

⁵ Line 8 of Schedule J allows listing of expenses for "childcare and children's education costs." You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

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- iii. Health insurance \$ _____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than YES ☐ / NO ☐
yourself and your family members?

- iv. Life insurance \$ _____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy YES ☐ / NO ☐
covering your life?

- v. Dependent care (for elderly or disabled \$ _____
family members)
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary
for you to expend this amount:

- vi. Payments on delinquent federal, state or local tax debt \$ _____
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant YES ☐ / NO ☐
to an agreement with the taxing authority?

- vii. Payments on other student loans \$ _____
I am not seeking to discharge

- viii. Other expenses I believe necessary for \$ _____
a minimal standard of living.

Explain the circumstances making it necessary
for you to expend this amount:

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16. After deducting the foregoing monthly expenses from my household gross income, I have _____ [no, or amount] remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs that are currently not met.⁶ These include the following:

III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐

I am age 65 or older.

☐

The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).

☐

I did not complete the degree for which I incurred the student loan[s].

Describe how not completing your degree has inhibited your future earning capacity:

☐

I have a disability or chronic injury impacting my income potential.

⁶ If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

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Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

☐

I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐

I incurred the student loans I am seeking to discharge in pursuit of a degree from an institution that is now closed.

Describe how the school closure inhibited your future earnings capacity:

☐

I am not currently employed.

☐

I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

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☐

I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

☐

Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of \$_____ in payments on the loans, including the following:

____ regular monthly payments of \$_____ each.

____ additional payments, including \$_____, \$_____, and \$_____.

22. I have applied for ____ forbearances or deferments. I spent a period totaling ____ months in forbearance or deferment.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education regarding payment options, forbearance and deferment options, or loan consolidation at least _____ times.

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24. I have sought to enroll in one or more “Income Driven Repayment Programs” or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

25. [If you did not enroll in such a program]. I have not enrolled in an “Income Driven Repayment Program” or similar repayment program offered by the Department of Education for the following reasons:

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the student loan(s) you are seeking to discharge. These may include efforts to obtain employment, maximize your income, or minimize your expenses. They also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

[Updated August 2023]

V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: _____

Owners:⁷ _____

Fair market value: _____

Total balance of
mortgages and
other liens. _____

28. I own the following motor vehicles:

Make and model: _____

Fair market value: _____

Total balance of
Vehicle loans
And other liens _____

29. I hold a total of _____ in retirement assets, held in 401k, IRA
and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company,
partnership, or other entity:

⁷ List by name all owners of record (self and spouse, for example)

[Updated August 2023]

Name of entity	State incorporated ⁸	Type ⁹ and %age Interest
_____	_____	_____
_____	_____	_____
_____	_____	_____

31. I currently am anticipating receiving a tax refund totaling \$_____.

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an “undue hardship” under 11 U.S.C. § 523(a)(8):

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Signature:

Name:

Date:

⁸ The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

⁹ For example, shares, membership interest, partnership interest.

2024 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR




Caryl E. Delano
Chief Judge

United States Bankruptcy Court
Middle District of Florida
801 N. Florida Avenue, Suite 932
Tampa, FL 33602
(813) 301-5190



Sheryl L. Loesch
Clerk of Court

TO: Chapter 13 Practitioners

FROM: Hon. Caryl E. Delano 

DATE: December 4, 2023

SUBJECT: Administrative Order FLMB-2023-3 Prescribing Procedures for Chapter 13 Cases Filed on or After December 4, 2023; Revised Model Plan; Revised Order Confirming Plan.

Effective December 4, 2023, the Court entered an amended *Administrative Order Prescribing Procedures for Chapter 13 Cases* and has adopted a revised *Model Plan* and *Order Confirming Plan*, all of which are posted in the Court's Procedure Manual available on The Source at www.flmb.uscourts.gov. The revisions were made to conform the Administrative Order, the Model Plan, and the Order Confirming Plan to our current Chapter 13 procedures; to facilitate more uniform Chapter 13 procedures throughout the Middle District; and to make the procedures more understandable for practitioners, debtors, and creditors.

On November 6, 2023, drafts of the proposed revisions to the Chapter 13 forms were emailed to all CM/ECF Users and posted on the Court's website for public comment through December 20, 2023. I would like to thank our judges, the Chapter 13 Trustees, the members of the Ad Hoc Chapter 13 Committee, and the attorneys who submitted comments to the proposed forms for their participation in this process.

Chapter 13 practitioners are strongly encouraged to start using the revised Model Plan as soon as possible. A fillable PDF form will be available in the Procedure Manual shortly and I am advised that Best Case is in the process of revising its form Model Plan.

The vast majority of the revisions are stylistic. The following is a summary of the substantive revisions. I have highlighted the substantive revisions made after the November 6 posting.

Summary of Substantive Revisions to the Administrative Order Governing Procedures in Chapter 13 Cases

Paragraph 1 – Debtors' attorneys (and Trustees for unrepresented debtors) must file a proof of service of the Administrative Order on the Debtor.

Paragraph 4 – provides the Trustees’ website addresses for debtors to locate information regarding their plan payments.

Paragraph 6.B.(iii) – provides that adequate protection payments on loans for which the Plan provides for MMM must be in an amount sufficient to cover monthly HOA and ad valorem property taxes.

Paragraph 6.B.(iv) – If the Plan provides for mortgage modification mediation and the mediation does not result in a modified mortgage, Debtor must file an amended Plan within 14 days of the mediator’s final report or notice of denial of a modification.

Paragraph 7 – clarifies that creditors’ and lessors’ acceptance of direct payments via ACH transfer does not violate the automatic stay and that if the Plan provides for the Debtor to make a direct payment to the creditor/lessor, the automatic stay is terminated upon the filing of the Plan.

Paragraph 8.F. – If Debtor timely pays Plan Payments in an amount sufficient for the Trustee to disburse adequate protection payments to secured creditors/lessors as set forth in the Plan, such adequate protection payments are deemed contractually timely as to the secured creditor/lessor.

Paragraphs 11 and 12 clarify the process for the refund of undisbursed payments if the case is dismissed or converted and the deadline for filing administrative expense claims, including claims by Debtor’s attorney for fees.

Paragraph 14 – the reimposition of the automatic stay is effective upon Debtor’s filing and service of an amended Plan that provides for a secured creditor or lessor and any known successor in interest to the creditor or lessor.

Paragraph 16.A. – provides that “Debtor must be able to testify at the meeting of creditors scheduled under § 341(a) and Rule 2003(a) that Debtor has filed all tax returns for all taxable periods ending during the four-year period ending on the petition date.”

Paragraphs 26, 27, and 28 – address extensions of time to object to Debtor’s claimed exemptions.

Paragraph 29 – upon request, Debtor must provide information regarding Debtor’s interest in a business, corporation, or trust.

Paragraph 30 – clarifies Debtor’s duty to disclose to the Trustee and file appropriate amendments to report changes in financial circumstances.

Summary of Substantive Revisions to the Model Plan

Section A – a check box has been added on the first page to indicate that student loans are provided for in Section E, Nonstandard Provisions.

Section 5(c) – consistent with the Administrative Order, adequate protection payments on loans for which the Plan provides for MMM must be in an amount sufficient to cover monthly HOA and ad valorem property taxes.

Section 5(g) applies to secured claims being paid through the Plan under § 1322(b)(2) and also under § 1322(c)(2) for claims secured by Debtor's principal residence that mature during the Plan.

Summary of Substantive Revisions to the Order Confirming Plan

Revisions to the Order Confirming Plan are largely stylistic and include a re-ordering of the paragraphs to more closely track the Chapter 13 process (e.g., Debtor's obligations under the confirmed Plan; the Trustee's distribution of payments and claims allowance; payment of administrative expenses if the case is dismissed or converted; and discharge provisions). Substantive provisions include the following:

Paragraph 11 provides that Debtor's timely Plan Payments to the Trustee are deemed to be paid contractually on time as to secured creditors if their payments are included in Plan Payments.

Paragraphs 11-15 clarify the disallowance of claims and distributions by the Trustee.

Paragraphs 22 and 23 clarify the process for the refund of undisbursed plan payments if the case is dismissed or converted to another chapter (including Chapter 12) and the deadline for filing administrative expense claims, including claims by Debtor's attorney for fees if they seek payment from the Chapter 13 Trustee.

Paragraph 9 clarifies the Debtor's duty to disclose changes in financial circumstances and assets.

The "Appendix" to the Order Confirming the Plan (relating to the filing of tax returns and payment of taxes) has been deleted.

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Bankruptcy Law

Jan. 4, 2024, 5:30 AM EST

Student Loan Borrowers Slow to Rely on Touted Bankruptcy ToolBy [Alex Wolf](#)

Deep Dive

- Guidance yields modest uptick in bankrupt student loan relief
- Early successes to encourage more debt discharge attempts

Bloomberg Law News 2024-01-05T09:29:53150213482-05:00

Student Loan Borrowers Slow to Rely on Touted Bankruptcy Tool

By Alex Wolf 2024-01-04T05:30:11000-05:00

Guidance yields modest uptick in bankrupt student loan relief

Early successes to encourage more debt discharge attempts

The federal government trumpeted the initial success of an initiative to make it easier to eliminate student loans when filing for bankruptcy – but a year later the results are more tepid than consumer advocates had hoped.

The guidance from the departments of Justice and Education, introduced in November 2022, has the potential to change lives and upend nationwide standards that for nearly three decades have made it virtually impossible for struggling borrowers to get rid of federal student loans.

But changing the trend has proved more complicated than advocates had expected due to reluctance from lawyers and a slow-to-change system.

The departments in November celebrated what they deemed a successful first year of their program designed to navigate around the notorious legal barrier to expunging federal student loan debt in bankruptcy. Within the first 10 months of the guidance, 632 bankrupt student borrowers had filed cases to have their loans wiped out, a “significant increase from recent years,” the agencies said in a press release.

But some of the most fervent supporters of the change say such cases won’t make a sizable dent in the nation’s \$1.7 trillion federal student debt crisis. The lackluster take-up is even more notable after President Joe Biden failed in his plan to forgive an estimated \$430 billion in student loan debt, and was forced to allow student loan payments to restart following three years of a pandemic-related pause.

Read More: [Millions of Student Loan Borrowers Still Aren’t Making Payments](#)

Alrena Dale, a 60-year-old Flint, Mich., resident, this year was able to discharge \$155,000 in student loans, an unexpected blessing.

"I always had to work two or three jobs after I graduated and it was exhausting, and my health started deteriorating," the University of Phoenix graduate said. "This was truly a godsend for me."

But discharges like Dale's are still well short of what advocates had hoped for.

"I wish there were just a lot more cases," said Matthew Bruckner, a Howard University School of Law professor and student loan discharge advocate. "Even if it's an acceleration, it's modest and therefore disappointing."

More substantial student loan relief in bankruptcy is being held back by sluggish government response times, opaque application of the guidance, and a general reluctance by consumer attorneys to fight what has traditionally been a losing battle, attorneys and others say.

More lawyers need to file student loan discharge cases for the process to work as intended, said Edward Boltz, a managing partner with the Law Offices of John T. Orcutt and former president of the National Association of Consumer Bankruptcy Attorneys.

The initial increase in filings was encouraging, but "it still needs to be 10 or maybe even 100 times more than that," Boltz said. "My hope is that in the next 12 months we'll see another acceleration."

'Smashing My Head Into a Wall'

Previously, trying to help clients discharge federal student loans "was like smashing my head into a wall," said Dale's attorney, Robert Branson of Branson Law PLLC.

A 1998 bankruptcy code amendment created a nearly impenetrable barrier to liberation from student loan obligations. Unlike most forms of consumer debt, which are frequently reduced or eliminated in bankruptcy, federal student debt can only be discharged in cases where the borrower can show it presents an "undue hardship." The 2022 guidance was intended to lower that bar.

Most US bankruptcy courts employ a three-prong undue hardship test that has earned a reputation for being almost impossible to satisfy, and has for decades discouraged debtors and their attorneys from even trying.

To make the process more fair and accessible, a new step was created. Now, after filing a suit against the government to discharge federal loans, debtors fill out and submit a 15-page attestation form to be analyzed by the DOE and DOJ.

Government attorneys have been instructed to use prescribed standards to assess each submission and make a recommendation to the bankruptcy court for each discharge request. The DOJ can support a partial discharge in cases where the attestation may not support a complete debt elimination.

"It's almost more like mediation than litigation, even though it looks like I'm suing them," said Branson, who filed roughly 15 discharge suits for clients last year. He said the whole process takes about nine months. "So far it seems to be working."

Discharge proceedings more than tripled in the first 10 months compared to previous years, and the number of discharges granted has increased significantly, DOJ trial attorney Alexis Daniel told a consumer bankruptcy panel in November.

For comparison, in the ten months before the guidance was issued, fewer than 180 cases were filed to discharge federal and private student loan debt in bankruptcy, according to data from Bloomberg Law. The number of personal bankruptcies filed in 2022 were near historic lows, due in part to pandemic relief measures.

The government hasn't publicly reported the number of cases that have been fully resolved under the new guidance. But it said in 99% of new cases where courts have entered orders or judgments, the debtor has received a full or partial discharge.

No 'Hockey Stick'

George Vogl, a managing director with Stretto Inc. who markets software to assist consumer bankruptcy lawyers, said he was heartened to see an uptick in discharge adversary proceedings compared to previous years, but he had hoped to see more.

Hesitancy by consumer attorneys, some of whom have never filed an adversary case, is the most significant constraint on new filings, said Vogl.

But that could change once more lawyers see cases succeed, he said. "I don't know if we're going to see the hockey stick increase I would like to see, but I do expect substantial growth will occur," he said.

For example, Boltz, the former head of the consumer bankruptcy group, said he wanted to take things slow and test the waters last year by bringing just two cases, both for older and more destitute clients.

In addition to feeling out how federal agencies are adapting to the policy, Boltz said he's being careful about putting new debts on his clients since it costs a few thousand dollars to litigate an adversary proceeding.

"Previously it was a herculean task, where now it's just a headache," he said.

Intention Versus Execution

Minneapolis bankruptcy attorney Andrew C. Walker of Walker & Walker Law Offices PLLC has filed 38 adversary proceedings for clients under the new guidance without asking them to pay legal fees upfront.

"Zero of them have made it all the way to a resolution," and it's often taking several weeks to receive an attestation form after filing a case, he said. "I imagine that's a staffing bottleneck."

Despite the uncertainties, Walker believes the new hardship evaluation process is sensible and fair.

Jeffrey Butwinick, another consumer bankruptcy attorney with his own firm based in Minnesota, has had more luck. Of 35 adversary cases he filed under the new guidance, seven have reached a final resolution with all but one ending in the debt being tossed, he said.

It was the first time in his legal career that he was able to see some success in debt discharge proceedings. But the pace seems to have slowed over the course of the year, Butwinick said.

The government's application of the guidance doesn't always account for struggles people are facing, particularly with regard to medical conditions and budgeting for automobile expenses, Butwinick added. DOJ attorneys also seem unwilling to compromise in cases brought by younger debtors, he said.

"I have specific concerns but overall it's much, much better than what we had before and there are a lot of people who can benefit from the program," he said.

A DOJ spokesperson said in a statement that the agency has seen progress helping struggling borrowers eliminate burdensome debt in the first year of the guidance and that it's committed to improving the process.

"We nevertheless appreciate that cases are not always moving as expeditiously as we would like, and we understand—including from conversations with attorneys and practitioners whose clients are going through the process—that this can be difficult for borrowers during an already uncertain time," the spokesperson said.

Political Football

As the guidance enters another year, lawyers who have seen some measure of success say they plan to file more adversary cases in the months to come.

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1/5/24, 9:31 AM

Student Loan Borrowers Slow to Rely on Touted Bankruptcy Tool

If you can get a critical mass of lawyers to participate, "this will take on a life of its own," said Branson. "I want to be the first kid on the block to wipe out 100 of these things."

Despite any shortcomings, it represents the most substantial shift by the federal government on the discharge issue in decades. But the guidance is voluntary and not enshrined in any formal legislation, creating a sense of urgency since there's no guarantee a new presidential administration would keep it in place, attorneys say.

Bruckner of Howard Law said he fears the program could be unraveled somewhat easily, especially if there isn't a large body of results to show for it. "I want more, and I want faster," he said.

Butwinick plans to file at least 20 more complaints in the next two months and anticipates more attorneys in his district will increase their case loads as well. But he fears "a political football-type thing" interfering with the program.

"That's a reason to do this sooner rather than later if you're thinking about it, because there's always a chance the option could go away," he said.

Dale, who never got into the office management career she had hoped for after attending the University of Phoenix in Florida nearly 20 years ago, attested to the unexpected relief she received from the new guidance. She no longer has to think about going to her grave with student loans.

"I don't have the stress on my mind with that being over my head knowing that I owe that kind of money, knowing that I can't ever pay it back," Dale said.

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AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Trustee Talk

BY MICHAEL BUJOLD, ROBERT GEBHARD, PATRICK LAYNG,
KRISTA HALE AND NICOLE ZOLLARS

The Transition to Virtual § 341 Meetings: Lessons Learned, and Looking Ahead

Michael Bujold is deputy director of the USTP's Field Operations, and Robert Gebhard is assistant director of the USTP's Office of Oversight, in Washington, D.C. Patrick Layng is U.S. Trustee for Regions 11 (Northern District of Illinois and Wisconsin) and 19 (Colorado, Utah and Wyoming), based in Chicago and Denver. Krista Hale is a supervisory auditor, and Nicole Zollars is an auditor, with the USTP's office in Denver.

Before the COVID-19 pandemic, with few exceptions, § 341 meetings of creditors¹ for chapter 7, 12 and 13 cases were conducted in person. Debtors and their counsel drove to office buildings or courthouses and sat in nondescript conference rooms awaiting their turn. Trustees called debtors individually to testify in sessions that typically lasted 10 to 15 minutes. Participants often missed work (and potentially lost much-needed pay), had to arrange for childcare, or incurred parking or other travel expenses. Some had to travel great distances to attend these in-person meetings. Only rarely did meetings occur by telephone or through interrogatories, typically for debtors with extenuating circumstances (e.g., incarceration, serious or terminal illness or active military duty).²

As the pandemic unfolded in early 2020, the U.S. Trustee Program (USTP) and private trustees quickly pivoted from in-person to virtual § 341 meetings that were conducted primarily by telephone. By avoiding significant disruption to the efficient administration of bankruptcy cases, the shift to telephonic § 341 meetings helped sustain the bankruptcy system's operations during a historic emergency. Virtual § 341 meetings also came to enjoy broad support as their benefits to the bankruptcy system and stakeholders became apparent.

Now, the USTP is implementing a policy of conducting § 341 meetings over video in all chapter 7, 12 and 13 cases in USTP jurisdictions. The policy

is the product of careful preparations to ensure that virtual meetings deliver on their promise of added efficiency while preserving the integrity of the bankruptcy system.

This article describes the evolution of virtual § 341 meetings and the USTP's attention to the user experience and procedural safeguards, with lessons learned from telephonic meetings and a pilot program in several jurisdictions that demonstrated video's clear advantages. It also looks ahead to remaining components of the transition to video § 341 meetings, and highlights USTP resources to help practitioners and other participants adapt with ease.³

A Long-Term Solution

The deft transition to virtual § 341 meetings at the onset of the pandemic avoided significant disruption to the efficient administration of cases, and speaks to the dedication of courts, clerks, trustees and practitioners. Although born of necessity, virtual meetings proved a capable method of administering cases efficiently under unprecedented circumstances. They also revealed a number of advantages for participants in the bankruptcy system. Particularly in consumer cases, virtual meetings resulted in greater debtor attendance, thus requiring fewer continuances. Creditor participation improved, and stakeholders saw substantial time and cost savings.

The USTP sought to build on this success by identifying a long-term solution. This meant

¹ 11 U.S.C. § 341.

² See, e.g., *Handbook for Chapter 7 Trustees at 3-10*, and *Handbook for Chapter 13 Standing Trustees at 3-15*, both available at [justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials](https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials) (unless otherwise specified, all links in this article were last visited on Nov. 17, 2023).

³ See "Section 341 Meeting of Creditors Information," U.S. Trustee Program, available at www.justice.gov/ust/moc.

maintaining the benefits of virtual § 341 meetings while strengthening processes that promote their integrity. These processes include preserving the evidentiary value of meeting testimony, and promoting the formality and solemnity of these meetings, which are the only formal bankruptcy process that many debtors experience in the administration of their cases. Telephonic meetings posed challenges with debtor identification, credibility determinations and decorum. Meanwhile, videoconference technology proliferated, both commercially and personally, as the pandemic persisted.

Thus, the USTP began considering using videoconference platforms to conduct § 341 meetings. Trustees also inquired about using video platforms soon after the initial pivot to virtual meetings by phone. The USTP proceeded cautiously, approving trustee requests to conduct video § 341 meetings only in select instances and only with appropriate security measures in place.

After careful research and deliberation, the USTP determined that virtual § 341 meetings should replace in-person meetings in the post-pandemic era, with a preference for a videoconferencing format. The USTP also designed a pilot program to conduct virtual § 341 meetings in Region 19 (Colorado, Wyoming and Utah) using the Zoom videoconferencing platform beginning in January 2023.

Not surprisingly, video proved superior to the telephone in promoting debtor verification, credibility determinations and decorum. Debtors could attend from any quiet location with an internet connection, including their residence or their attorney's office. Trustees could perceive debtors and their counsel, in addition to the interactions among them. Virtual waiting rooms helped maintain order until trustees were ready to call the participants for each case. Thus, video alleviated several concerns with in-person meetings while reintroducing aspects that safeguard the integrity of the bankruptcy system.

Laying the Groundwork for Virtual § 341 Meetings by Video

The Region 19 pilot prompted the USTP to build a framework that would help ensure consistency, satisfy all applicable legal and related USTP requirements, and maximize the user experience for all stakeholders.⁴ First, the USTP released two key governing documents: one establishing interim procedures to guide trustees in conducting their virtual § 341 meetings,⁵ the other for debtors and other parties-in-interest.⁶ Even at the pilot's inception, the USTP anticipated that the guidance would evolve with experience. Second, to assist participants with specific needs, the USTP created a series of "how to" documents. The subjects includ-

ed setting up and activating Zoom licensed accounts (for trustees), connecting and joining a Zoom § 341 meeting (for participants), using Zoom to connect a language interpreter to a § 341 meeting and changing the Zoom display language for non-English speakers.

Third, the USTP created a survey for trustees to provide prompt feedback after every § 341 meeting calendar. These forms also helped trustees report issues involving connectivity and technology, debtor identification verification, decorum, security and debtor attendance. The surveys from the first eight months showed not only that Zoom meetings work, but that the vast majority ran smoothly with no issues. Among other highlights:

- Just over 1 percent of all cases experienced an unresolved connection issue, with only a slightly higher percentage (3 percent) in cases involving self-represented debtors;
- Although unresolved identification-verification issues arose in about 12 percent of self-represented cases, the rate among all cases was only about 2 percent;
- Only five cases (less than 0.1 percent) were reported as having decorum issues;
- Issues specific to a case — and not with identification verification or connectivity — were the leading factor in whether trustees had to continue meetings, and almost all of these continued meetings were conducted over video, with very few having to be completed telephonically; and
- Non-appearances were very low, at about 3 percent of all cases.

To assist self-represented debtors, many trustees were encouraged to send information, document requests and Zoom links before the meetings to facilitate debtor appearances. The USTP appreciates trustees' extra measures such as these. The feedback collected from individual trustees during the pilot continues to assist in the effort to improve virtual § 341 meetings.

Finally, and perhaps most importantly, the USTP undertook extensive outreach to members of the bankruptcy community to discuss the pilot and its effect on all stakeholders. The USTP met multiple times with the Administrative Office of the U.S. Courts, the Bankruptcy Clerks Advisory Group, the three bankruptcy clerks of court in Region 19, trustee software providers, the National Association of Bankruptcy Trustees and the National Association of Chapter 13 Trustees. Other forms of outreach included training and candid dialogue with debtors, debtors' attorneys and legal aid providers, among others.

As a whole, the Region 19 pilot was an overwhelming success, with nearly all Zoom meetings proceeding without issue while continuing to accomplish an important statutory purpose. The USTP later expanded the pilot — with similarly successful results — to Regions 9 (Michigan and Ohio) and 15 (Southern District of California, Hawaii, Guam and the Northern Mariana Islands).

Nationwide Expansion in Two Waves

Spurred by the pilot's success, the USTP recently announced its intent to expand video § 341 meetings nationwide, with expansion occurring in two waves. The USTP successfully undertook the first wave, which generally cov-

⁴ The USTP established standardized settings and control features that were preconfigured in each Zoom licensed account. These features include a warning disclaimer from the Federal Bureau of Investigation in both English and Spanish; a customized virtual waiting room that informs participants they have entered the proper meeting; use of an official background for trustees to display; and controls for the trustee to mute or unmute microphones, stop video feeds, manage screen-sharing, place participants in virtual waiting rooms or remove participants from meetings.

⁵ Interim Procedures for Trustees to Conduct Virtual § 341(a) Meetings of Creditors in Chapter 7, 12, and 13 Cases. The term "interim" reflects adoption during the pilot and the understanding that the documents were subject to change in response to further experience and lessons learned.

⁶ "Best Practices for Debtors, Debtors' Attorneys, and Other Parties in Interest for Attending Virtual § 341(a) Meetings of Creditors in Chapter 7, 12, and 13 Cases," USTP, available at justice.gov/ustp/page/file/1590001/download.

ered the eastern half of the U.S.; the second will cover the remaining western half.

The USTP implemented this approach after the Administrative Office of the U.S. Courts informed the USTP of the judiciary's 2023 data center move and the challenges that it could pose for a court considering whether to implement § 341 meetings via Zoom. Proceeding in two waves helped avoid disruptions to the CM/ECF Test and Train servers on the West Coast related to the San Diego data center closure.

Based on lessons from the pilot, the USTP prioritized the assignment and distribution of Zoom licenses to all trustees. The timely activation of these accounts provided trustees with necessary instructions long before conducting their first § 341 meetings on the Zoom platform using the USTP-issued Zoom licenses. At the same time, this also ensured that the USTP had sufficient Zoom licensing information to coordinate with bankruptcy courts and clerks on the CM/ECF noticing changes needed for launch in individual districts.⁷

Now activated, these Zoom-licensed accounts are unique to each trustee and act as the trustee's virtual meeting room. This virtual meeting room can be accessed only through the trustee's unique personal meeting identification number or dedicated phone number and passcode.

At the same time, the USTP created national and local § 341 meeting information webpages to provide timely status updates to the public and foster awareness of available resources to ensure the success of the video § 341 meetings. Among other things, the USTP posted on its national website (a link that appears on every video § 341 meeting notice transmitted by bankruptcy court clerks) a guide to best practices for debtors, debtors' attorneys and other interested parties for attending virtual meetings, along with Zoom connection instructions, and links to dedicated local § 341 meeting information pages for every judicial district in which the USTP operates.⁸ In turn, these local pages include a table with all trustee names, contact information, meeting identification numbers, passcodes, dedicated Zoom phone numbers and software portals, as well as tables listing alternate in-person meeting locations.

Once again building upon experiences from the pilot, the USTP undertook extensive training and outreach⁹ as it rolled out the first wave this fall. To that end, more than 400 trustees received multiple sessions of training on the USTP's interim procedures and on the features of Zoom they will use to conduct § 341 meetings. Many trustees' assistants, staff attorneys and hearing officers also attended these training sessions.

In addition, the USTP conducted outreach sessions to attorneys, primarily debtor's counsel, in each district in the first wave. These outreach sessions have been well attended, with hundreds of attendees in some of the USTP's larger

districts, and they have provided important feedback on the best practices promoted by the USTP. The USTP appreciates the help of many courts in disseminating information about these outreach sessions to the attorneys in their districts. As with the pilot, the collective efforts of the USTP, bankruptcy courts, trustees and practitioners made the first wave successful.

Looking Ahead

The USTP anticipates completing the second wave in early 2024. Even after the nationwide expansion is complete, the USTP will continue to assess user experience and determine whether current policies and procedures can be improved or modified to best accomplish overall objectives. The USTP welcomes suggestions on further improvements to the process, especially from stakeholders who often participate in virtual § 341 meetings.

Accordingly, the USTP recently partnered with the Department of Justice's Office for Access to Justice in conducting a listening session with attorneys from Colorado Legal Services who provide bankruptcy services to low-income individuals and seniors. The session provided an opportunity to better understand the video § 341 meeting experience of debtors from underserved communities and their attorneys. The attendees confirmed that video § 341 meetings improve attendance and participation by debtors, and their feedback will be useful as the USTP works on future improvements.

Consistent with the pilot program, the USTP recognizes that the experience will naturally improve over time as trustees and practitioners become accustomed to virtual § 341 meetings on Zoom. Additional experience should boost user confidence and allow more efficient resolutions when problems arise.

Conclusion

The USTP remains excited about both the progress and promise of virtual § 341 meetings. Virtual meetings by Zoom satisfy statutory obligations while facilitating broader access with less time and cost involved, for the benefit of all bankruptcy system stakeholders. The professionalism and hard work of bankruptcy courts and clerks, trustees and practitioners have made early transition efforts successful. The USTP appreciates these partnerships as it strives to ensure the long-term success of virtual § 341 meetings. **abi**

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⁷ The USTP greatly appreciates the significant effort from bankruptcy court clerks to implement the noticing adjustments. To maximize participation and access to the virtual § 341 meetings, the USTP worked with the clerks so that every § 341 meeting notice contained not only the meeting identification number and passcode, but also the trustee's dedicated Zoom phone number and a link to the USTP's publicly available resources. Providing the phone number ensured that a person without access to a smartphone, laptop or the internet would not be precluded from joining the § 341 meeting.

⁸ See "Section 341 Meeting of Creditors Information," *supra* n.2.

⁹ The USTP also met with representatives from several organizations representing trustees and consumer bankruptcy attorneys to discuss specific concerns from their respective memberships.



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Bankruptcy Must Be On The Table As A Student Loan Solution

By **Jonathan Carson** and **Eric Kurtzman** (December 7, 2023, 4:02 PM EST)

As the political dialogue regarding student loan forgiveness continues, one option for distressed student loan borrowers warrants far more attention than it's receiving: student loan discharge in bankruptcy.

On Nov. 17, 2022, the U.S. Department of Justice and the U.S. Department of Education announced new guidance regarding how and when the federal government will agree to discharge federal student loans in bankruptcy.

Without a deeper understanding of how this guidance has transformed the student loan landscape, millions of federal student loan borrowers — including a high percentage of minority and socioeconomically disadvantaged former students — will miss a life-changing opportunity currently available to regain control over their financial condition.

Student loan discharge in bankruptcy is not an entirely new concept. For the past few decades, however, debtors have generally viewed it as generally unavailable through the bankruptcy process.

In 1998, Congress amended Section 523 of the U.S. Bankruptcy Code to remove the previous seven-year aging requirement on student loans to be discharged and replaced it with an undue hardship test. Congress, however, did not define "undue hardship."

As a result, courts have had to try to provide some guidance. The most commonly used test to assess undue hardship is the Brunner Test, named after the 1987 U.S. Court of Appeals for the Second Circuit case *Brunner v. New York State Higher Education Services Corp.*

This test, employed in many jurisdictions, requires debtors to demonstrate three key elements to qualify for discharge:

1. Present inability to repay the student loans;
2. Financial hardship that is likely to persist into the future such that the debtor is unlikely to repay the student loans in the future; and
3. Past good-faith efforts to try to repay the student loans.



Jonathan Carson



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In addition to the Brunner Test, some jurisdictions use the totality of circumstances test. This test looks to:

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

This broader approach provides more flexibility for debtors to present a comprehensive picture of their financial situation and argue for the discharge of their student loans.

Both standards require the filing of an adversary proceeding — a lengthy, unpredictable and costly legal process within the bankruptcy filing — to pursue the discharge of student loan debt. The historical result: Very few adversaries were ever filed.

In an effort to address this challenge, the DOJ and DOE introduced new guidance. The guidance provides objective standards under which all undue hardship cases are to be reviewed.

Under the guidance, the attorney still files an adversary proceeding, but in lieu of engaging in full litigation, the attorney completes a new attestation form that includes critical information designed to allow the DOJ and DOE to determine if the debtor meets the guidance's objective standards for the undue hardship test.

This critical improvement process results in the increased likelihood for discharge of the student loan debt that has been a financial burden carried by many for far too long. The guidance simplifies the process and promotes predictability with the predictable result that attorneys — and borrowers — should feel much more confident when filing for student loan discharge.

To clarify, the statute that requires an undue hardship in order to discharge federal student loans has not changed. Neither has the case law. Brunner remains the majority standard of review, as well as the totality of circumstances test.

While these standards remain the same, the guidance has made significant modifications to how to assess the standards by providing easily referenced benchmark data that clearly defines whether the student loan debtor faces undue hardship in repaying their loan. That may sound simple, and it should, because it is.

The problem student loan borrowers faced prior to these modifications was proving undue hardship when the definition of "undue hardship" depended on the subjective determination of individual judges and, accordingly, varied from court to court, case to case.

With the guidance, the DOJ and DOE have provided greater transparency than ever into how its attorneys — assistant U.S. attorneys — will evaluate each case and relevant financial information to make that determination.

In practice, many attorneys have found that the attestation form offers a new opportunity to provide a full picture of the client's financial situation and allows them to present the debtor's situation in a compelling manner.

In addition to providing hard financial data, it allows the attorney to elaborate on the client's circumstances that led them to their current situation and to provide context for why their student loan debt should be eligible for discharge within bankruptcy.

Student loan borrowers should not take filing for bankruptcy lightly. But for borrowers who take the bankruptcy path, there now remains no reason that the second-largest consumer debt, student loans, should be left unremediated.

Bankruptcy may very well be a struggling borrower's best option by providing a fresh start financially and relief from the stress associated with managing lenders and debt collectors. While it is true that bankruptcy may temporarily affect one's credit, missed debt payments and excessive credit utilization have similar negative impacts.

And without an inflection point like bankruptcy, for a large percentage of debtors, the debt keeps mounting with accrued interest. With conscious effort and financial planning, individuals can rebuild their credit relatively quickly after a bankruptcy discharge.

As consumer debtor attorneys have tested the waters in filing adversary proceedings on behalf of their clients since the guidance was put in place, they have been met with success, and the initial results indicate they have been effective.

According to a November press release from the DOJ, a full or partial discharge has been recommended by the government and agreed to by the court in 99% of cases in which courts have entered judgments or orders to date.^[1] There remains a significant potential for greater success as attorneys become familiar with the process and what it offers their clients.

Filing for bankruptcy to address student loan debt requires a significant shift in thinking about the bankruptcy process. Bankruptcy is often misunderstood or misrepresented, but needs to be on the table as a real solution to the student loan debt crisis.

The legal community now has an opportunity to educate distressed student loan borrowers about their expanded horizons, and has the option of discharging student loan debt in bankruptcy if it's the right choice for them.

Bankruptcy can provide relief from the seemingly insurmountable debt facing millions, and a fresh start that so many student loan borrowers seek without the uncertainty of elusive promises of student loan forgiveness that remain at the center of political debate.

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[1] <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan>.

Faculty

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Hon. Tiffany Payne Geyer is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed by the Eleventh Circuit Court of Appeals on March 25, 2022. Previously, she was a partner with BakerHostetler in Orlando and practiced primarily in the areas of bankruptcy and creditors' rights. Judge Geyer represented both corporate and individual debtors in chapter 11 cases and individuals in chapter 7 cases, and her clients included health care businesses and medical professionals, investment bankers and financial advisors. She also represented clients in the hospitality sectors, assisted in representing debtors in the energy sectors, and negotiated multiple settlements of guarantor liability and assignments for the benefit of creditors. In addition, she represented secured creditors, unsecured creditors, landlords and panel trustees. Judge Geyer has been listed in *Chambers USA* for Bankruptcy/Restructuring in Florida and in *The Best Lawyers in America* in 2020 for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. She began her legal career in Orlando clerking for Bankruptcy Judge Karen S. Jennemann, whose vacancy she filled upon her retirement, and she volunteered at a Florida nonprofit organization devoted to housing and educating young adults struggling with homelessness. Judge Geyer received her B.A. with honors in political science and public administration in 1998 from the University of Central Florida, and her J.D. in 2000 from the University of Florida Levin College of Law, where she received the Book Award for Legal Drafting and was a member of a trial competition team.

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