



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2022 Annual Spring Meeting

### **Student Debt/Student Loans**

Hosted by the Consumer Bankruptcy  
& Legislation Committees

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## Student Debt: Crisis or Opportunity

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## The Student Debt Crisis



### Addressing the Student Loan Crisis through Litigation

- Undue hardship under 11 U.S.C. § 523(a)(8)
- Judicially Created Tests: the *Brunner* test & the Totality of the Circumstances test

### Recent Cases: Student Loan Discharge & the *Brunner* test

- *Rosenberg v. N.Y. State Higher Educ. Servs. Corp.*
- *Randall v. Navient Solutions*
- *Bell v. U.S. Department of Education*
- *Educ. Credit Mgmt. Corp. v. Goodvin*
- *Wolfson v. DeVos*
- *Wheat v. Great Lakes Higher Educ. Corp.*

## Recent Cases: Student Loan Discharge & the Totality of the Circumstances Test

- *Ashline v. U.S. Dep't of Educ.*
- *Zilisch v. Fedloan Servicing*
- *Marchus v. Student Loans of North Dakota*

## Legislative Reform



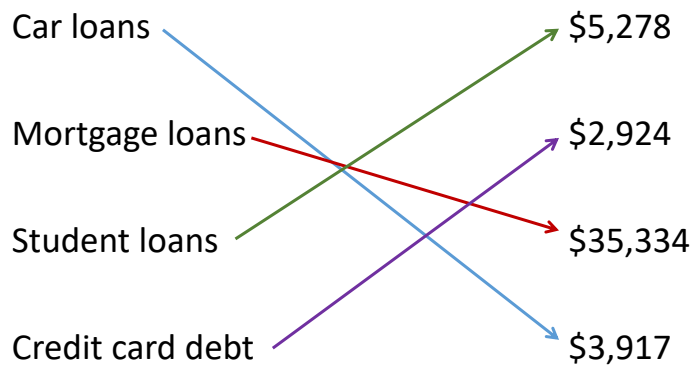
## Legislative Proposals

- Fresh START Through Bankruptcy Act
- Consumer Bankruptcy Reform Act of 2020
- Executive Action to Cancel Student Loan Debt
- Final Report of the ABI Commission on Consumer Bankruptcy

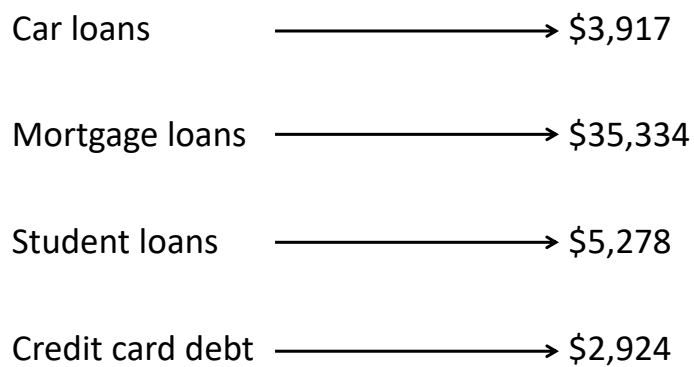
## Match Game (per person, 2021)

|                  |          |
|------------------|----------|
| Car loans        | \$5,278  |
| Mortgage loans   | \$2,924  |
| Student loans    | \$35,334 |
| Credit card debt | \$3,917  |

## Match Game (per person, 2021)



## Match Game (per person, 2021)



## Match Game (per person, 1978 & infl. adj.)

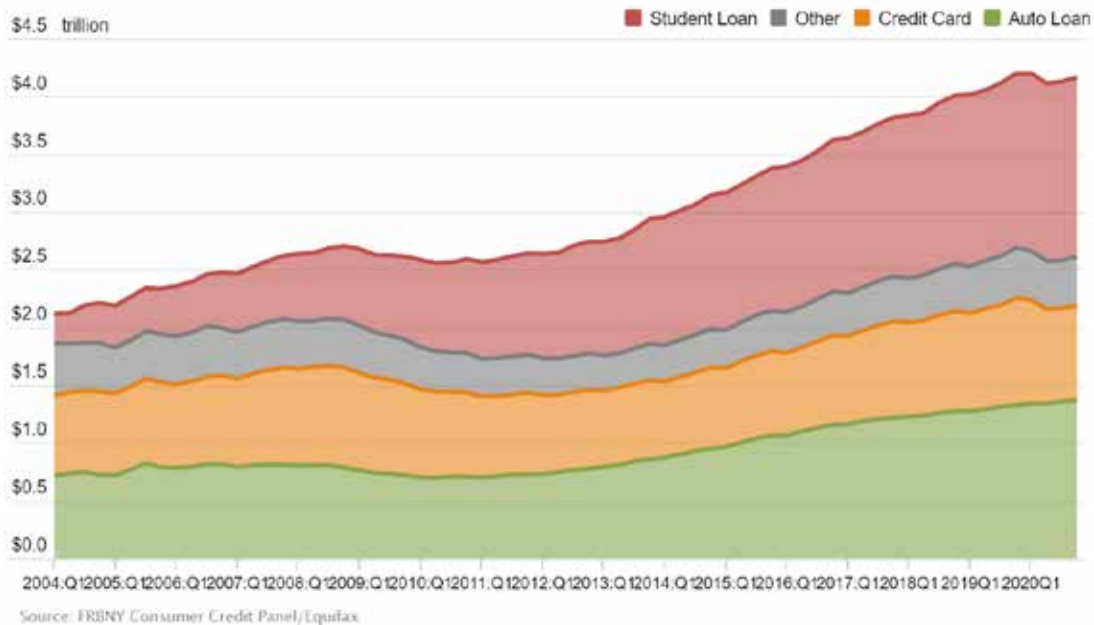
Car loans —————→ \$1,825

Mortgage loans —————→ \$13,441

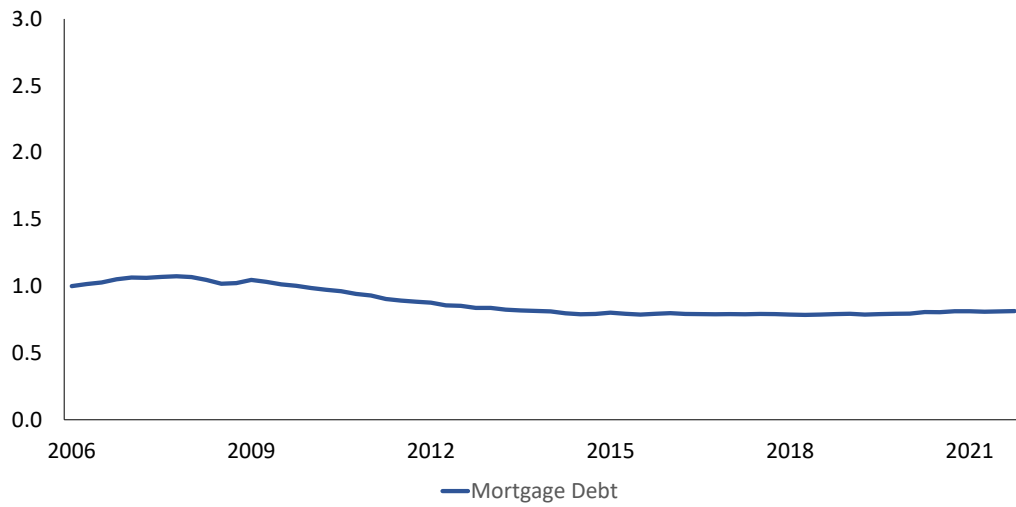
Student loans —————→ So small, statistics were not kept

Credit card debt —————→ \$920

## Non-Housing Debt Balance

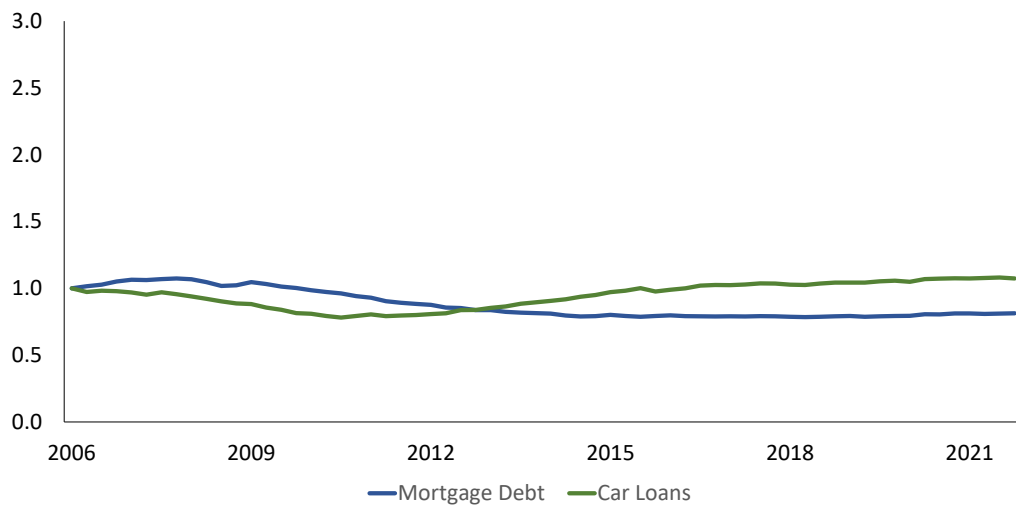


Relative Changes in Per Capita Debt Levels, 2006-2021  
(inflation adjusted)



From Federal Reserve, Census & BLS data

Relative Changes in Per Capita Debt Levels, 2006-2021  
(inflation adjusted)

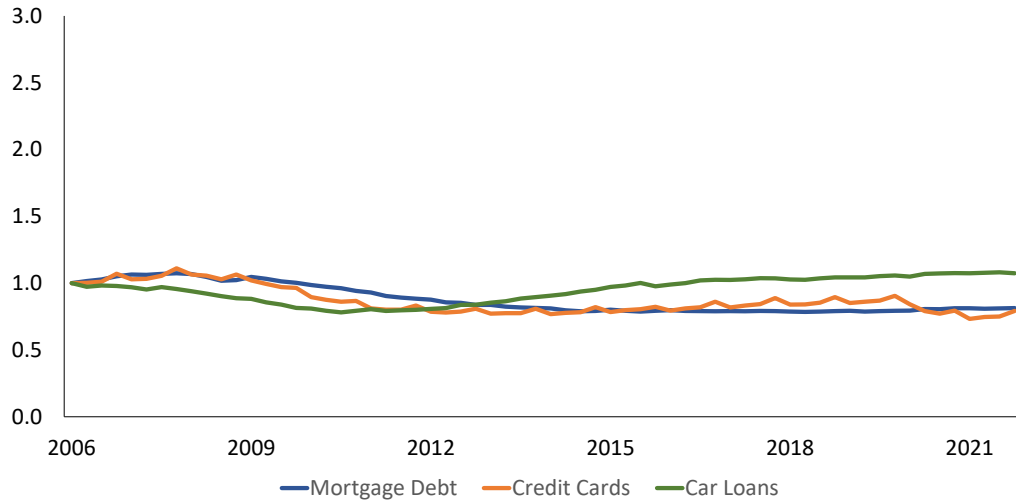


From Federal Reserve, Census & BLS data



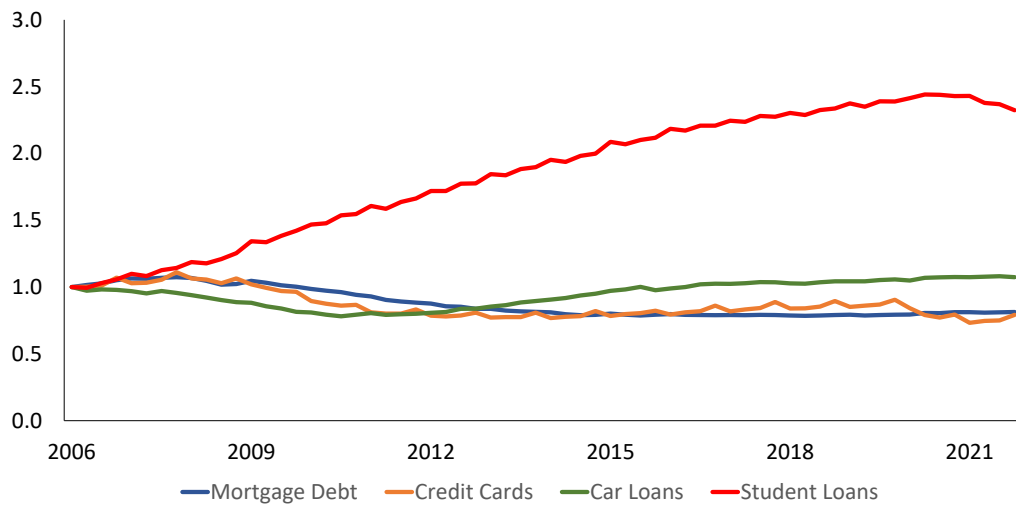
## 2022 ANNUAL SPRING MEETING

Relative Changes in Per Capita Debt Levels, 2006-2021  
(inflation adjusted)



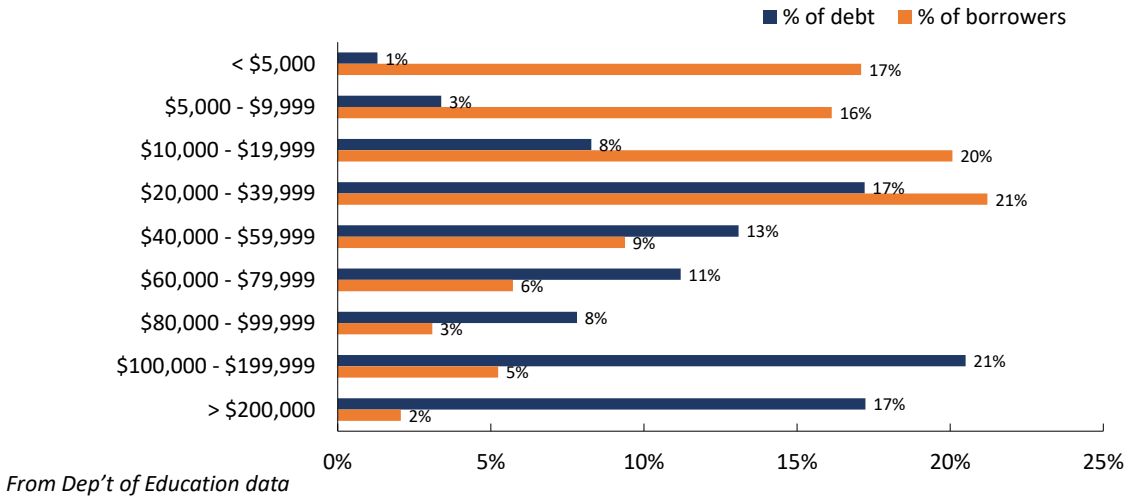
From Federal Reserve, Census & BLS data

Relative Changes in Per Capita Debt Levels, 2006-2021  
(inflation adjusted)

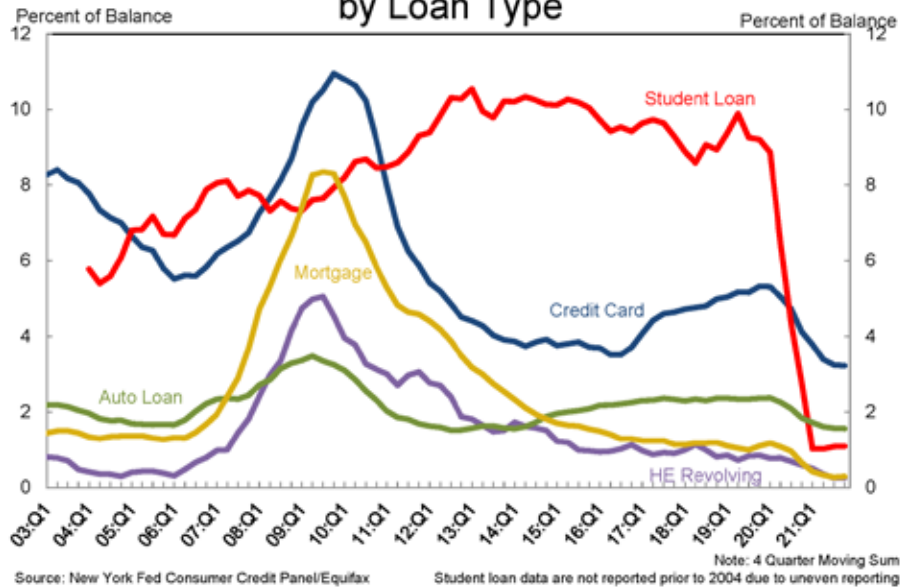


From Federal Reserve, Census & BLS data

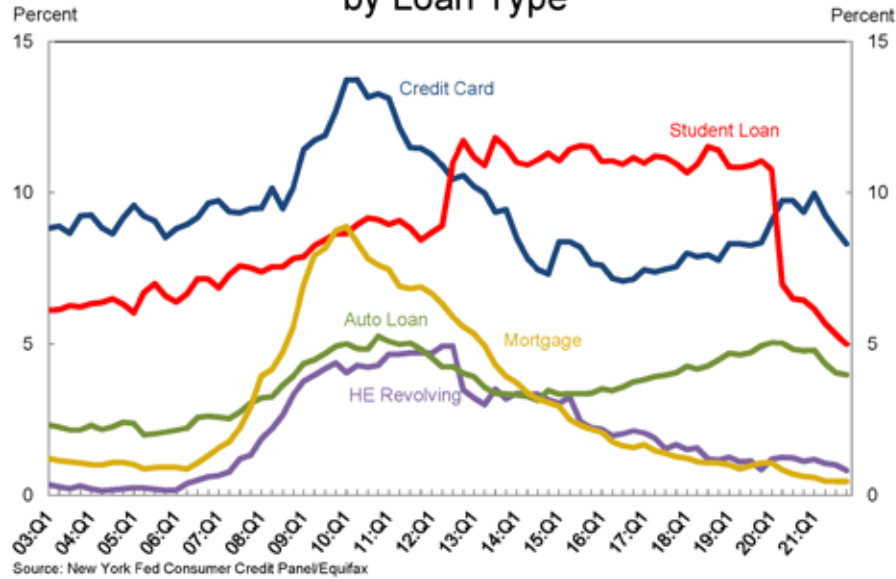
## Share of Borrowers, Share of Debt, by Loan Balance (federal loans only)



## Transition into Serious Delinquency (90+) by Loan Type



### Percent of Balance 90+ Days Delinquent by Loan Type



12

### 2017 Cohort, 3-yr. Percentage Default Rate by type of institution

From Dep't of Education data

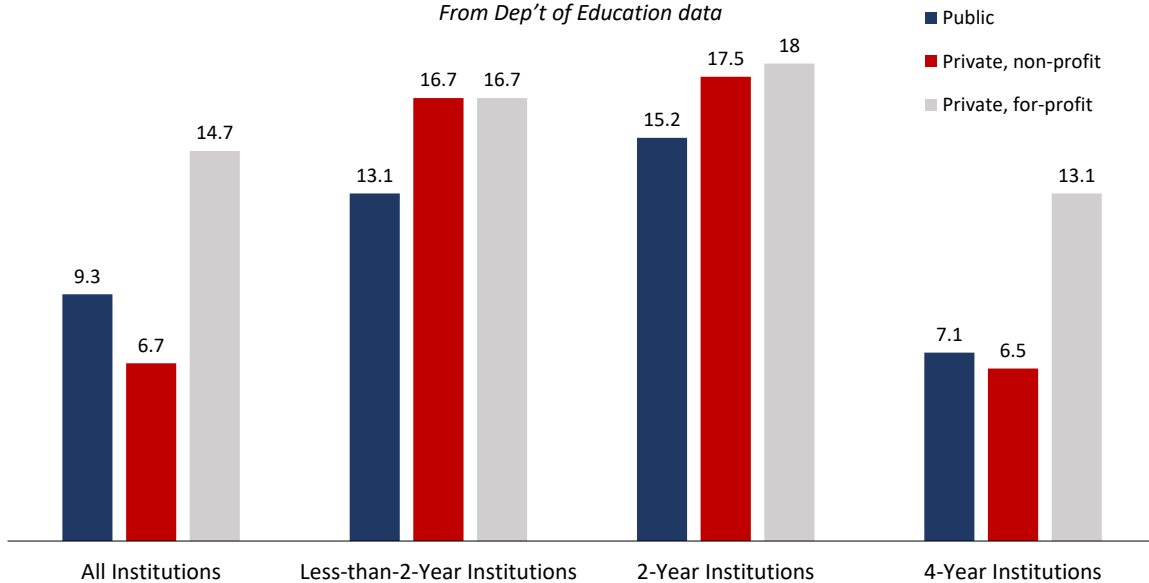


TABLE 2

**Most Black or African American noncompleters default on their loans**

Percentage of borrowers who entered college in the 2011-12 academic year who had entered repayment and defaulted by 2017, by race and educational attainment

|                           | All        | Bachelor's degree | Associate degree | Certificate | No degree, not enrolled |
|---------------------------|------------|-------------------|------------------|-------------|-------------------------|
| <b>All borrowers</b>      | <b>18%</b> | <b>1%</b>         | <b>10%</b>       | <b>22%</b>  | <b>41%</b>              |
| White                     | 13%        | 1%                | 8%               | 18%         | 33%                     |
| Black or African American | 32%        | 3%                | 13%              | 31%         | 55%                     |
| Hispanic or Latino        | 20%        | *                 | *                | 22%         | 41%                     |

\* Data are not available or have large standard errors so are not reported.

From Ben Miller, "The Continued Student Loan Crisis for Black Borrowers," Center for American Progress (2019) (available at <https://cdn.americanprogress.org/content/uploads/2019/11/26071357/Student-Debt-BRIEF.pdf>)

## Department of Education: Potential Reforms



## NEW IN APRIL:

- Federal student law forbearance [\$0 payments/0% interest] on federal student loans owned by Dept. of Ed. [or in default regardless of owner] extended to August 31, 2022. Covers about 85% of federal loans.



Hints that ED is  
working on  
changes:



Secretary Miguel Cardona ✓  
@SecCardona

We are working to change our policies so that bankruptcy is an option for those struggling with student debt. To ensure that every borrower can benefit from these changes, we have asked [@TheJusticeDept](#) to request a pause of any active bankruptcy case if the borrower wishes.

1:49 PM · Mar 9, 2022 · Hootsuite Inc.

76 Retweets 45 Quote Tweets 257 Likes

What changes?

-  Dept. of Ed. Definition of “undue hardship”?
-  New litigation policy about contesting every student loan hardship proceeding?
-  Operation Fresh Start?

Operation Fresh Start

- It appears that this program is still under advisement at DOE.
- The goals are to get all federal student loans out of delinquency or default.
- It was discussed as of September 2021. No official word yet.

## ED has made some advancement in Public Service Loan Forgiveness loans

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2% approval boosted to 5-10%.



PSLF Waiver program extended to October 2021.



Updated eligibility guidance for PSLF.

**Student Debt: Crisis or Opportunity**  
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**1) Addressing the Student Loan Crisis through Litigation**

**a. Student Loan Litigation**

- i. Under the existing Bankruptcy Code, student loan litigation is a means to address the student loan crisis through bankruptcy in a manner that is equitable, fair and effective. Until legislative reform occurs, courts are left to determine whether a debtor's circumstances demonstrate that repayment of student loan debt would result in an undue hardship under 11 U.S.C. § 523(a)(8). Courts throughout the country have demonstrated an increased flexibility in applying the judicially created tests for determining an undue hardship. As a result, more borrowers have been able to meet the burden of establishing an undue hardship and obtaining partial or total discharge of their student loan debts.

**b. Judicially Created Tests for Determining Undue Hardship Under 11 U.S.C. § 523(a)(8)**

- i. Most student loan debt is excepted from discharge under the Bankruptcy Code.<sup>1</sup> However, the Bankruptcy Code provides for a student loan debt to be discharged in the event that excepting the student loan debt from discharge "would impose an undue hardship on the debtor and the debtor's dependents."<sup>2</sup> The Bankruptcy Code does not define the term "undue hardship." Generally, courts apply one of two judicially created tests to determine whether excepting a

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<sup>1</sup> See 11 U.S.C. § 523(a)(8).

<sup>2</sup> *Id.*



student loan debt from discharge would impose an undue hardship on a debtor.

**ii. The *Brunner* Test**

1. The majority of courts have adopted the three-prong test established by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Educ. Serv. Corp.*<sup>3</sup>
2. In order to discharge a student loan debt under the *Brunner* test, a debtor must demonstrate that:
  - a. the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the loans;
  - b. additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
  - c. the debtor has made good faith efforts to repay the loans.<sup>4</sup>

**iii. The Totality of the Circumstances Test**

1. Some courts apply the “totality of the circumstances” test, which considers “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor and the debtor’s dependent’s reasonable and necessary living expenses; and (3) any other relevant facts and circumstances.”<sup>5</sup>

**c. Recent Cases: Student Loan Debt Discharge under the *Brunner* Test**

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<sup>3</sup> *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). The *Brunner* test is generally followed by the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.

<sup>4</sup> *Id.* at 396.

<sup>5</sup> The totality of the circumstances test was adopted by the Bankruptcy Appellate Panel for the First Circuit in *Bronsdon v. Educ. Credit Mgmt Corp. (In re Bronsdon)*, 435 B.R. 791 (B.A.P. 1st Cir. 2010), and by the United States Court of Appeals for the Eighth Circuit in *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702 (8th Cir. 1981).

i. *Rosenberg v. N.Y. State Higher Educ. Servs. Corp.*<sup>6</sup>

1. The Bankruptcy Court for the Southern District of New York found that the debtor met his burden of establishing that repaying his student loan debt would impose an undue hardship on him. The court held that the total amount of the debtor's student loan debt, over \$220,000, was discharged.
2. The court found that the debtor established all three prongs of the *Brunner* test.
  - a. **Prong (1): That the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the loans.** According to the debtor’s bankruptcy schedules, his monthly expenses were well in excess of his monthly income. His budget demonstrated that he was unable to repay his student loan debt and maintain a minimum standard of living.
  - b. **Prong (2): That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.** The court noted that the *Brunner* test required a finding that the debtor’s state of affairs was likely to persist for a significant portion of the repayment period, not a finding that the debtor’s state of affairs was likely to persist forever. The court determined that the repayment period had already ended due to Educational Credit Management Corporation (“ECMC”), the student loan creditor, accelerating the loan and making the total amount due in full. This led the court to conclude that since the repayment period had already ended, the debtor’s state of affairs was certain to persist for the duration of repayment period.
  - c. **Prong (3): That the debtor has made good faith efforts to repay the loans.** The court found that the debtor demonstrated good faith by regularly contacting ECMC, requesting forbearances, making

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<sup>6</sup> *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg)*, Adv. No. 18-09023, 610 B.R. 454 (Bankr. S.D. N.Y. 2020).

some payments during periods of forbearance, and making 40% of the payments that came due during periods that the student loan debt was not in forbearance or deferment.

3. An appeal of the bankruptcy court's decision was filed by ECMC. The U.S. District Court for the Southern District of New York reversed the bankruptcy court's decision to grant the debtor's motion for summary judgment and remanded the case to the bankruptcy court for further proceedings.<sup>7</sup> However, the district court made clear that it "expresses no opinion as to whether the Student Loan is dischargeable."<sup>8</sup> The district court concluded neither the debtor nor ECMC had established that they were entitled to judgment as a matter of law.
  - a. The district court concluded that the debtor must provide additional evidence and explanation regarding the necessity of the expenses claimed in the debtor's schedules.
  - b. The district court also determined that the debtor must provide additional evidence to establish his efforts to "maximize his income, minimize his expenses, and participate in alternative repayment options."<sup>9</sup>
  - c. Further, the district court rejected the bankruptcy court's conclusion that ECMC's acceleration of the student loan ended the repayment period because the student loan could be rehabilitated. Therefore, the debtor must present evidence to establish prong 2 of the *Brunner* test.
4. The case is now pending before the bankruptcy court.

ii. *Randall v. Navient Solutions*<sup>10</sup>

1. The Bankruptcy Court for the District of Maryland found that the debtor met her burden of establishing that repaying the total amount of her student loan debt of approximately

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<sup>7</sup> Rosenberg v. Educ. Credit Mgmt. Corp., 20-CV-00688, 2021 U.S. Dist. LEXIS 187106 (S.D.N.Y. Sep. 29, 2021).

<sup>8</sup> *Id.* at \*25.

<sup>9</sup> *Id.* at \*32-33.

<sup>10</sup> *Randall v. Navient Sols. (In re Randall)*, Adv. No. 19-00368-MMH, 628 B.R. 772 (Bankr. D. Md. June 21, 2021).

\$190,000 would impose an undue hardship on her. The court found that the debtor had the ability to repay \$12,000 of the student loan debt. Therefore, the court granted a discharge of all except \$12,000 of the debtor's student loan debt.

2. The court found that the debtor established all three prongs of the *Brunner* test.
  - a. **Prong (1): That the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the loans.** The court found that the debtor’s expenses were reasonable and demonstrated that she would not be able to pay all of her student loan debt and maintain a minimal standard of living. The court found that the debtor could afford to pay \$100.00 per month toward her student loan debt over the following ten years.
  - b. **Prong (2): That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.** The court noted that the 68 year old debtor’s earning potential and future employment opportunities were likely to be impacted by her age. Additionally, her age was likely to also impact her ability to continue to work overtime as she had done in the past in an effort to maintain her regular household obligations.
  - c. **Prong (3): That the debtor has made good faith efforts to repay the loans.** The court found that the debtor demonstrated good faith by making efforts to repay her student loans, requesting forbearances, and managing her finances to the best of her ability.

iii. *Bell v. U.S. Department of Education*<sup>11</sup>

1. The Bankruptcy Court for the Western District of Virginia found that the debtor met his burden of establishing that repaying his student loan debt would impose an undue hardship on him. The court held that the total amount of the

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<sup>11</sup> *Bell v. U.S. Dep’t of Educ. (In re Bell)*, Adv. No. 20-05001, 2021 Bankr. LEXIS 2393 (Bankr. W.D. Va. Sep. 1, 2021).

debtor's student loan debt, approximately \$110,000, was discharged.

2. The court found that the debtor established all three prongs of the *Brunner* test.
  - a. **Prong (1): That the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the loans.** The court concluded that the debtor could not maintain a minimal standard of living if required to repay his student loan debts because his monthly income was significantly less than his regular monthly expenses.
  - b. **Prong (2): That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.** The court determined that the debtor met his burden of establishing the second prong based upon many factors, including: (1) the debtor’s inability to secure high paying employment, despite numerous efforts over an extended period of time; (2) the debtor’s lack of certifications and licenses; (3) the debtor’s age as he was 70 years old; and (4) limited employment opportunities as he gets older. The court also rejected the Department of Education’s (the “DOE”) argument that the availability of Income Based Repayment (“IBR”) plans precluded the debtor from demonstrating that repayment of the student loan debt would impose an undue hardship. The court reasoned that accepting that argument would render the undue hardship discharge provision effectively meaningless, as it would prevent every debtor who had the ability to obtain an IBR plan ineligible to obtain a discharge of his student loan debt. Additionally, the court emphasized the hardships that would be imposed upon the debtor through participating in an IBR plan, such as the requirement to recertify his income and expenses annually, the continuing accrual of interest and increasing of the overall student loan debt, and the tax liability that

would result from any portion of the debt that is later forgiven.

- c. **Prong (3): That the debtor has made good faith efforts to repay the loans.** The court found that the debtor demonstrated good faith through his extensive efforts to secure employment, his regular communication with the DOE, his requests for forbearances, and the DOE's approval of his forbearance requests. The court noted that his inability to make any of the student loan payments did not indicate a lack of good faith, particularly when the monthly amount of his IBR plan repayment would have been \$0.00 based upon his financial circumstances.

iv. *Educ. Credit Mgmt. Corp. v. Goodvin*<sup>12</sup>

1. The Bankruptcy Court for the District of Kansas found that the debtor met his burden of establishing that repaying the remaining balance of approximately \$49,581 owed on the loan that consolidated the debtor's student loans in 1992 ("Consolidation Student Loan") with a 9% rate of interest would impose an undue hardship on him. The court granted a discharge of the Consolidation Student Loan, but held that the debtor's remaining student loans of approximately \$27,689 were excepted from discharge.
2. The court found that the debtor established all three prongs of the *Brunner* test.
  - a. **Prong (1): That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the loans.** The court determined that the debtor's disposable income of \$209 monthly is insufficient to repay the Consolidated Student Loan. The court rejected the defendant's argument that debtor's eligibility to consolidate the loans and repay them through the REPAYE plan, which would have provided for a monthly payment of \$157, would enable the debtor to repay the Consolidated Student Loans and maintain a minimum

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<sup>12</sup> *Goodvin v. Unites States Dep't of Educ. (In re Goodvin)*, 2020 Bankr. LEXIS 2342 (Bankr. D. Kan. Sep. 1, 2020).

standard of living. The court reasoned that: (1) the debtor's monthly payment through REPAYE was insufficient to cover the monthly accrual of interest and would not reduce the principal amount in a meaningful way; and (2) the debtor would be forced to rely on forgiveness of the remaining balance, which would have increased significantly by the end of the twenty year repayment period due to the continuing accrual of interest.

- b. **Prong (2): That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.** The court determined that anticipated employment income that the debtor would receive during the ten year period before he reaches the full retirement age of 67 years old and the income the debtor anticipates receiving in retirement (a modest retirement amount and social security income) would likely result in the debtor continuing to experience difficulty maintaining a minimal standard of living.
  - c. **Prong (3): That the debtor has made good faith efforts to repay the loans.** The court found that the debtor demonstrated good faith by making efforts to repay his student loans, by paying a significant amount of his student loan debt, by taking actions to improve his employment opportunities, and by working diligently to advance his earning capability. The court noted that the original amount of the Consolidated Student Loan was \$12,078 and the debtor made payments toward this loan in the total amount of \$19,527.
3. An appeal of the bankruptcy court's decision was filed by ECMC. The United States District Court for the District of Kansas affirmed the bankruptcy court's decision.<sup>13</sup> The district court found that the bankruptcy court did not err in granting a partial discharge of the debtor's student loan debt because the debtor met his burden of establishing the three prongs of the *Brunner* test.

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<sup>13</sup> *Educ. Credit Mgmt. Corp. v. Goodvin*, 2021 U.S. Dist. LEXIS 49890 (D. Kan. Mar. 17, 2021).

v. *Wolfson v. DeVos*<sup>14</sup>

1. The Bankruptcy Court for the District of Delaware found that the debtor met his burden of establishing that repaying his student loan debt would impose an undue hardship on him. The court held that the total amount of the debtor's student loan debt, approximately \$95,000, was discharged.
2. The court found that the debtor established all three prongs of the *Brunner* test.
  - a. **Prong (1): That the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the loans.** The Bankruptcy Court found that the debtor’s income was insufficient to cover minimal living expenses without even accounting for any repayment of his student loan debt. The 34 year old debtor suffered from medical conditions that limited his ability to work and throughout his adult life his wages were insufficient to maintain a minimum standard of living. The debtor’s father contributed financially to the debtor monthly to assist with his modest household expenses. The court noted that the debtor’s father’s contributions were charity and did not constitute income for the purposes of the *Brunner* test.
  - b. **Prong (2): That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.** The court found that that the debtor’s state of affairs was certain to persist for the remainder of the payment period because the repayment period had already ended. The court noted that the ten-year repayment term for both of the debtor’s student loans were already concluded and the loans were also likely to have been accelerated due to the default. The court also concluded that the debtor’s work history for over a decade demonstrated that it is unlikely that he would ever earn income sufficient to repay his student loan debt.

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<sup>14</sup> *Wolfson v. DeVos (In re Wolfson)*, 2022 Bankr. LEXIS 103 (Bankr. D. Del. Jan. 14, 2022).



- c. **Prong (3): That the debtor has made good faith efforts to repay the loans.** The court found that the debtor satisfied the requirement of demonstrating good faith despite never making any payment toward the student loan debt. The court emphasized that the debtor's financial circumstances inhibited his ability to make any payments. Additionally, the court noted the extensive efforts made by the debtor to secure gainful employment.

vi. *Wheat v. Great Lakes Higher Educ. Corp.*<sup>15</sup>

1. On a Motion to Reconsider, Alter, or Amend judgment, the Bankruptcy Court for the Middle District of Alabama found that the court correctly concluded that the debtor met her burden of establishing that repaying her student loan debt would impose an undue hardship on her. The court denied the Motion and held that the debtor's student loan debt was discharged.
2. The court found that the debtor established all three prongs of the *Brunner* test.
  - a. **Prong (1): That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the loans.** The court found that it correctly concluded that the debtor satisfied the first prong. The debtor's schedules demonstrated that her regular monthly household expenses significantly exceeded her monthly income. The court found that the debtor's monthly expenses were reasonable. The court also rejected the USDE's argument that the availability of a \$0.00 monthly payment through an Income Drive Repayment ("IDR") plan negated the debtor's ability to satisfy the first prong. Particularly, in light of the fact that the debtor's income was insufficient to maintain a minimal standard of living even if all student loan repayment was excluded.
  - b. **Prong (2): That additional circumstances exist indicating that this state of affairs is likely to**

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<sup>15</sup> *Wheat v. Great Lakes Higher Educ. Corp. (In re Wheat)*, 2022 Bankr. LEXIS 168 (Bankr. M.D. Ala. Jan. 25, 2022).

**persist for a significant portion of the repayment period of the student loans.** The court found that it correctly concluded that the debtor satisfied the second prong. The debtor was a 32 year old, single mother of three children, with modest income and limited employment options. Additionally, the debtor's youngest child would not reach majority for an additional 10 years and the debtor faced various obstacles related to severe medical conditions of her daughter and mother.

- c. **Prong (3): That the debtor has made good faith efforts to repay the loans.** The court found that it correctly concluded that the debtor satisfied the third prong. The debtor testified to extensive unsuccessful efforts to maximize her income through securing gainful employment in her field of work and attempts to minimize her expenses. Additionally, the court recognized the debtor's efforts to enroll in an IDR plan.

**d. Recent Cases: Student Loan Debt Discharge under the Totality of the Circumstances Test**

*i. Ashline v. U.S. Dep't of Educ.*<sup>16</sup>

1. The Bankruptcy Court for the Northern District of Iowa found that the debtor met her burden of establishing that repaying her student loan debt would impose an undue hardship on her. The court held that the total amount of the debtor's student loan debt, \$230,000, was discharged.
2. The court found that all three factors considered under the totality of the circumstances test favored a finding of undue hardship.
  - a. **Factor (1): The debtor's past, present, and reasonably reliable future financial resources.** The debtor was a 47-year old single mother who had been unable to secure well-paying employment after earning her degree. Additionally, she was likely to have already maximized her earning potential in her current role as a dental assistant with modest wages.

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<sup>16</sup> *Ashline v. U.S. Dep't of Educ. (In re Ashline)*, Adv. No. 16-09028 (Bankr. N.D. Iowa Sep. 21, 2021).

- b. **Factor (2): A calculation of the debtor's and the debtor's dependent's reasonable and necessary living expenses.** The court concluded that the debtor's living expenses were modest and reasonable based on her resources. The debtor had also made good faith efforts to repay her student loans.
- c. **Factor (3): Any other relevant facts and circumstances.** The court rejected the DOE's argument that due to IBR plans being available the student loan debt would not impose an undue hardship. IBR plans would provide a reduced and affordable monthly payment amount and provide for forgiveness of the debt after 20 to 25 years of payments. In rejecting the DOE's argument, the court reasoned that the: (1) IBR plan would impose additional hardships on the debtor, such as the mental and emotional consequences of requiring the debtor to pay until she is elderly; (2) likelihood the student loan debt would continue to grow as a result of the accrual of additional interest; and (3) potential for a "student loan forgiveness tax bomb", which would become due in full upon the forgiveness of the student loan debt.

ii. *Zilisch v. Fedloan Servicing*<sup>17</sup>

1. The Bankruptcy Court for the Southern District of Iowa found that the debtor met her burden of establishing that repaying her student loan debt would impose an undue hardship on her. The court held that the total amount of the debtor's student loan debt, \$145,000, was discharged.
2. The court found that the all three factors considered under the totality of the circumstances test favored a finding of undue hardship.
  - a. **Factor (1): The debtor's past, present, and reasonably reliable future financial resources.** The debtor was a 41-year old single mother who was previously diagnosed with an autoimmune disease. Her employment history included sporadic part-time

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<sup>17</sup> *Zilisch v. Fedloan Servicing (In re Zilisch)*, Adv. Nos. 18-00449-als7 and 18-99001-als (Bankr. S.D. Iowa Sep. 7, 2021).

and low earning employment. Additionally, she was likely to have already maximized her earning potential in her current role at the TSA with modest wages.

- b. **Factor (2): A calculation of the debtor's and the debtor's dependent's reasonable and necessary living expenses.** The court found that the debtor's expenses were modest. Additionally, the DOE did not object to any of the amounts claimed by the debtor.
- c. **Factor (3): Any other relevant facts and circumstances.** The court noted that the debtor's income was just enough to cover her monthly expenses for her and her dependents. Additionally, she took actions to attempt to negotiate with the DOE regarding payment plans and deferments of the student loan debt. Further, the court found that the limitations on the debtor's employment were not self-imposed, rather they resulted from the debtor balancing her own health conditions and the care of her daughter. The court also rejected the DOE's argument that excepting the student loan debt from discharge would not impose an undue hardship because under the IBR plan the debtor's monthly payment would be \$0.00. The court reasoned that an affordable payment option cannot be the only basis for consideration of undue hardship and that IBR plan enrollment should not eliminate a debtor's ability to pursue an undue hardship discharge in bankruptcy.

iii. *Marchus v. Student Loans of North Dakota*<sup>18</sup>

1. The Bankruptcy Court for the District of North Dakota found that the debtor met her burden of establishing that repaying her student loan debt would impose an undue hardship on her. The court held that the total amount of the debtor's student loan debt, approximately \$38,515, was discharged.
2. The court found that the all three factors considered under the totality of the circumstances test favored a finding of undue hardship.

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<sup>18</sup> *Marchus v. Student Loans of North Dakota (In re Marchus)*, 630 B.R. 91 (D.N.D. May 18, 2021).

- a. **Factor (1): The debtor's past, present, and reasonably reliable future financial resources.** The debtor was 63 years old, with no pension, investment accounts, or money saved for retirement. Her past earnings were very modest, she suffered from various medical conditions that impacted her ability to earn income, and her future income was unlikely to be more than her past and present income.
- b. **Factor (2): A calculation of the debtor's and the debtor's dependent's reasonable and necessary living expenses.** The court determined that the debtor's expenses demonstrated a minimal standard of living at best.
- c. **Factor (3): Any other relevant facts and circumstances.** The court found that the debtor made good-faith efforts to maximize her income and diligent attempts to improve her financial situation. Further, the court found that her inability to pay was the result of circumstances that were not related to her work ethic or her aspirations to achieve a better financial situation.

**2) The Student Loan Crisis: Legislative Proposals.** The current student loan moratorium has recently been extended through August 31, 2022. What is the end game? There are 40 bills pending in Congress right now with "student loan" in their title.

**a. Fresh START Through Bankruptcy Act<sup>19</sup>**

- i. Cosponsored by Senators Cornyn (R-TX) and Durbin (D-IL).
- ii. Federal student loans freely dischargeable after 10 years and, before that, only upon a showing of undue hardship.
- iii. Private student loans dischargeable only upon a showing of undue hardship (no time limit).
- iv. There is a clawback provision aimed at schools where at least one-third of the student body receives federal loans and the school's default and repayment rates fail to meet statutory thresholds. In this case, the school must reimburse the Department of Education

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<sup>19</sup> S. 2598, 117th Cong., 1st Sess. (2021).

between 20% and 50% on a discharged loan. The exact number depends on how badly the school missed the thresholds.

**b. Consumer Bankruptcy Reform Act of 2020<sup>20</sup>**

- i. All student loans are freely dischargeable and treated no differently than any other general unsecured debt.

**c. Resolutions Calling on the President of the United States to take executive action to broadly cancel Federal student loan debt.<sup>21</sup>**

- i. Calls on the president to cancel \$50,000 in federal student loan debt for every borrower.
- ii. Nineteen co-sponsors in the Senate; sixty-five co-sponsors in the House.
- iii. Not legally binding.

**d. Final Report of the ABI Commission on Consumer Bankruptcy<sup>22</sup>**

- i. Private student loans should be treated like any other general unsecured debt and be dischargeable.
- ii. Federal student loans should be freely dischargeable after 7 years and, before that, only upon a showing of undue hardship.
- iii. Nondischargeability protections limited only to debts incurred by the person who benefitted from the education. Nondischargeability should not apply to third parties, such as guarantors.
- iv. Nondischargeable student loans become a priority debt and treated as such in a chapter 13 plan. The debt need not be paid in full through the plan so long as all disposable income is devoted to repayment in a five-year plan.

**3) Department of Education: Potential Reforms**

- a. Redefine “undue hardship” under 11 U.S.C. §362(a)(8) and/or reconsider automatically contesting every student loan discharge adversary proceeding.
  - i. There are hints that the DOE is working to change their policies.

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<sup>20</sup> S. 4991, 116th Cong., 2d Sess. (2020).

<sup>21</sup> S. Res. 46 & H. Res. 100, 117th Cong., 1st Sess., (2020).

<sup>22</sup> Available at <https://consumercommission.abi.org/>.

## 2022 ANNUAL SPRING MEETING

1. On March 9, 2022 Secretary Miguel Cardona tweeted: “We are working to change our policies so that bankruptcy is an option for those struggling with student debt. To ensure that every borrower can benefit from these changes, we have asked @TheJusticeDept to request a pause of any active bankruptcy case if the borrower wishes.”  
[https://twitter.com/SecCardona/status/1501646447103643655?s=20&t=wxLNo\\_rKOEaUX6\\_c6cR\\_wA](https://twitter.com/SecCardona/status/1501646447103643655?s=20&t=wxLNo_rKOEaUX6_c6cR_wA)
- ii. One of these changes is Operation Fresh Start which is a plan to get all federal student loans out of delinquency or default. The details have been forthcoming since September 2021.
  1. See [Eight Questions about Student Loan Default and "Fresh Start"](https://www.newamerica.org/education/2021/08/24/eight-questions-about-student-loan-default-and-fresh-start/) (newamerica.org)
  2. [Inside the Biden administration’s plan to restart student loan payments- POLITICO](https://www.politico.com/news/2021/09/01/biden-administration-plan-restart-student-loan-payments-508481)
- b. Recent changes:
  - i. Federal student law forbearance [\$0 payments/0% interest] on federal student loans owned by Dept. of Ed. [or in default regardless of owner] extended to August 31, 2022. Covers about 85% of federal loans.
    1. The pause includes the following relief measures for eligible loans:
      - a. a suspension of loan payments
      - b. a 0% interest rate
      - c. stopped collections on defaulted loans
    - i. [COVID-19 Relief: Loans in Default | Federal Student Aid](https://www.federalstudentaid.gov/coronavirus-relief)
  - ii. **The 2% approval rate for Public Service Loan Forgiveness approvals has been boosted to 5-10%.**
    1. “In short, the 2% approval rate has been boosted to 5% to 10% (the denominator is hard to determine.) According to the September 2021 report, the vast majority of denials before the new waiver program (80%) were people either in non-qualifying FFEL repayment or some other non-repayment status (forbearance or deferment) for part of the ten-year period. The waiver should permit most or all of those denials to be reversed. So if you were turned down for

PSLF before October 2021, send in an application under the waiver program. It is currently set to expire in October 2022.”

- a. [PSLF update - Credit Slips](#)
2. The Biden administration has updated eligibility guidance for PSLF.
  - a. [Biden Administration Updates Eligibility Guidance For Expanded Student Loan Forgiveness Program \(forbes.com\)](#)



# Faculty

**Veronica D. Brown-Moseley** is a shareholder at the Boleman Law Firm, P.C. in Richmond, Va., and represents consumers in chapter 7 and chapter 13 bankruptcy cases in the firms' Richmond, Hampton and Virginia Beach offices. She frequently publishes and speaks about consumer bankruptcy-related topics. Ms. Brown-Moseley is a co-founder and serves as vice president of Brighter Tomorrows Begin Today, a nonprofit organization dedicated to assisting individuals in achieving their academic and professional goals. She has also served as a leader in a number of bar associations, and routinely engages in community service efforts. Ms. Brown-Moseley received her B.A. in political science from Virginia Commonwealth University and her J.D. from the University of Richmond T.C. Williams School of Law.

**James J. Haller** is a practitioner with Haller Law in Mundelein, Ill., and has been practicing primarily bankruptcy and consumer law since 1993. He maintains a private practice representing consumers filing for bankruptcy and under other federal consumer protection statutes. Mr. Haller served for many years on the board of directors for the National Association of Consumer Bankruptcy Attorneys (NACBA) and in 2017 served as its president. He also is the director for Professional Development for NACBA. Mr. Haller received his B.A. from Carleton College in Northfield, Minn., and his J.D. from Washington University in St. Louis.

**Prof. Robert M. Lawless** is the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior & Social Science at the University of Illinois College of Law in Champaign, Ill., where he writes and teaches about bankruptcy, consumer finance and business law. He also served as the College's associate dean for research from 2013-16. Prof. Lawless served as the reporter for the ABI's Commission on Consumer Bankruptcy and was the recipient of ABI's Service Award in 2019. He is a co-author of *Secured Transactions: A Systems Approach and Empirical Methods in Law*. He also is a regular contributor to the blog Credit Slips, a discussion on credit, finance and bankruptcy. Prof. Lawless has testified before Congress, and his work has been featured in media outlets such as CNN, C-SPAN, NPR, the *New York Times*, the *Wall Street Journal*, *USA Today*, the *National Law Journal*, the *L.A. Times* and the *Financial Times*. Prof. Lawless is a member of the American Law Institute and the National Bankruptcy Conference, and he is a Fellow in the American College of Bankruptcy. He received both his undergraduate degree in accounting and his J.D. from the University of Illinois, during which time he served as editor-in-chief of the *University of Illinois Law Review*.

**Stacey Wells Salters** is an associate with Thompson Coburn LLP in its financial restructuring and bankruptcy practice group in Dallas. She brings a diverse range of complex commercial litigation experience that spans across various industries, including advertising, cannabis, energy, telecom, health care, mortgage banking and insurance. Previously, Ms. Salters clerked for Hon. Jeffrey P. Norman of the U.S. Bankruptcy Court for the Southern District of Texas and served as briefing attorney to Hon. Chief Justice Carolyn Wright (Ret.) of the Texas Fifth District Court of Appeals. She received her B.S. with honors from the University of South Florida and her J.D. *cum laude* from the Thurgood Marshall School of Law, where she was admitted to the Order of Barristers, was a Henry Doyle Moot Court Competition champion and participated in the Duberstein Bankruptcy Moot Court Competition.