AMERICAN BANKRUPTCY INSTITUTE

2023 Annual Spring Meeting

Recent Developments in Debt Restructurings & Workouts

CONCURRENT SESSION

Hon. Kevin J. Carey (ret.)
Hogan Lovells US LLP; Philadelphia

M. Benjamin Jones
Ankura Consulting Group LLP; New York

Almedina Palic
Birch Lake Associates, LLC; Chicago

Cullen A. Drescher Speckhart
Cooley LLP; Washington, D.C.

2023

Recent Developments in Debt Restructurings & Workouts

ABI Annual Spring Meeting
April 21, 2023 at 11:30 am

Panelists:

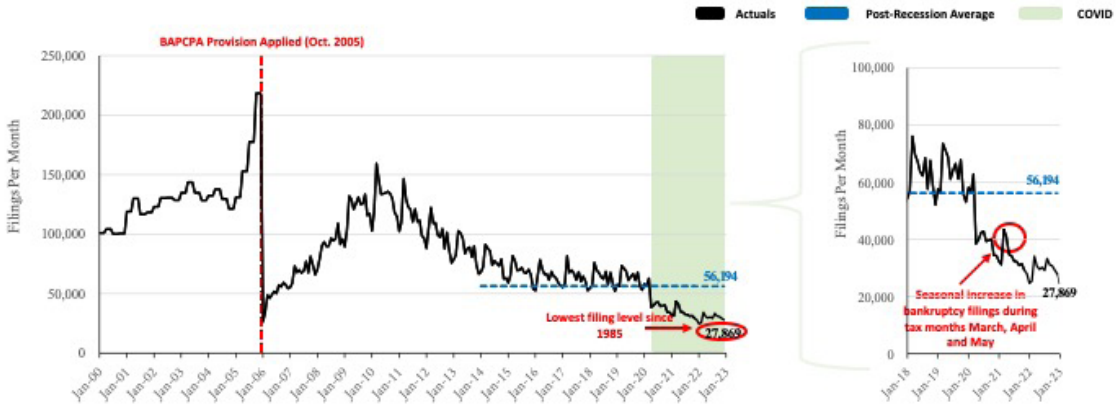
Hon. Kevin Carey (ret.), Hogan Lovells US LLP, moderator

M. Benjamin Jones, Ankura Consulting Group, LLP

Almedina Palic, Birch Lake Associates, LLC

Cullen A. Drescher Speckhart, Cooley LLP

Consumer Bankruptcy Filings

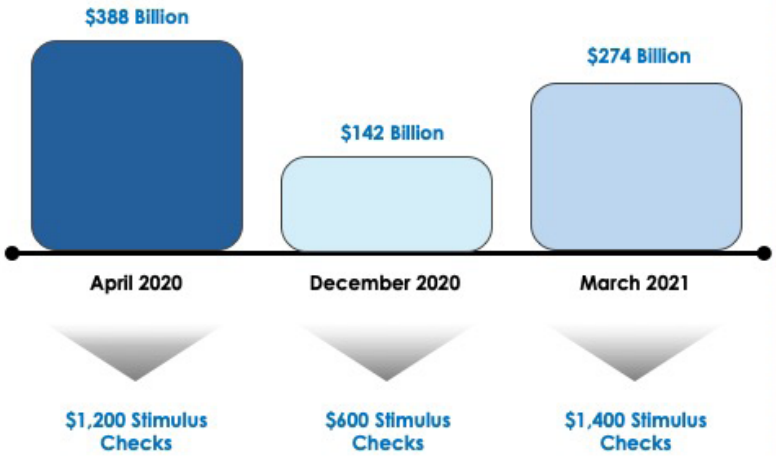


- The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was enacted on April 20, 2005, and most of its provisions applied to cases filed on or after October 17, 2005
- At the time, it was widely reported that consumer bankruptcies would be more costly and complex post-BAPCPA which caused a pull-forward of consumer bankruptcy filings before October 17, 2005
- The Great Recession was marked by significant increase in home foreclosures which resulted in increased consumer bankruptcies

Source: American Bankruptcy Institute, EPIC
Note: Bankruptcy filing information prior to January 2006 was reported on a quarterly basis and the quarterly numbers have been divided out to simple monthly averages

Government Stimulus

The United States government has provided $804 billion directly to low- and middle-income individuals and families via three rounds of stimulus payments that were delivered via direct deposit, checks or debit cards — additional stimulus payments have been provided through enhanced unemployment benefits and monthly child tax credit checks



Supplemental Benefits

- A total of $567 billion in unemployment benefits have been paid out through three federal pandemic-related programs that enhanced payments, expanded eligibility and increased the duration of payments
- At the beginning of the pandemic, the jobless received a federal boost of $600 a week on top of what they received from the state for four months
- Lawmakers renewed the supplement in December 2020 after a months-long break, but lowered the amount to $300 a week
- While the $300-a-week benefit remained in place until September 2021, 25 GOP-led states, including Florida, Texas, South Carolina and Iowa stopped taking the federal money and ended the program early in an effort to encourage people to go back to work
- Beginning July 15, 2021, single taxpayers with income of up to $75,000 and married couples with income up to $150,000 began to receive monthly child tax credit checks
- The full credit is $3,600 per child up to age 6, or $300 a month, and $3,000 per child ages 6-17, or $250 per month

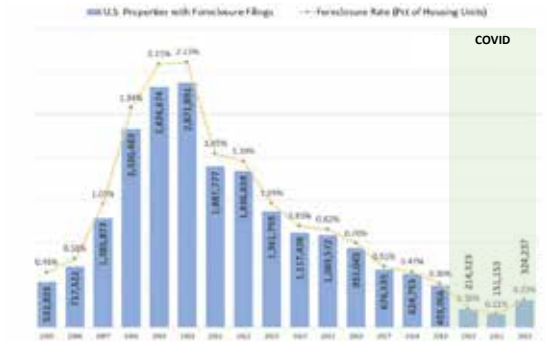
Foreclosure Protections

The CARES Act included a foreclosure moratorium and provided mortgage borrowers with options to temporarily suspend payments during the COVID-19 pandemic, however, these protections ended July 31, 2021, and have not been extended

What Protections Were Available to Homeowners?

- Mortgage forbearance allowances under the CARES Act provided homeowners with federally-backed mortgages the option to temporarily suspend their monthly mortgage payments
- The CARES Act provided 12 months of forbearance, but federal entities extended the forbearance to 18 months
- The housing protection only covered federally-backed mortgages – meaning home loans made, guaranteed, or securitized by federal entities, however, about 75% of mortgages in the U.S. are federally-backed

U.S. Foreclosure Activity



Source: ATTOM

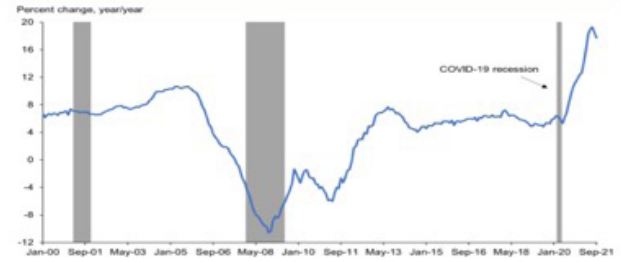
Supplemental Protections Available?

- The Consumer Financial Protection Bureau (CFPB) is not planning on implementing further bans on foreclosures, but the CFPB did announce a new rule for borrowers who were more than 120 days behind on mortgage payments
- The new rule took effect from August 31, 2021 - January 1, 2022, and stipulated the following:
  - Before any foreclosure can start, a loss mitigation application must be completed and submitted by the borrower and reviewed by the loan servicer
  - Loan servicers need to confirm that a property is abandoned before starting foreclosure proceedings
  - Loan servicers must make a reasonable effort to reach borrowers before starting any foreclosure

Home Price Appreciation

In the wake of the short but steep COVID recession, house prices have risen to record levels

House Appreciation Accelerated as COVID Took Hold

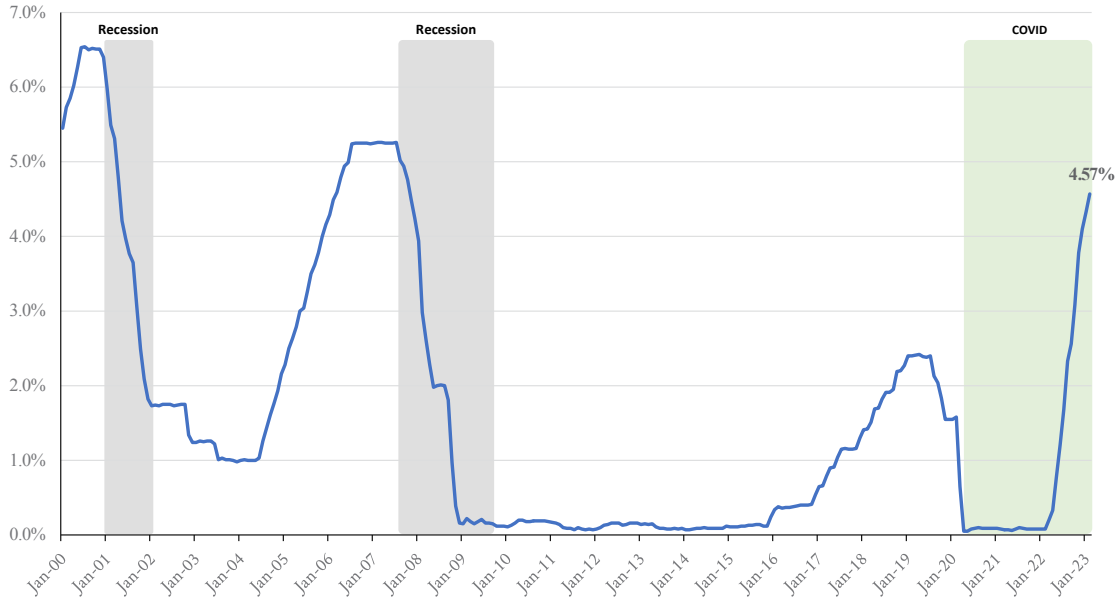


Correlation Between Bankruptcy Filings & House Foreclosures

- During the pandemic, large transfer payments that included stimulus checks and extended/expanded unemployment benefits boosted household incomes. As a result, household incomes and housing demand did not collapse when unemployment spiked to a seasonally adjusted 14.8 percent in April 2020 (from 4.4 percent a month earlier)
- In addition, very low mortgage interest rates, reflecting market forces and very accommodative monetary policy, raised the demand for housing. The Federal Reserve cut its policy rate to the effective lower bound (0 percent), purchased large quantities of Treasuries and mortgage-backed securities (quantitative easing), and provided forward guidance that the fed funds rate was likely to remain at the effective lower bound for an extended period
- The pandemic also boosted the demand for housing by increasing the need to work from home and for more socially distanced housing away from dense urban areas
- These factors helped push up house prices. In normal times, new construction gradually increases the supply of housing, which limits upward house-price pressure. However, the recent supply response has been muted relative to the rise in prices, and the price response has been magnified by pandemic-related supply constraints. Those constraints include disruptions to supply chains for building supplies and restrictions on work practices
- Currently, banks have little incentive, for various reasons, to put delinquent homeowners into foreclosure. Housing prices have been rising steadily for years, and many parts of the country are now facing record high prices for existing homes. That means that there are likely few homeowners underwater on their mortgages, owing more on their mortgages than the overall value of their house. That means it is more likely banks have an incentive to restructure a loan, or tack those missed payments onto the back end of the mortgage

Source: Federal Housing Finance Agency, National Bureau of Economic Research

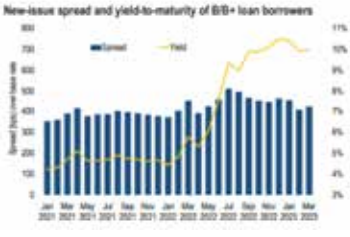
Federal Fund Effective Rate



Cost of Borrowing

Despite credit spreads remaining close to non-recessionary averages, corporate borrowing costs have risen significantly

- As of March 28th, HY yields are up to 9.18%, almost double their lows in early 2022. By rating within HY, BB yields are 7.14%, B yields are 9.25%, and CCC yields are 15.70%.
- Leveraged-loan yields are up to 9.51%, also close to double the lows seen in January 2022.
- The yield-to-maturity for the leveraged loan index of 9.51% is 33bp above the HY bond index (9.18%), which is comparable to loan yields as much as 100bp above the HY bond index on 3/7/23 and an average 41bp above over the past year.
- Spreads over LIBOR for B/B+ loan borrowers have stayed relatively flat, but yields have risen dramatically with the spike in global rates.



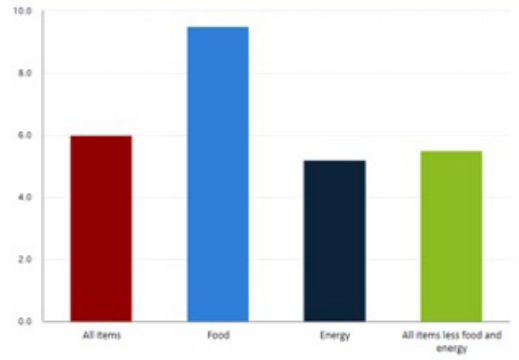
Source: JP Morgan, Pitchbook | LCD

Inflation

Annual inflation has slowed recently, but is still well above the 10-year average of 2.5%

Consumer Price Index 1-Month and 12-Month % Changes Since Feb. 2013

Consumer Price Index - 12-Month % Change for Major Categories



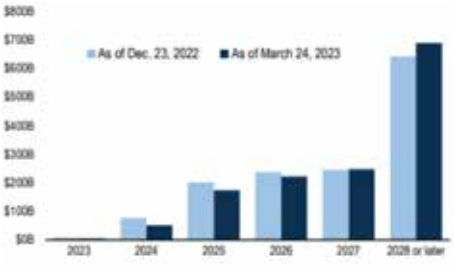
- The 6.0-percent increase in the Consumer Price Index for all items from February 2022 to February 2023 was down from a 6.4-percent increase for the 12 months ending in January. Consumer prices for all items less food and energy rose 5.5 percent from February 2022 to February 2023.
- Consumer food prices increased 9.5 percent from February 2022 to February 2023, down from 10.1 in January and 10.9 percent in December 2022. Prices for food at home rose 10.2 percent over the last 12 months, down from 11.3 percent in January 2023. Prices for food away from home rose 8.4 percent from February 2022 to February 2023.
- Energy prices rose 5.2 percent over the past 12 months. Gasoline prices fell 2.0 percent, and fuel oil prices rose 9.2 percent. Consumer prices for electricity rose 12.9 percent, and prices for natural gas increased 14.3 percent. Shelter prices rose 8.1 percent over the last 12 months.

Source: U.S. Bureau of Labor Statistics

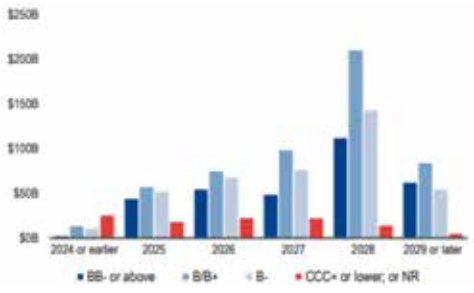
Maturity Wall

The amount of leveraged loans maturing in the next few years is more than any other period on record

US Leveraged Loan Maturity Wall



US Leverage Loan Maturity Wall by S&P Issuer Rating

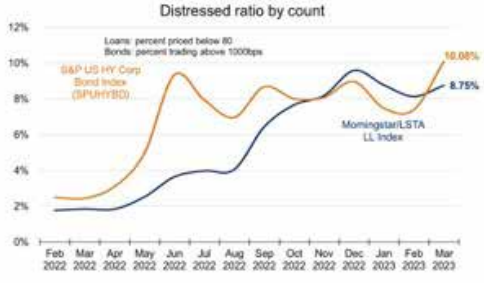


- Due to refinancing or amend-and-extend activity, since the start of the year, there has been a $25.7 billion reduction of loans maturing in 2024, to $50.6 billion as of March 24. The amount of loans coming due in 2025 has fallen by $27.7 billion over the same period, to $173.5 billion.
- Despite the extension of maturities, through the end of the first quarter of 2025, $89.7 billion of loans are due to mature. In the history of the Morningstar US Leveraged Loan Index, this marks the largest dollar volume outstanding for a Q1 period with maturities due in the next two years.
- Looking at the $54.5 billion of debt that matures before the end of 2024, 69% of this is rated B- or lower, or is unrated. Of this $54.5 billion that matures before the end of 2024, nearly $11 billion is classified as current liabilities.
- This comes as funding costs for B/B+ rated companies climbed back into double-digit yields in March. The average yield to maturity paid by B/B+ rated companies is 10.15%, which compares to 5.79% a year ago.

Source: PitchBook | LCD, Morningstar

Default Rates

The rapid rise in interest rates this past year and, subsequently, debt servicing and refinancing costs, is expected to lead to a continued increase in corporate debt defaults.



- As of March 31st, the distressed universe of bonds trading at spreads of 1000bp+ and loans sub-$80 is $263bn, or 9.3% of leveraged credit. By count, 10.08% of HY bonds trade wide of 1000bp, whereas 8.75% of loans trade sub-$80.
- A distressed universe of between 8-10% of outstanding has coincided with an average default rate over the next 12 months of 2.9%.
- Loan issuing companies are particularly susceptible to interest rates given the floating rate nature of bank loans. Loan defaults are projected to rise to 3.5% in 2023 and 4.0% in 2024, which compares to projected HY bond defaults of 3.0% in 2023 and 3.3% in 2024.
- The composition of defaults/distressed transactions in 1Q23 included 3 companies with only bonds outstanding, 11 companies with only loans outstanding, and 3 bond-and-loan issuers.

Source: JP Morgan, IHS Markit, PitchBook | LCD, Morningstar

Liability Management Concepts

- Overview
- Drop-Down Transactions
- Uptier Transactions
- OpCo/PropCo Transactions
- Two-Step Transactions

Overview

- Economy is in a continued rate of uncertainty
- Although bankruptcy filings (both business and consumers) have slightly increased recently, they remained at historic lows in 2022
- One recent trend is that companies are increasingly resorting to liability management transactions accompanied by a subsequent bankruptcy filing
- Liability management transactions can take many forms, but the common underlying purpose is to protect assets from liabilities

Drop-Down Transactions

- A borrower utilizes capacity under existing investment and restricted payment covenants to transfer collateral away from the restricted entities to an “unrestricted subsidiary”
- Once the assets are transferred to the unrestricted subsidiary, the borrower has flexibility on what to do with the transferred assets
- Does not require the consent of the majority of creditors, although it is often sought and obtained from participating majority creditors to avoid litigation

Drop-Down Transactions – Examples

J.CREW

- Transferred 72% of certain IP assets to an unrestricted subsidiary, and then guaranteed and pledged its assets to secure the issuance of new secured notes
- Subsequently executed a debt-for-debt exchange in which its existing unsecured notes were exchanged for both new senior secured notes, and preferred and common equity

REVLON

- Issued $65 million of new revolving loans to supporting lenders, which enabled them to become majority creditors
- In 2020, Revlon solicited the support of the majority of term lenders under an existing 2016 $1.8 billion term loan facility to support an amendment that would allow the transfer of collateral, including valuable IP to an unrestricted subsidiary
- In Revlon's pending bankruptcy, a group of lenders challenged the transaction, but the bankruptcy court dismissed their lawsuit

Uptier Transactions

- Where a borrower works with a majority of its financial creditors and amends the existing financing agreements to permit the issuance of new senior priming debt
- Often, majority creditors will exchange their existing debt for new senior priming debt
- The non-participating minority creditors are essentially left with subordinated debt
- Vulnerable to challenge as a fraudulent transfer by minority lenders or a creditors' committee in bankruptcy, though the safe harbor usually protects these transactions in bankruptcy cases

Uptier Transactions – Examples

Serta Simmons Bedding

- A majority group of secured term loan lenders made new superiority loans to Serta and exchanged a portion of their original loans for new loans with a higher repayment and lien priority than loans of non-exchanging lenders

TriMark®

- Majority lenders amended the existing first-lien creditor agreement to allow issuance of new super senior priming debt
- Then, the lenders entered into a super senior credit agreement secured by the same collateral that secured the existing first-lien debt and exchanged the old debt for the new debt

Opco/PropCo

- In an OpCo/PropCo transaction, a subsidiary in the corporate family serves as the holding company for the properties (the property company or "PropCo"), while the main company (the operating company or "OpCo") continues to use the real properties for its business purposes
- This structure requires transferring the properties to an already existing entity in the owner's current corporate structure or to a newly created entity within the corporate family to serve as the PropCo following the conveyance
- These OpCo/PropCo transactions are often undertaken to facilitate debt raising or financing goals by creating a financially strong borrower unencumbered by claims and operating expenses imposed on the operating business

Opco/PropCo – Examples

- As part of the bankruptcy reorganization transactions of JC Penny, JC Penny split into a PropCo that owned 160 stores and six distribution centers with the goal of winding down or selling those properties, and an OpCo owned by Simon Property Group and Brookfield that owned the remaining stores and intellectual property

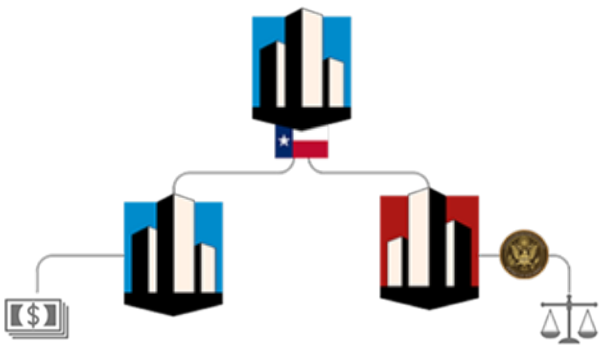
- In preparation for bankruptcy, the debtors structured a transaction where the OpCo was moved to the operating stores which filed for bankruptcy, and the Propco held the real estate assets, which did not file

Two-Step Transactions

- Through a "divisive merger", a company will move assets and liabilities from one corporate entity to another. Typically, the liabilities will reside in one entity while assets will be placed in a different entity

- Delaware and Texas state law both provide for divisive mergers

- Texas divisive merger statute states movement of assets pursuant to a divisive merger are not "transfers"



Two-Step Transactions – Examples

- Bestwall spun off from Georgia-Pacific after years of asbestos litigation and filed for bankruptcy that same year in the Western District of North Carolina

- J&J's consumer health subsidiary utilized the Texas divisional merger statute and created LTL Management, LLC, which held talc liabilities, and a holding company that contained all other assets and liabilities associated with its consumer health business

- Re-filed for bankruptcy after its first case was dismissed by the Third Circuit

Restructuring $400 Billion of Student Loan Debt by Executive Order is on Thin Ice, and Spring Temperatures are Rising Quickly

Adrienne K. Walker, Locke Lord LLP

A. Student Loan Debt Relief Program.

In August 2022, President Biden announced that the Department of Education would make good on one of President Biden's campaign promises to address debt relief for student loan borrowers. The program would provide up to $400 billion in debt relief on approximately $1.6 trillion in student loan debt held by more than 45 million borrowers.[1] As widely reported, the debt relief program would provide up to $20,000 in debt cancellation to Pell Grant recipients with loans held by the Department of Education, and up to $10,000 in debt cancellation to non-Pell Grant recipients with loans held by the Department of Education. Subject to certain limited restrictions, Borrowers are eligible for this relief if their individual income is less than $125,000 ($250,000 for married couples) (the "Student Loan Debt Relief Program").

The President's asserted authority for the Student Loan Debt Relief Program is the HEROES Act, a law passed after the September 11th attacks that gives the secretary of education the power to respond to a "national emergency" by making changes to the student-loan programs so that borrowers are left not worse off because of the emergency. *See* 20 U.S.C. §§ 1098aa–1098ee. Starting in March 2020, then Secretary of Education Betsy DeVos suspended payments on federal student loans and the accrual of interest on such loans. President Biden's administration repeatedly continued the pause on student loan payments and interest accruals. At the time the Student Loan Debt Relief Program was announced, the government extended the Covid-era pause on student loan repayments through December 31, 2022. The pause on student loan payments and interest accrual has continued during the ongoing litigation.

Almost before the ink dried on Biden's press release, legal challenges to the Student Loan Debt Relief Program were filed. The primary case challenging the program was filed by six states, led by Nebraska, and in November 2022 resulted in an injunction in the Student Loan Debt Relief Program issued by the U.S. Court of Appeals for the Eighth Circuit, effectively putting the Student

[1] *See Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need it Most*, dated August 24, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ (last visited April 9, 2023).

Loan Debt Relief Program on hold. *See Biden v. Nebraska*, Case No. 22-506. On December 1, 2022, the Supreme Court accepted the application to consider vacating the 8th Circuit injunction and to hear arguments on February 28, 2023. Soon after, a companion case styled as *Department of Education v. Brown* was accepted by the Supreme Court, also scheduled for argument on February 28, 2023. *See Department of Education v. Brown*, Case No. 22-535. On appeal to the Supreme Court, the following issues were presented:

> (1) Whether the respondents (i.e., the six states or two student loan borrowers) have Article III standing to challenge the Department of Education's student-debt relief plan; and
>
> (2) Whether the Secretary of Education's student loan relief plan exceeds the Secretary's statutory authority, is arbitrary and capricious, or was adopted in a procedurally improper manner.

The Supreme Court heard argument on February 28, 2023 and a decision is anticipated at the end of the current term in June 2023. On the issue of standing, *Biden* argued that the states failed to establish that the Student Loan Debt Relief Program injures Missouri because there was no showing of any financial harm to the Missouri Higher Education Loan Authority (MOHELA), which in turn owes money to the State. *Biden* claimed that the states have not shown that any reduction in revenue would lead MOHELA to default on its obligations to Missouri. Conversely, the states argued, among other things, that MOHELA will be directly harmed because its "revenue is determined by how many accounts MOHELA services—the more it does, the more it earns. . . and the Cancellation will "completely" eliminate the debt of nearly half of all borrowers (20 of 43 million). Because many borrowers have more than one account, MOHELA is at risk of losing at least half of the Direct Loan accounts it services, which equates to millions of dollars of revenue per year." Brief for the Respondents at 13, *Biden v. Nebraska*, No. 22-506 (Jan. 27, 2023) https://www.supremecourt.gov/DocketPDF/22/22506/253353/20230127155912043_2023.01.27%20-%20Respondents%20Brief%20FINAL.pdf (follow Brief for the Respondent State of Nebraska, et al. hyperlink).

On the merits of the Student Loan Debt Relief Program, *Biden* argued that its plan fell squarely within the HEROES Act. Biden argued that the "Act authorizes the Secretary to ensure that

borrowers are not worse off in relation to their student loans "because of" an emergency. 20 U.S.C. 1098bb(a)(2)(A). And the term "because of" is most "often associated with but-for causation." *Comcast Corp. v. National Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020); *see University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (collecting cases)." *Biden* asserted that the record established "because of" caution, arguing that "the evidence further showed that, without the proposed relief, those borrowers would likely experience default and delinquency rates beyond pre-pandemic levels. The plan thus directly targets those borrowers facing "a worse position financially" "because of" the pandemic." *See* 20 U.S.C. 1098bb(a)(1) and (2); *see also* Brief for the Petitioner, 8-9, *Biden v. Nebraska,* No. 22-506 and 22-535 (Jan. 4, 2023) https://www.supremecourt.gov/DocketPDF/22/22-506/251435/20230104222942852_22-506tsUnitedStates.pdf In response, *Nebraska* argued the debt cancellation underlying the Student Loan Debt Relief Program exceeded the Department of Education's authority in the HEROES Act. The states' primary argument is the lack of any real connection to a national emergency, or that the borrowers will face a worse financial position "because of" the national emergency. *See* 20 U.S.C. 1098bb(a)(2)(A). *Nebraska* relied on a plain text reading and that the text "demands proximate or direct causation, meaning COVID-19 must be the "cause that directly produces" the need for relief." Brief for the Respondents at 23. *Nebraska* also argued that the HEROES Act does not authorize direct discharge of loan principal, rather it is limited to more temporary relief and/or modification. Finally, *Nebraska* argued the scope of the proposed $400 billion debt relief to be excessive in scope and that it violates the "major-questions doctrine" because the Student Loan Debt Relief Program is an issue of immense economic and political significance and that the Department of Education failed to show clear congressional authorization. Brief for the Petitioner, at 27-28.

At oral argument on February 28, 2023, the Court appeared skeptical of the Student Loan Debt Relief Program. The questions illuminated *Biden's* headwinds and fell largely along ideological lines. The more liberal justices raised questions suggesting that the states lacked sufficient standing to challenge the Student Loan Debt Relief Program. The more conservative justices were equally skeptical of Biden's authority under the HEROES Act to enact such broad debt relief when the plain text does not use the term "cancellation". Chief Justice John Roberts captured the conservative justices' skepticism that the term "modification" in the HEROES Act could be read

synonymous with "cancellation" when he commented "we're talking about half a trillion dollars and 43 million Americans… How does that fit under the normal understanding of 'modifying'?" A decision on the Student Loan Debt Relief Program is anticipated by June 30, 2023.

B. A More Effective Department of Education?: Discharge of Student Loans in Bankruptcy

Bankruptcy Code section 523(a)(8) provides that student loan debts may be discharged in bankruptcy if the bankruptcy court determines that payment would impose an undue hardship on the debtor and the debtor's dependents. The test to determine whether the student loan payments would present an "undue hardship" is not set forth in the Bankruptcy Code, but bankruptcy courts have generally applied either the "Brunner Test" or the "Totality Test."

Under the "Brunner Test", to discharge a student loan, 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. *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395, 396 (2d Cir. 1987). Courts that apply the "Totality Test" consider: (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. *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). Under either the Brunner Test or Totality Test, to discharge student loans in a bankruptcy case, a debtor must commence an adversary proceeding to prove by a preponderance of the evidence that paying the student loans would impose an "undue hardship."

To provide greater clarity to both debtors seeking student loan discharges and Department of Justice ("DOJ") attorneys that enforce the vast majority of student loans, the DOJ issued robust guidelines on November 17, 2022, outlining a new process for the DOJ to assess the debtor's undue-hardship. *See At a Glance: Department of Justice's New Process for Student Loan Bankruptcy Discharge Cases*, a copy is attached hereto at **Exhibit A** (the "DOJ Guidance") The DOJ Guidance reflects that the DOJ recognizes that "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." *Id*. at 1-2. The DOJ Guidelines is aimed at simplifying the process to obtain a bankruptcy discharge.

According to the DOJ Guidance, debtors are invited to submit an "attestation" with factual information to assess the undue hardship factors in the following manner:

a. Present Ability to Pay: if the attestation demonstrates that the debtor's expenses equal or exceed the debtor's income, the DOJ will determine that the debtor lacks a preset ability to pay.

b. Future Ability to Pay: the DOJ will assume the debtor's present ability to pay and current financial condition will not likely change if certain factors exist – such as retirement age, disability or chronic injury, protracted unemployment history, lack of degree or extended repayment status. If those factors are not present, the DOJ will next assess whether the facts show that the debtor's present inability to pay is likely to continue.

c. Good Faith Efforts: the DOJ will consider objective criteria reflecting the debtor's reasonable efforts to earn income, manage expenses and repay the student loan. Notably, a debtor will not be unilaterally disqualified if they had not previously enrolled in an income driven repayment plan.

Once a debtor files an adversary proceeding seeking to discharge their student loans under Bankruptcy Code section 523(a)(8), the debtor may submit an attestation to the Department of Justice to assist in evaluating the debtor's undue hardship. A form of attestation prepared by the Department of Justice, along with guidance of concrete examples of how a debtor's request for discharge will be evaluated, is attached hereto as **Exhibit B**. If the Department of Justice determines the facts in the attestation demonstrate an undue hardship, the Department of Justice and the debtor may stipulate to facts and jointly recommend to the bankruptcy court to discharge the student loans, either in full or partial. The final decision on whether to discharge any student loan in bankruptcy, however, is ultimately determined by the bankruptcy judge. It is too early to tell if the DOJ Guidelines will have a material benefit to student loan borrowers, but the additional clarity and objective standards should result in a more streamlined and efficient process.

EXHIBIT A

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 Jesperson*, 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 Jesperson*, 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." *Jesperson*, 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 Jesperson*, 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

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[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]

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[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

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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

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[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 IDRP 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 Jesperson,* 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 IDRP 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 IDRP. 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 IDRP enrollment 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 IDRP determinations, 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 IDRP enrollment. 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 IDRP, this factor is evidence of good faith.[18]

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[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 IDRP 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 Jesperson*, 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 IDRP, the Department attorney should give significant weight to the fact that, as noted, Education has found widespread problems with IDRP 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 IDRP 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 IDRP, 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 IDRP. Acceptable explanations or evidence could include, for example:

- that the debtor was denied access to, or diverted or discouraged from using, an IDRP, 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 IDRP;
- that the debtor had a plausible belief that an IDRP would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRP 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 IDRP.

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 IDRP 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.

EXHIBIT B

[Updated January 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.

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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 <u>one</u> 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].

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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 Expenses[2]

i. My expenses for food — do exceed ☐ do not exceed ☐
$431 (one person)
$779 (two persons)
$903 (three persons)
$1028 (four persons)

ii. My expenses for housekeeping supplies — do exceed ☐ do not exceed ☐
$40 (one person)
$82 (two persons)
$74 (three persons)
$85 (four persons)

iii. My expenses for apparel & services — do exceed ☐ do not exceed ☐
$99 (one person)
$161(two persons)
$206 (three persons)
$279 (four persons)

iv. My expenses for (non-medical) personal care products and services — do exceed ☐ do not exceed ☐
$45 (one person)
$82 (two persons)
$78 (three persons)
$96 (four persons)

v. My miscellaneous expenses (not included elsewhere on this Attestation) — do exceed ☐ do not exceed ☐
$170 (one person)
$306 (two persons)
$349 (three persons)
$412 (four persons)

vi. My total expenses in these categories — do exceed ☐ do not exceed ☐
$785 (one person)

[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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$1410 (two persons)
$1610 (three persons)
$1900 (four persons in household)
Add $344 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 ☐

$75 (per household member under 65)
$153 (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

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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 Costs[4]

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 yourself and your family members? YES☐ / NO☐

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 covering your life? YES☐ / NO☐

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 to an agreement with the taxing authority? YES☐ / NO☐

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.

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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 January 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.

Faculty

Hon. Kevin J. Carey is a partner in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and is a retired bankruptcy judge. He also is ABI's President and represents both companies and creditors in domestic and cross-border bankruptcy proceedings. Judge Carey was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (serving as chief judge from 2008-11). During that time, he authored more than 200 reported decisions, issued important rulings on key issues such as valuation, fiduciary duties and other complex chapter 11 and confirmation issues, and presided over such high-profile cases as *Exide Technologies*, *Tribune Co.* and *New Century Financial*. Judge Carey was the first judge to serve as global chair of the Turnaround Management Association and is an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame, as well as a Distinguished Fellow of the Association of Insolvency & Restructuring Advisors. In addition, he is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, as well as a contributing author to *Collier on Bankruptcy*. He also is a part-time adjunct professor in the LL.M. in Bankruptcy program at St. John's University School of Law in New York City. Judge Carey began his legal career in 1979 clerking for Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

M. Benjamin Jones is a senior managing director at Ankura Consulting Group, LLC in New York and has more than 20 years of experience advising and participating in complex corporate reorganizations. He has been involved in all aspects of financial restructuring, serving as a CRO or as an advisor to financially underperforming/distressed companies, lenders, creditors, corporate boards and equity owners. Mr. Jones has advised clients in diverse businesses, including health care, education, professional services, manufacturing, apparel, food processing, retail and entertainment. In addition to serving as an advisor, he has also served in turnaround management positions, including as president, CRO and CFO on numerous occasions for both private and public companies. Mr. Jones has played a key role in dozens of successful restructuring and M&A engagements, including Mariner Post-Acute Networks, Centennial Healthcare, World Health Alternatives, The Penn Traffic Co., Milacron, Lionel, Caraustar Industries, Golden Books Family Entertainment and Rand McNally. Prior to joining Ankura, he was a senior managing director at CDG Group and started his career at Ernst & Young, where he worked in the national research group and financial advisory services group, focusing on valuations and middle-market corporate finance transactions. Mr. Jones received his B.S. in accounting with distinction from Wake Forest University.

Almedina Palic is a director with Birch Lake Associates LLC in Chicago, where she evaluates investment opportunities and works with senior executives to implement value accretive strategies. She has experience working with capital providers and stakeholders on portfolio management, capital-raising, and mergers and acquisitions. Her recent experience includes transactions in the food, logistics and tech-enabled services sectors. Ms. Palic joined Birch Lake from the Industrials Group at SunTrust Robinson Humphrey, and previously held positions at Bank of America Merrill Lynch and Eli Lilly & Co. She is an active member of leading trade associations, including the Women's Association of

Venture and Equity (WAVE). Ms. Palic received her B.S. in finance from the Kelley School of Business at Indiana University.

Cullen A. Drescher Speckhart is chair of Cooley LLP's business restructuring & reorganization practice and partner in charge of its Washington, D.C., office. She is a top advocate in corporate restructuring and financial litigation, with a diverse practice spanning a range of industries, including health care, life sciences, technology, energy and retail. Ms. Speckhart regularly represents debtors, creditors' committees, trustees and foreign representatives in significant bankruptcy matters throughout the U.S. Having led some of the largest and most significant restructuring engagements in a multitude of jurisdictions, she has deep experience in complex insolvency litigation. Her recent practice experience includes serving as lead restructuring counsel to official creditor constituencies in Mallinckrodt, LTL Management (Johnson & Johnson), Endo International, Le Tote, 24 Hour Fitness and White Stallion Energy. Ms. Speckhart also acts as lead restructuring counsel to companies seeking to reorganize in and out of court and provides business risk management and strategic advice to entities across such industries as technology, life sciences, cyber services and cryptocurrency. Her company-side practice involves representation of public and private debtors in chapter 11 cases, and she often confronts complex emerging legal issues and matters of public importance. Her current work on behalf of companies in bankruptcy includes representing Ascena Retail Group (Ann Taylor, Loft, Lane Bryant), as well as serving as lead restructuring counsel to Enjoy Technology, NS8, PhaseBio Pharmaceuticals, Quanergy Systems and Lucira Health in chapter 11 proceedings. Ms. Speckhart is a frequent speaker on corporate insolvencies, restructuring in life sciences and technology, career and professional development, advocacy and leadership. In 2015, she co-authored the ABI's manual on Chapter 15, and in 2017, she was selected as a member of ABI's inaugural "40 Under 40" class. In 2021, on account of exemplary practice performance and leadership, she was named Restructuring Lawyer of the Year at the Global M&A Network's 13th Annual Turnaround Atlas Awards. Ms. Speckhart serves on the advisory board of the Institute for Restructuring Studies at the University of Pennsylvania, and her career, practice and leadership experiences have been covered by numerous national media outlets. As part of her work on issues related to diversity, equity and inclusion and women's initiatives, she led a team in designing and delivering a bespoke leadership training program for Cooley professionals seeking development in confidence, public speaking and personal branding. Before entering private practice, Ms. Speckhart clerked for then-Chief Judge Stephen C. St. John of the US Bankruptcy Court for the Eastern District of Virginia. During law school, she was the first prize winner of the ABI's inaugural Bankruptcy Law Student Writing Competition and the first law student ever to receive the Thatcher Prize for Excellence, an award presented annually to a William & Mary graduate student of outstanding scholarship, leadership, service and character. Ms. Speckhart received her B.A. in politics and economics from Georgetown University and her J.D. from the College of William & Mary, Marshall-Wythe School of Law.