AMERICAN BANKRUPTCY INSTITUTE

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Northeast Consumer Forum

Student Loans: How Do We Deal with Them Before and After Bankruptcy?

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CONCURRENT SESSION

2019

Non-bankruptcy Options for Managing Student Loans

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The Numbers

- Total outstanding student loan debt: **$1.5 trillion**
  - Second-largest type of consumer debt (after mortgages)
- Total number of Americans with student loans: **44 million**
  - Approximately **1 in 9**
- Percentage of students graduating with debt: **70%**
- Average 2016 **undergrad** student debt: **$37,000.**
  - 2015 was $35,000. 2014 was $33,000. 2013 was $30,000.
- Percentage of borrowers in delinquency or default: **25%**

Sources: The Center for Financial Literacy, the Consumer Financial Protection Bureau, The Institute for College Access and Success, Edvisors, the Government Accountability Office, MarketWatch, Student Loan Hero, New York Fed

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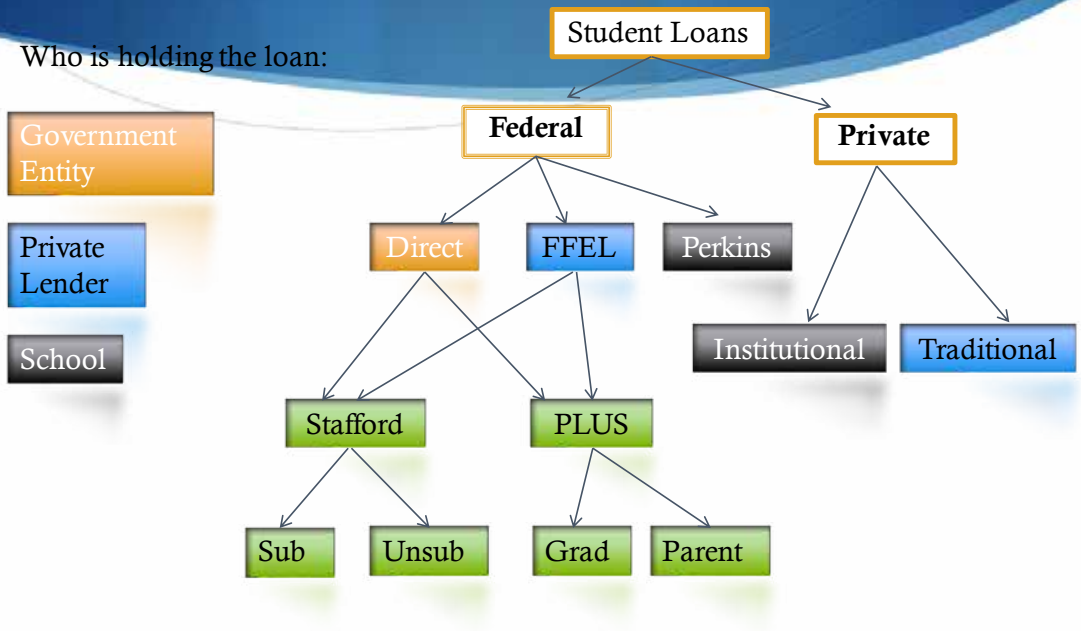
Types of Student Loans

Who is holding the loan:



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Figuring Out the Type of Loan

Private

- Pull credit report.
- Review note, application, bills, and letters for name of lender, loan program.
- Look for a co-signer or option of one (*much* more likely to be present).
- * Few options to manage repayment

Federal

- **Check NSLDS** (www.nslds.ed.gov)
  - Requires FSA ID (different from Federal PIN).
- Review note, application, bills, and letters for name of federal loan program (i.e., "Stafford" or "PLUS")
- *More options to manage repayment

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Balance-Based Repayment (federal)

Monthly payments made based on loan balance and interest rate. The general rule is the longer the repayment term, the lower the monthly payment, but the more you'll pay in total.

- **Level**: 10 year, 25 year, 30 year (limitations)
- **Graduated:** 10 year, 25 year, 30 year (limitations)

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Income-Driven Repayment (IDR)

If borrower cannot afford balance-based payments on federal loans, consider income-driven repayment options

- Affordable payments even for large federal loan balances
- Better long-term solution than deferments and forbearance (which will run out)
- Poverty exemptions
- Progress towards loan forgiveness
- Interest subsidy on subsidized loans for first 3 years

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IDR Plans

- Income Contingent Repayment (ICR)
  - Most expensive. Possibly useful for Parent PLUS borrowers.
- Income Based Repayment (IBR)
  - Most widely accessible – Direct and FFEL loans
- "New" Income Based Repayment (IBR)
  - More like PAYE – but PAYE is better.
- Pay As You Earn (PAYE)
  - "Best" plan but most restrictive
- Revised Pay As You Earn (REPAYE)
  - Like PAYE but with different restrictions

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Public service loan forgiveness

- Only Direct Loans
- Must make 120 payments (10 years of payments) AFTER Oct. 1, 2007. Not retroactive.
- Payments must be made through eligible payment plans (10-year Standard, ICR, IBR, PAYE, or REPAYE). Can't be in default.
- Full-time, qualifying public service employment for each payment, and when borrower applies for forgiveness
- Can submit application to "track" payments
- **Forgiven amount not taxable income**

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Other Loan Forgiveness Programs

- **Teacher Loan Forgiveness**
  - Right type of loan
  - Right type of teaching
  - In right type of school
  - 5 consecutive years, $5,000 or $17,500 award
- **Perkins Loan Forgiveness**
  - Perkins loans only, for specific professions
  - Up to 100% forgiveness after five years

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Defining Default

Private

Requires review of the promissory note, as "default" is defined by the terms of each individual loan.

Federal

"The failure of a borrower and endorser, if any, to make an installment payment when due, or to meet other terms of the promissory note, if the Secretary finds it reasonable to conclude that the borrower and endorser, if any, no longer intend to honor the obligation to repay, provided that this failure persists for **270 days**."

34 C.F.R. 685.102

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Consequences of Private Loan Default

- Negative credit reporting.
- Collection calls and letters.
- Assessment of late fees.
- Assessment of collection costs.
- Litigation in state court.

Aside from bankruptcy restrictions, private default is not much different from defaulting on other unsecured consumer debt

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Consequences of Federal Loan Default

- Negative credit reporting
- Denial of new federal aid
- Collection fees up to 25%.
- "Forced" Administrative Collections – Treasury offset, wage garnishment
- Litigation (in a small number of cases)
  - **No** statute of limitations applies.

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Private Loan Default Resolution

- Similar to other types of unsecured debts – lender must secure a judgment in state court. Is debtor judgment-proof?
- Raise defenses
- Raise counterclaims
- Wait out SOL
- Settlements

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Federal Default Resolution

Discharge

Rehabilitation

Consolidation

Compromise/settlement

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Federal Loan Administrative Discharges

Various administrative discharges eliminate the borrower's repayment obligation for some or all of their student loans.

- Total and Permanent Disability / Death
- False Certification
  - Ability to Benefit, Disqualifying Status, Unauthorized Signature, Identity Theft
- Closed School
- Unpaid Refund
- Defense to Repayment (in limbo)

Note: These discharges are also available to borrowers in good standing on federal loans – you don't have to be in default.

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Federal Loan Rehabilitation

Borrower makes 9 on-time monthly payments in a consecutive 9 or 10-month period.

- Borrowers have a right to "reasonable and affordable" monthly payments.
- Default gets deleted from credit history, but late payment history remains
- AWG stops after 5th payment
- Up to 16% in collections costs

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Federal Loan Consolidation

- New Direct federal loan pays off defaulted loans
  - Other benefits = conversion to Direct loan program, post-default repayment management
- Process takes 30-90 days
- On credit report, old loans marked "paid in full" (negative history remains)
- Collection costs of up to 18.5% capitalized.
- No payments required if borrower selects IDR plan

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Relief from Collection Activity

- Tax Refund Offset
  - Complete Request for Review form.
  - Also: Seek reimbursement for injured spouse via IRS Form 8379.
- Federal Benefits Offset
  - Complete Hardship / Statement of Financial Status form.
- Administrative Wage Garnishment
  - Complete Request for Hearing and Financial Disclosure Statement Forms. Note other basis for contesting garnishment.

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ATTORNEYS AT LAW

Undue Hardship Student Loan Litigation: Creditor's Take on Trial

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Overview:

- **Parties**
- **Early-suit options**
- **Burdens of Proof**
- **Legal Standards**
- **Discovery**
- **Common Issues at Trial**
- **Who Obtains a Discharge?**
- **Recent cases in the 1st and 2nd Circuits**

Parties

- **Only 0.1 % of debtors seek a discharge of their student loans in bankruptcy.**
  - » Jason Iuliano, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard, 86 Am. Bankr. L.J. 495, 499 (2012).
- **Who will your client's adversary proceeding be against?**
  - 33% Department of Education ("DOE")
  - 58% Educational Credit Management Corporation ("ECMC")
    - » Rafael I. Pardo & Michelle R. Lacey, The Real Student-Loan Scandal: Undue Hardship Discharge Litigation, 83 Am. Bankr. L.J. 179, 209 (2009).

What is ECMC ?

- **Educational Credit Management Corporation** ("ECMC") is a nonprofit company that provides support for the administration of the Federal Family Education Loan Program ("FFEL") as a student loan guaranty agency.
  - ***William D. Ford Direct loans***: loans made directly from the DOE to students without involvement of a private lender.
  - ***Family Education Loan Program (FFEL):*** loans made by private lenders and guaranteed by the government.
    - » Many of the terms and conditions for the FFEL and Direct loan programs are the same. However there are some differences in repayment options.
    - » There are still many FFEL loans in the system, but as of **July 2010**, no new FFEL loans are being made.
- The filing of the bankruptcy triggers the involvement of ECMC.
- Debtor typically names the original servicer of their loan (or, occasionally, the original lender) and then ECMC will move to substitute or join the proceeding.
  - You can determine who owns the Debtor's loans by using a central database of all federal student loan data:
    - » https://nslds.ed.gov/nslds/nslds_SA/ NSLDS STUDENT ACCESS National Student Loan Data System

What's your likelihood of having a trial?

- Fewer hardship discharge cases are resolved out of court than in other civil litigation.
  - 36% of the debtors' cases in the Iuliano study were settled or had other pre-trial dispositions.
    - » National Consumer Law Center, "The Truth about Student Loans and the Undue Hardship Discharge," available at: https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/iulianoresponse.pdf (April 2013) (citing Jason Iuliano, "An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard", 86 AMBKRLJ 495 (Summer 2012)).
  - By comparison, generally, about 97% of all cases in state and federal courts are resolved by means other than by trial.
    - » Id. (citing *Court Review: The Journal of the American Judges Association,* Volume 42, Issue 3-4 - A Profile of Settlement, Dec. 1 2006).

Early-suit Options

- Reach out to creditor's counsel at outset of adversary proceeding.
- Exhaust administrative repayment options.
- Make sure debtor does not qualify for an administrative discharge.
- If hardship results from medical reason, start gathering medical evidence.

Burdens of Proof

- Debtors are not permitted to discharge educational loans in bankruptcy unless excepting the loans from discharge will impose an undue hardship on the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8).
- Debtor brings the adversary proceeding and has the ultimate burden of proof.
- Creditor bears a threshold burden of establishing that the debt is the type excepted from discharge under 11 U.S.C. § 523(a)(8).
- Debtor must prove undue hardship by a preponderance of the evidence.

Determining whether Debt is the Type Excepted from Discharge

- Most courts have analyzed whether a loan is a qualified educational expense by focusing on the stated purpose for the loan when it was obtained, rather than how the proceeds were actually used by the borrower.
- Courts focus on the *substance of the transaction* creating the obligation.
  - The "substance of the transaction test" recognizes that the purpose of § 523(a)(8) is to exempt entities that make educational loans from the effect of a borrower's bankruptcy discharge.
    - » In re Rumer, 469 B.R. 553, 562 (Bankr. M.D. Pa. 2012)(internal citations omitted).

What is the Standard for Proving Undue Hardship?

- It depends…
  - Congress did not define "undue hardship" by statute so it has been defined by case law.
  - Majority of the Circuits follow the 3-prong Brunner test.
    - » Brunner v. New York State Higher Educ. Servs. Corp.. 831 F.2d 395, 396 (2d Cir. 1987).
  - Eighth Circuit has adopted the "totality of the circumstances" test established in 1981.
    - » Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews), 661 F.2d 702, 704 (8th Cir.1981).
  - First Circuit has *not* adopted either test; however, in a decision by the B.A.P., it has applied the totality of the circumstances test.
    - » In re Bronsdon, 435 B.R. 791, 801 (B.A.P. 1st Cir. 2010).

Brunner Standard

- Three-prong test of undue hardship:
  - (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
  - (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; and
  - (3) that the debtor has made good faith efforts to repay the loans.
    - » Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

"Totality of the Circumstances" Standard

- Arguably a more "flexible approach" in which three categories of factors are evaluated to determine undue hardship:
  - (1) the debtor's past, present, and reasonably reliable future financial resources;
  - (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and
  - (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.
    - » In re Fern, 563 B.R. 1, 3–4 (B.A.P. 8th Cir. 2017).

Other Relevant Circumstances

- Courts have summarized many of the "circumstances" to be considered under either the second prong of Brunner or the third prong of the "Totality of the Circumstances test" in the following (non-exhaustive) list:
  - (1) Total incapacity now and in the future to pay one's debts for reasons not within the control of the debtor.
  - (2) Whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment.
  - (3) Whether the hardship will be long-term.
  - (4) Whether the debtor has made payments on the student loan.
  - (5) Whether there is permanent or long term disability of the debtor.
  - (6) The ability of the debtor to obtain gainful employment in the area of study.
  - (7) Whether the debtor has made a good faith effort to maximize income and minimize expenses.
  - (8) Whether the dominant purpose of the bankruptcy petition was to discharge the student loans.
  - (9) The ratio of the student loan to the total indebtedness.
    - » In re Erkson, 582 B.R. 542, 550 (Bankr. D. Me. 2018).
    - » Morgan v. U.S. Dep't. of Higher Educ. (In re Morgan), 247 B.R. 776, 782 (Bankr. E.D. Ark. 2000).
    - » D'Ettore v. Devry Inst. of Tech. (In re D'Ettore), 106 B.R. 715, 718 (Bankr. M.D. Fla. 1989).
    - » In re Coleman, 98 B.R. 443 (Bankr.S.D. Ind. 1989).

Discovery

- Anticipate that discovery will track like other types of civil litigation/adversary proceedings.
  - Written discovery:
    - Creditor will likely serve comprehensive document requests (that will need to be supplemented prior to trial);
      - Bank statements, medical records, tax returns, property records, etc.
    - Requests for admissions;
    - Interrogatories.
  - Deposition of debtor
  - Possibly Independent Medical Exam ("IME") of debtor if debtor intends to call a medical expert. Fed. R. Evid. 35

Issues at Trial

- Fact specific inquiry
  - "Every decision regarding the dischargeability of student loans rises or falls on the **unique facts** of the case."
    - » In re Erkson, 582 B.R. 542, 556 (Bankr. D. Me. 2018).
  - "The determination of undue hardship is **case- and fact-specific**."
    - » In re King, 368 B.R. 358, 367 (Bankr. D. Vt. 2007).
- "Good faith efforts" to repay the loans
  - Brunner:
    - Good faith is a "moving target" that must be tested in light of the particular circumstances of the party under review.
    - Many ways to establish good faith effort: history of some payment, the use of deferments, and the exploration of employment options.
      - » In re Maulin, 190 B.R. 153, 156 (Bankr. W.D.N.Y. 1995).
  - Courts have declined to apply Brunner or append an explicit "good faith" component to the Totality of the Circumstances test.
    - But, courts have recognized that just because no "good faith" requirement could be read into the Totality of the Circumstances test, that does not necessarily mean that a debtor acting in ***bad faith*** is entitled to a hardship discharge.
      - » In re Brown, No. 15-bk-20067, 2017 WL 745590 (Bankr. D. Me. Feb. 24, 2017), *aff'd sub nom.* Brown v. Educ. Credit Mgmt. Corp., 581 B.R. 695 (D. Me. 2017), *aff'd*, No. 18-1012 (1st Cir. Mar. 13, 2019).
- "Disqualifying actions"
  - Irrespective of the test the Court is applying, the decision whether the failure to discharge a student loan will cause undue hardship to the debtor and the dependents of the debtor under § 523(a)(8), rests on both the economic ability to repay and the existence of any disqualifying action(s).
    - » In re Bronsdon, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).
  - The party opposing the discharge of a student loan has the burden of presenting evidence of any disqualifying factor (such as bad faith).
    - » In re Ayele, 468 B.R. 24, 32 (Bankr. D. Mass. 2012), aff'd, appeal dismissed sub nom. Ayele v. Educ. Credit Mgmt. Corp., 490 B.R. 460 (D. Mass. 2013), aff'd (Oct. 22, 2013).

Issues at Trial

- Income/Expenses
  - Anticipate a detailed review and request from counsel that these be updated/supplemented prior to trial.
- Medical Testimony
  - Debtor is not qualified to testify about either her diagnosis or her prognosis.
  - Proponent of expert testimony bears the burden of establishing admissibility under Federal Rule of Evidence 702 by a preponderance of the evidence.
    - Qualification, reliability and fit.
      - » In re Benjumen, 408 B.R. 9, 18 (Bankr. E.D.N.Y. 2009) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592–593 n. 10 (1993)).
  - BUT, no bright line rule that medical expert testimony *is required*.
  - Determination as to the necessity of corroborating medical evidence depends on number of factors, such as the nature of the condition, the impact that condition has on the debtor's earning potential and the specifics of the debtor's own testimony regarding the condition.
      - » In re Erkson, 582 B.R. 542, 553 (Bankr. D. Me. 2018); In re Nash, 446 F.3d 188, 194 (1st Cir. 2006).

Issues at Trial

- Motivation for filing bankruptcy is to discharge student loans.
- Failure to make any repayment efforts/loans always in forbearance.
- When size of the student loan debt is the principal basis for a claim of undue hardship, the Ford repayment programs become more relevant to a totality-of-the-circumstances undue hardship analysis.
  - » Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 780–81 (8th Cir. 2009).

Who Obtains a Discharge?

- In Pardo-Lacey study, 57% of 119 proceedings resulted in discharge of some or all of the student loan debt.
  - Of those, average debtor got approximately 72% of the debt discharged.
    - » Rafael I. Pardo & Michelle R. Lacey, The Real Student-Loan Scandal: Undue Hardship Discharge Litigation, 83 Am. Bankr. L.J. 179, 209 (2009).
- In Iuliano study, 39% of 207 debtors discharged some portion of their student loans (25% full discharge; 14% partial):
  - 27% Settlement with creditors
  - 10% Judgment following trial
  - 2% Terminated by default judgment
  - 0.5% Summary judgment
    - » Jason Iuliano, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard, 86 Am. Bankr. L.J. 495, 512 (2012).

Pardo-Lacey Study

- Some of the factors Pardo & Lacey *anticipated* would affect the extent of debt discharged:
  - Gender
  - Age
  - Marital status
  - Dependents
  - Medical condition
  - Employment status
  - Educational degree
  - Monthly income
  - Monthly household expenses
  - Debt to income ratio
  - Employment status of debtor

Pardo-Lacey Study

- Factors the study determined actually were statistically significant:
  - Whether debtor or dependent suffered from a medical condition
  - Debtor's failure to attain the education pursued with the borrowed funds
  - Debtor's employment status

Pardo-Lacey Study "Fun" Facts

- Pardo & Lacey also examined whether "extralegal factors" affected extent of discharge:
  - Creditor
  - Whether Debtor was represented by Attorney
  - Debtor's Attorney
  - Level of experience of Debtor's Attorney
  - Judge
  - Resolution of adversary proceeding through trial rather than settlement

Pardo-Lacey Study "Fun" Facts

- Four of these factors had statistically significant impacts on extent of debt discharged:
  - Creditor
  - Resolution of proceeding by trial
  - Level of experience of Debtor's Attorney
  - Identity of Debtor's Attorney

Recent Cases of Undue Hardship

- In re Erkson, 582 B.R. 542, 550 (Bankr. D. Me. 2018).
  - Evidence submitted by the Debtor in her supplemental discovery responses and during her testimony at trial was "comprehensive, credible and transparent."
  - DOE and ECMC argued that the Debtor's failure to present any expert testimony or other corroborating evidence precluded the Court from considering the Debtor's alleged hearing impairment.
  - Determination of necessity of corroborating medical evidence depends on any number of factors, such as the nature of the condition, the impact that condition has on the debtor's earning potential and the specifics of the debtor's own testimony regarding the condition.
  - Court reviews number of collected cases on necessity of medical expert and notes obvious key distinction between the Debtor and the debtors in the cases cited of her age.
    - Court finds it does not need expert medical testimony or corroborating evidence to establish that, as one ages, it becomes increasingly unlikely for an existing hearing impairment to substantially resolve.
    - Unlike the Debtor, many of the debtors in the cases cited suffered from conditions which can be treated or managed with medications and, in many cases, it was not readily apparent how the medical condition asserted by the debtors impacted their ability to earn income.
  - Court finds Debtor can, and did credibly, testify that she has difficulty hearing and that impairment makes it difficult to communicate. Her testimony, coupled with her age and the nature of her condition, sufficient to establish that she suffers from a hearing condition that negatively impacts her capacity for earning and that condition is unlikely to be remedied in sufficient time to afford her a meaningful period of time during which to generate sufficient income to maintain a minimal standard of living while making payments on her student loans.
  - BUT: Court finds Debtor met her burden to establish the existence of a hearing condition without providing expert medical testimony or other corroborating evidence, however, hardship discharge did not depend on determination. Debtor's current financial condition and her future economic prospects were sufficient to establish the grounds for discharge without even considering the challenges presented by her hearing impairment.

Recent Cases of Undue Hardship

- In re Bene, 474 B.R. 56 (Bankr. W.D.N.Y. 2012)
  - The Brunner Court's meaning of "undue hardship" in repaying a student loan relied on words and phrases that do not have the same meaning 25 years later because some were sociological terms, not legal terms.
    - When Court adjusts for predictive changes in the Brunner Court's understanding of the sociological terms "poverty" and "minimal standard of living," and recognizes that the "repayment period" was 10 years in 1987 and now is 25 years, the Court finds that the Debtor has passed the Brunner test, *but for* interposition of the Ford Program changes that substitute "satisfaction" for "repayment."
  - Court predicts that the Second Circuit would de-emphasize its focus on "the bargain" between a student loan borrower and the government, given the many ways in which the government has unilaterally changed its position in the past 25 years, and may re-shift in the Debtor's favor.
  - Court predicts that the Second Circuit would look first to the Brunner test without regard to the current Ford Program options, and then look at those options only if a debtor passed the original Brunner Test.
  - Court predicts that when a debtor passes the Brunner Test but for the Ford options, the Second Circuit would adopt a "totality of circumstances" test.
  - Holds that Debtor has passed the Brunner Test and also satisfies the "totality test" presented by the current version of the Ford Program.

Recent Cases where Debtor did not Obtain a Discharge

- In re Brown, No. 15-bk-20067, 2017 WL 745590 (Bankr. D. Me. Feb. 24, 2017), *aff'd sub nom.* Brown v. Educ. Credit Mgmt. Corp., 581 B.R. 695 (D. Me. 2017), *aff'd*, No. 18-1012 (1st Cir. Mar. 13, 2019).
  - First Circuit affirmed the District Court, which affirmed the bankruptcy court's determination, following trial, that debtor had not established "undue hardship;" bankruptcy court's factual findings were reasonably supported by the record, and the bankruptcy court reasonably applied the law to those facts.
  - Trial court's decision turned on its determination that Debtor's testimony was less credible with respect to her reasonably reliable future income.
  - Conflicting testimony regarding Debtor's employment history suggests that the her most significant obstacle to gainful employment was not her age, gender or physical limitations but, rather, her unrealistic expectations that reasonable employment must be flexible, comfortable, enjoyable and lucrative.
  - Trial court acknowledged medical expert testimony not required to establish the existence of a limiting medical condition, but, in this case, Debtor's contradictory statements raised credibility issues and, therefore, some evidence beyond her own anecdotal testimony would have been helpful in establishing the limiting effect of her numerous medical ailments.
  - First Circuit: "We assume without deciding that the totality-of-the-circumstances test governs the 'undue hardship' determination."

Recent Cases where Debtor did not Obtain a Discharge

- In re Lozada, 594 B.R. 212 (Bankr. S.D.N.Y. 2018)
  - Unique consideration in evaluating Debtor's projected budget was the fact that Debtor and his wife regularly contributed 10% of their income to the Church.
  - Addressed split of authority as to whether Congress intended religious and charitable donations to be permissible expenses in determining undue hardship under § 523(a)(8).
  - Concluded that since Congress has not provided explicit guidance on this issue, charitable giving cannot *per se* be exempted from contractual obligations. Instead, charitable giving expenses [e.g. tithes] evaluated on a case-by-case basis, considering factors such as the amount and the debtor's history in order to determine whether tithing constitutes a reasonably necessary expenditure for that debtor.
  - "While the Court respects Mr. Lozada's commitment to charity, the reality is that when he elects to tithe rather than pay his nondischargeable debt, he is making donations using someone else's money."
  - Debtor failed to carry his burden on any of the three Brunner test prongs.

Treatment of Student Loan Claims in Chapter 13 Plans

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Hypothetical - Treatment of Student Loan Claims in Chapter 13 Plan

Debtors both work at the local university. Together they have about $273,000.00 in student loans which are equally divided between the two Debtors. The student loan claims are with the U.S. Dept. of Education and are serviced by Federal Loan Servicing. The loans of both Debtors are in the Public Service Loan Forgiveness Program (PSLFP) and have been in this program for about 5 years. The PSLF Program forgives the remaining balance on Direct Loans after making 120 qualifying monthly payments under a qualifying repayment plan while working full-time for a qualifying employer. Both loans are also in income-driven repayment plans which sets Debtors monthly student loan payments at an amount that is intended to be affordable based on Debtors income and family size.

Debtors have one 18-year-old son who is a senior in high school and will be attending college in the Fall.

Debtors gross monthly income is $11,000.00 monthly and they net $7,000.00. The monthly student loan payments are $475.00 and $325.00. Debtors have never missed any of their student loan payments. Debtors own a home with a mortgage, have one vehicle payment and two leased vehicle payments (one of which is for Debtors' son). Debtors have approximately $80,000.00 in credit card debt which they are struggling to pay.

Debtors have sought your advice about filing for bankruptcy. They are above median income and have no Chapter 7 option.

Debtors goals are twofold: restructure their credit card debt but do nothing to jeopardize the repayment of their student loans or their participation in the PSLFP or the income-driven repayment plans.

Would you advise Debtors to file a Chapter 13 bankruptcy or have them pursue their non-bankruptcy options?

How would you treat the student loan claims in a Chapter 13 plan to accomplish Debtors' goals?

What objections are the Chapter 13 trustee likely to raise?

What type of Chapter 13 plan is confirmable on these facts?

What Happens to Student Loans When a Debtor Files for Chapter 13?

- All collection activity stops
- Student loans will be placed in forbearance
- interest will continue to accrue on all types of federal student loans
- Lender and/or servicer will NOT process income based repayment ("IBR") requests
- All months Debtors are in Chapter 13 will NOT Count toward qualifying monthly payments under the Public Service Loan Forgiveness Program (PSLFP)
- Debtors will not have rehabilitation options on defaulted loans

"We were not able to process your recertification request for your Income-Driven Repayment plan. A letter will be sent detailing the reasons that we could not approve your request and the next steps if you think this information is incorrect."

- FedLoan Servicing email to Chapter 13 Debtors

How do you incorporate an Income-Driven Repayment Plan (IDR) into a Chapter 13 plan?

How do you incorporate continued participation in Public Service Loan Forgiveness Program (PSLFP) in a Chapter 13 Plan?

How do Debtors rehabilitate a defaulted student loan while in Chapter 13?

- **For IRDs, Executive Office for U.S. Attorneys and Dept. of Education have a template with plan language to be added to Chapter 13 plan as nonstandard plan provision**

- **This template is confusing and unnecessary long and is in no way mandatory**

- **Template does not apply to PSLFP**

- **Template does not apply to loan rehabilitation/default situations**

- **Use your own plan language!!!!!**

Relevant Cases

- In re Hyland, Middle District FL
  Court declined to use template and substituted its own language

- In re Berry, District of So Carolina
  "By failing to comply with the terms of the Plan [regarding IRD & PSLFP], despite notice and Debtor's demand, FedLoan Servicing was in violation and contempt of the Court's Confirmation Order."

Nonstandard Plan Provision for Student Loan IDRP & PLSF Plans During Debtors' Chapter 13 Bankruptcy

A. Federal Student Loan Claims in Income-Driven Repayment Plans

The Debtors are currently in Income-Driven Repayment Plans ("IDRPs") on the Federal Student Loans identified in Section _____ of their Modified Chapter 13 plan. The Debtors shall continue to maintain the contractual installment payments on their Federal Student Loans/U.S. Department of Education Loans pursuant to the IDRPs without disqualification due to the bankruptcy. U.S. Department of Education/ FedLoan Servicing and/or any other servicer of Debtors' Federal Student Loans identified in Section _____ shall not place the student loans into deferment or forbearance because of the filing of the Chapter 13 bankruptcy case. For so long as Debtors maintain the contractual installment payments pursuant to the IDRPs, it shall not be a violation of 11 USC Section 362 or any other applicable law or regulation for U.S. Department of Education and/or any loan servicer to communicate directly with the Debtors by mail, telephone or email. In the event that different IDRPs are offered by U.S. Department of Education and/or any loan servicer, which offers more favorable repayment options, the Debtors shall be permitted to seek participation in such IDRPs without disqualification due to this bankruptcy and without further permission of the court. Debtors may recertify under the applicable IDRP annually or as otherwise required and shall within thirty (30) days following a determination of their monthly payments due pursuant to such recertification file Supplemental Schedules I and J to reflect such change. U.S. Department of Education and/or any loan servicer shall not be required to enroll Debtors in any IDRPs unless Debtors otherwise qualify for such IDRPs.

B. Federal Student Loan Claims in Public Service Loan Forgiveness Program

The Federal Student Loans of both Debtors identified in Section _____ of their Chapter 13 plan are currently in the Public Service Loan Forgiveness (PSLF) Program. This Program in part forgives any remaining balances on Direct Loans after 120 qualifying payments under qualifying repayment plans. The Debtors shall continue to maintain the contractual installment payments on their Federal Student Loans/U.S. Department of Education Loans pursuant to the PSLF Program without disqualification due to the bankruptcy. U.S. Department of Education/ FedLoan Servicing and/or any other servicer of Debtors' Federal Student Loans identified in Section _____ shall not place the student loans in the PSLF Program on the filing date into deferment or forbearance because of the filing of the Chapter 13 bankruptcy case. The Department of Education/ FedLoan

Servicing and/or any other service shall make the determination of what is a "qualifying payment" under the PSLF Program without regards to the filing or pendency of Debtors' Chapter 13 case. It shall not be a violation of 11 USC 362 or any other applicable law or regulation for U.S. Department of Education and/or any loan servicer to communicate directly with the Debtors by mail, telephone or email on any and all matters relating to Debtors ongoing participation in the PSLF Program. The Debtors shall be permitted to seek ongoing participation in the PSLF Program without disqualification due to this bankruptcy and without further permission of the court. U.S. Department of Education and/or any loan servicer shall not be required to enroll Debtors in any PSLF Program unless Debtors otherwise qualify for such PSLF Program.

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

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

Part 8 [or Insert Local Chapter 13 Plan Section Number] **Nonstandard Plan Provisions**

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

2) Identification of Federal Student Loan Debt

a) Only Federal Student Loans that are currently in an income-driven repayment ("IDR") plan, or which Debtor is eligible to repay under an IDR plan during the pendency of this Chapter 13 case, are listed in subsection (2)(b), below. Debtor could owe other student loan obligations. The special provisions contained in this ___ [Insert "Part 8" or Plan Section Number] of the Chapter 13 Plan only apply to the Federal Student Loans listed in subsection (2)(b), below.

b) As of [Insert date bankruptcy petition was filed], the Debtor's Federal Student Loan debt includes the following Title IV Student Loans:

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

c) The Federal Student Loans identified in subsection (2)(b), above, are held by the United States Department of Education ("Education") and / or [insert here other Title IV Student Loan Holders if applicable], pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070, et seq. Hereinafter, Education and other Title IV Student Loan Holders are referred to individually and collectively as "Title IV Loan Holder."

3) Federal Student Loans not in Default
As of [Insert date bankruptcy petition was filed], the Debtor is not in default, as defined in 34 CFR 682.200(b) or 685.102, as applicable, on any Federal Student Loans listed in subsection (2)(b) of this Section.

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

5) Continuation of Pre-Petition Federal Student Loan IDR Plan

a) During the course of this Chapter 13 bankruptcy case until its dismissal or closure, the Debtor may continue participating in the IDR plan in which the Debtor participated pre-petition and for which Debtor otherwise continues to be qualified as determined by the Title IV Loan Holder.

i) The Debtor's monthly IDR plan payment is, as of the date of Debtor's bankruptcy petition, $_____.

ii) The Debtor's monthly IDR plan payment is due to the Title IV Loan Holder on the [Insert day of the month] day of each month.

b) Debtor's Monthly Payments for Pre-Petition IDR Plan [use if Debtor will make IDR plan payment directly to Title IV Loan Holder]

i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

ii. Following confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section, outside of the Debtor's scheduled plan payments to the Chapter 13 Trustee.

ALTERNATIVE Subsection 5(b) [use if Debtor will make IDR plan payment through Chapter 13 Trustee's office]

b) Debtor's Monthly Payments for Pre-Petition IDR Plan

i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

ii. In order for the Chapter 13 Trustee to transfer timely the Debtor's first post-confirmation payment on the IDR plan, the Debtor must remit that IDR plan payment to the Chapter 13 Trustee *in advance* of the first post-confirmation payment due date, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of those funds to the Title IV Loan Holder.

iii. The Title IV Loan Holder will be paid through the Chapter 13 plan as a Class _____ Creditor.

iv. Following confirmation of this Chapter 13 Plan and in addition to the Debtor's scheduled Chapter 13 Plan payment to the Chapter 13 Trustee's office, the Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment. The Chapter 13 Trustee will transfer the IDR plan payment funds to the Title IV Loan Holder.

v. The Debtor must remit each post-confirmation IDR plan payment to the Chapter 13 Trustee *in advance of the IDR payment due date*, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of the IDR plan payment to the Title IV Loan Holder.

vi. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

vii. Upon request of the Chapter 13 Trustee, the Debtor will request the Title IV Loan Holder modify Debtor's monthly IDR plan payment due-date to accommodate the Chapter 13 Trustee's disbursement schedule.

viii. The Chapter 13 Trustee may request the Title IV Loan Holder establish an automated clearinghouse (ACH) account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

ALTERNATIVE Paragraph 5 (use if Debtor will apply to and enroll in an IDR plan during Debtor's Chapter 13 plan)

5) Initial Participation in an IDR Plan

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

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

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

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

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

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

(e) Within thirty (30) days of Debtor's receipt of a notice that the Title IV Loan Holder has determined Debtor's qualification for participation in an IDR plan and calculated

Debtor's monthly IDR plan payment, the Debtor shall notify the Chapter 13 Trustee of the IDR participation and the amount of the IDR plan monthly payment. Debtor is responsible to file with the Bankruptcy Court a motion to modify the Chapter 13 Plan to permit monthly payment under the IDR plan, indicating whether the payments will be made directly by the Debtor or through the Chapter 13 Trustee's office, and adjusting the Chapter 13 plan dividends, if necessary.

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

ALTERNATIVE SUBSECTION (f)
[Use for IDR Payments Inside the Chapter 13 Plan]

The Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment for the Chapter 13 Trustee to transfer to the Title IV Loan Holder.

In order for the Chapter 13 Trustee to transfer Debtor's monthly IDR plan payment to the Title IV Loan Holder timely, the Debtor must remit each IDR plan payment in full to the Chapter 13 Trustee *in advance of the IDR payment due date*, and in good funds (money order, bank check, TFS payment, or payroll deduction).

i. The Title IV Loan Holder will be paid through the Chapter 13 Plan as a Class _____ Creditor.

ii. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

iii. Upon the request of the Chapter 13 Trustee, the Debtor will request the Title IV Loan Holder modify Debtor's monthly IDR plan payment due date in order to accommodate the Chapter 13 Trustee's disbursement schedule.

iv. The Chapter 13 Trustee may request the Title IV Loan Holder establish an ACH account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

6) Waivers

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

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

7) Annual Certification of Income and Family Size

Pursuant to 34 CFR 685.209, 34 CFR 685.221, or 34 CFR 682.215, as applicable, the Debtor shall annually certify (or as otherwise required by the Title IV Loan Holder) the Debtor's income and family size, and shall notify the Chapter 13 Trustee of any adjustment (increase or decrease) to the Debtor's monthly IDR plan payment resulting from annual certification.

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

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

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

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

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

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

8) Discontinuation of Participation in IDR

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

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

c. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan without notice to the Title IV Loan Holder, Debtor will incur a

delinquency and may default on the Federal Student Loan as defined in CFR 34 CFR 682.200(b) and 685.102.

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

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

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

9) Opportunity for Title IV Loan Holder to Cure

Debtor first shall give notice to the Title IV Loan Holder in writing by letter of any alleged action by the Title IV Loan Holder concerning the Federal Student Loans and IDR plan that is contrary to the provisions of this Section and or 11 U.S.C. § 362(a). Debtor shall not institute any action in the Bankruptcy Court against the Title IV Loan Holder under 11 U.S.C. § 362(a) and (d) until after the Title IV Loan Holder has been given a reasonable opportunity to review, and, if appropriate, correct such actions. Notices provided to the Title IV Loan Holder under this subsection must include a description or identification of the actions that Debtor alleges to be in violation of this Section of the Chapter 13 Plan and/or 11 U.S.C. § 362(a).

10) Notice

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

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

ordered by the court, **in addition to the aforementioned monies, the Debtor(s) must commit all tax refunds, beginning with tax year 2017 to the plan each year during the applicable plan period. Said refunds must immediately (upon receipt of) be turned over to the Chapter 13 Trustee, in a certified check or money order (Debtor(s) should not sign their IRS Refund Check and send it to the Trustee. All money sent to the Trustee needs to be in the form of a certified check or money order) made payable to Jon M. Waage, Chapter 13 Trustee, with complete information as to what tax year the refund represents and send to our payment address, at PO Box 260, Memphis TN 38101-0260. Additionally, the Debtor(s) must provide complete copies of all tax returns to the Trustee's office no later than April 15th of each year for the preceding year's taxes.**

31. The NONCONFORMING PROVISIONS of Debtors' Plan (paragraph 9) is hereby stricken. The Debtor(s) shall be permitted to pay her Federal Student Loan(s)/U.S. Department of Education Loans outside of the plan. Claim(s) 14-1 of Navient Solutions, LLC and Claim(s) 15-1 of Navient Solutions, LLC shall be allowed, however claimant shall not receive any distributions by the Chapter 13 Trustee under the confirmed plan. The Debtor(s) shall not be entitled to discharge in whole or in part of any student loans. The Debtor(s), is/are currently in an Income-Dependent Repayment Program ("IDRP"). The Debtor(s) shall continue to pay his/her Federal Student Loan(s)/U.S. Department of Education Loans pursuant to the IDRP separately and outside of the Plan without disqualification due to the bankruptcy. Federal Student Loan(s)/U.S. Department of Education Loans shall not place the student loans into a deferment or forbearance because of the filing of the Chapter 13 bankruptcy case. For so long as the student loans are paid outside of the plan, it shall not be a violation of 11 USC 362 or any other applicable law or regulation for Federal Student Loan(s)/U.S. Department of Education Loans to communicate directly with the Debtor by mail, telephone or email. In the event that a different IDRP is offered by Federal Student Loan(s)/U.S. Department of Education Loans, which offers more favorable repayment options, the Debtor(s) shall be permitted to seek participation in such IDRP without disqualification due to this bankruptcy and

without further permission of the court. Debtor(s) may recertify under the applicable IDRP annually or as otherwise required and shall within thirty (30) days following a determination of his monthly payment due pursuant to such recertification file an amended budget to reflect such change. Federal Student Loan(s)/U.S. Department of Education Loans shall not be required to enroll Debtor(s) in any IDRP unless Debtor(s) otherwise qualifies for such IDRP.

Trustee Jon M. Waage is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

JMW/br

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: LaDeidra Antoinette Berry, Debtor(s).	C/A No. 16-01460-JW Chapter 13 **ORDER**

This matter comes before the Court upon the Motion to Determine Award of Attorney's Fees and Application for Fees Pursuant to the Equal Access to Justice Act ("Motion") filed by LaDeidra Antoinette Berry ("Debtor"), which seeks an award of attorney's fees and costs under 11 U.S.C. § 105 and the Equal Access to Justice Act.[1] Pennsylvania Higher Education Assistance Agency d/b/a FedLoan Servicing ("FedLoan Servicing") filed a response to the Motion, and a hearing was held on the matter.[2] The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. Pursuant to Fed. R. Civ. P. 52, which is made applicable to this matter pursuant to Fed. R. Bankr. P. 7052 and 9014(c), the Court makes the following findings of fact and conclusions of law.[3]

FINDINGS OF FACT

1. Debtor is obligated on a student loan ("Debtor's Loan") held by the United States Department of Education ("DOE") and serviced by its agent FedLoan Servicing.

[1] Further references to the United State Bankruptcy Code (11 U.S.C. § 101, *et al.*) shall be by section number only.

[2] Despite being named as a party, the United States Department of Education (the "DOE") did not file an objection to the Motion.

[3] To the extent the following findings of fact are conclusions of law, they are adopted as such, and to the extent the following conclusions of law are findings of fact, they are so adopted.

2. In order to pay Debtor's Loan, prior to filing the above-captioned case, and continuing at times post-petition, Debtor was enrolled in both the Public Service Loan Forgiveness Program ("PSLF Program"), which allow a borrower employed full-time in a public service position to obtain forgiveness of student loan debt after making 120 monthly payments, and an income-driven repayment plan ("IDR"), which permits a student loan borrower to make payments in amounts based on the income earned by the borrower.[4]

3. On March 25, 2016, Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code.

4. Upon receiving notice of Debtor's bankruptcy case, FedLoan Servicing placed Debtor's Loan in an administrative forbearance. Upon placing the loan in forbearance, FedLoan Servicing stopped collection efforts against Debtor, and discontinued applying Debtor's payments in accordance with the PSLF Program or her IDR plan.

5. On March 25, 2016, Debtor proposed a chapter 13 plan ("First Plan"), which provided the following treatment for Debtor's Loan:

> F. Student Loan Claims: As indicated on Schedule J, the Debtor will pay this creditor directly, this creditor will not share in pro rata distribution from the Trustee: Fed Loan Servicing. If this claim is filed by any other entity or account number: Debtor will be responsible to notify the Trustee or Trustee may make disbursement on the claim pursuant to IV.E. above.
>
> Debtor agrees that if she signs a certification of plan completion, she will be certifying that all contractual payments that came due to this creditor have been made through the date of certification.

(Emphasis added). Through this provision, it appears Debtor intended to maintain and continue her contractual student loan payments to FedLoan Servicing through direct payments and under

[4] The Court observes that the parties interchangeably use the term "income-based repayment plan" ("IBR") with the term "income-driven repayment plan." It is the Court's understanding that Debtor was enrolled in an IBR plan, which is a type of IDR plan.

the programs under which she had qualified and was performing at the time of the filing of her petition and the First Plan.

6. Debtor served the First Plan on FedLoan Servicing at PO Box 69184, Harrisburg, PA, 17106-9184, which is the same post office box that was indicated for notices in the proof of claim filed by FedLoan Servicing in this case.

7. After no objections were filed, the Court entered an Order Confirming the First Plan on May 9, 2016.

8. On June 14, 2016, FedLoan Servicing filed a proof of claim on behalf of the DOE, indicating that Debtor owed $97,009.87 on Debtor's Loan. The proof of claim indicated all notices and payments during the bankruptcy case should be sent to FedLoan Servicing.[5]

9. On July 27, 2016 and August 30, 2016, FedLoan Servicing responded by letters to concerns raised by Debtor's counsel that FedLoan Servicing was not complying with the terms of the confirmed First Plan, including timely crediting Debtor's payments towards the PSLF program and IDR plan.[6] The letter states the following in response to Debtor's inquiries:

> [Debtor's] request, as we understand it, is for information pertaining to the Public Service Loan Forgiveness (PSLF) program. Unfortunately, until we receive notice from the courts that the bankruptcy has concluded, her loans will not be eligible for the PSLF program. Per the Department's guidelines, qualifying payments must be made for the full scheduled monthly installment amount on an Income Driven Repayment Plan, a 10 year Standard Repayment Plan, or another Direct Loan Program repayment plan with an amount equal to that of a 10 year Standard Repayment Plan.
>
> Due to the active bankruptcy, Ms. Berry is not being billed for a monthly installment. Any payments made would be at her sole discretion and would not be a result of a required scheduled payment. Therefore, under the criteria from the Department, these payments would not count as qualifying payments. Once the

[5] The proof of claim indicated that notices should be sent to "U.S. Department of Education c/o FedLoan Servicing" at P.O. Box 69184, Harrisburg, PA 17106-9184.

[6] The August 30, 2016 letter was submitted into evidence by Debtor without objection.

bankruptcy concludes and billing resumes, Ms. Berry could continue to make qualifying payments.

10. In response, Debtor filed an amended plan on October 3, 2016 ("Second Plan"),[7] which provided the following treatment for Debtor's Loan:[8]

> F. Student Loan Claims: As indicated on Schedule J, the Debtor will pay this creditor directly; this creditor will not share in the pro rata distribution from the Trustee: FedLoan Servicing. If this claim is filed by any other entity or account number, Debtor will be responsible to notify the Trustee or Trustee may make disbursements on the claim pursuant to IV.E. above.
> Debtor agrees that if she signs a certification of plan completion, she will be certifying that all contractual payments that came due to this creditor have been made through the date of certification.
>
> The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part of her student loan obligations.
>
> *The Debtor shall be allowed to seek enrollment, or to maintain any pre-petition enrollment, in any applicable income-driven repayment ("IDR") plan with the U.S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), including but not limited to the Public Service Loan Forgiveness program, without disqualification due to her bankruptcy. Any direct payments made to the Debtor to Ed since the filing of her petition shall be applied to any IDR plan in which the Debtor was enrolled pre-petition, including but not limited to the Public Service Loan Forgiveness program.*
>
> Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.
>
> The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
>
> Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the

[7] The Second Plan included a coversheet which indicated, in bold font, the changes made to the First Plan, including "Amended to include additional language regarding the Debtor's student loan claims in Section IV.F."

[8] According to § 1329(b)(2), a confirmed plan may be modified and the plan as modified becomes the plan, unless the modification is disapproved. Therefore, for the purposes of this Order, the First Plan and Second Plan may be collectively referred to as the "Plan."

> Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
>
> *The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment.* At such time, the Trustee or the Debtor, may if necessary file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
>
> *During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payment of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.*
>
> In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.
>
> The Debtor's attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR.

(Emphasis added). It appears this plan provision was intended to more definitely describe Debtor's proposed treatment of Debtor's Loan to maintain her prepetition enrollment in the IDR plan and PSLF program via direct payments to FedLoan Servicing, as well as to permit her to apply for and requalify each year for those programs. It further provided for the application of all post-petition payments made to FedLoan Servicing directly by Debtor.

11. According to its certificate of service, the Second Plan was properly served on the United States Attorney for South Carolina,[9] the DOE,[10] the United States Department of Justice,[11] and FedLoan Servicing. The address listed for FedLoan Servicing was the same address that FedLoan Servicing listed for notices on the loan's proof of claim.

12. No objections were filed to the Second Plan, and on January 20, 2017, the Court entered an Order Confirming Plan.[12]

13. Also on January 20, 2017, Debtor filed a certificate of service, which indicated that the January 20, 2017 confirmation order was served on the FedLoan Servicing on behalf of the U.S. Department of Education at the address listed for notice in the proof of claim.

14. On April 27, 2017, Debtor filed a Motion to Enforce Plan ("Motion to Enforce"), which sought to enforce the Plan against FedLoan Servicing and the DOE as payments on Debtor's Loan were still not being applied in accordance with the terms of the confirmed plan. The Motion to Enforce also sought an award of attorney's fees and costs from FedLoan Servicing and the DOE.

15. On May 22, 2017, the DOE filed an Objection to the Motion to Enforce. However, FedLoan Servicing did not file an objection to the Motion to Enforce.

16. After the filing of the Motion to Enforce, Debtor's counsel received a letter dated June 15, 2017 from American Education Services,[13] which appears to be an entity related to FedLoan Servicing. The June 15, 2017 letter stated:

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[9] Debtor served the United States Attorney for South Carolina at the Wells Fargo Building, 1441 Main Street, Suite 500, Columbia, S.C. 29201.

[10] Debtor served the U.S. Department of Education at 400 Maryland Avenue, SW, Washington D.C. 20202.

[11] Debtor served the U.S. Department of Justice at 950 Pennsylvania Avenue, NW, Washington D.C. 20530.

[12] For the purposes of this Order, the confirmation orders that confirmed the First Plan and Second Plan may be collectively referred to as the "Confirmation Order."

[13] The June 15, 2017 letter was admitted into evidence without objection.

> Because we did not receive a request for IDR recertification after receiving the [Notice of Meeting of Creditors], Ms. Berry's installment went from a Partial Financial Hardship (PFH) installment of $129.09 to a Permanent Standard installment of $897.97 on April 7, 2016. On May 24, 2017, Ms. Berry contacted our office regarding recertifying for the IDR plan. She was advised that the bankruptcy status must be ended before she may recertify her current IDR. Unfortunately, this information is not entirely accurate. Please accept our apologies for any confusion or inconvenience that this situation may have caused Ms. Berry.
>
> As long as Ms. Berry is only recertifying the current Income Based Repayment (IBR) plan, she may complete the enclosed application or recertify electronically . . . .

17. On July 14, 2017, in response to certain discovery requests made by Debtor as part of the Motion to Enforce, FedLoan Servicing filed a Motion to Quash, in Part, Subpoena of Debtor.

18. On August 29, 2017, the Court received and entered a Consent Order Resolving Motion to Enforce ("Consent Order"), which was agreed to by Debtor, FedLoan Servicing and the United States of America on behalf of the DOE. Therein, FedLoan Servicing and the DOE agreed to apply Debtor's post-petition payments to her IDR plan and the PSLF program, providing in part that "her loan balance will be recalculated accordingly including but not limited to removing any post-petition capitalization of interest" and "her payments as they were made to date will be accepted as if the payment amount due under the prior annual period continued to be in effect . . . ." The Consent Order expressly reserved Debtor's right to seek attorney's fees from the DOE and FedLoan Servicing under § 105, the Equal Access of Justice Act, and other statutes. The Consent Order also mooted FedLoan Servicing's Motion to Quash.

19. On September 28, 2017, Debtor filed the Motion seeking an award of attorney's fees and costs from FedLoan Servicing and the DOE under § 105 and the Equal Access of Justice Act for the parties' failure to comply with the terms of the confirmed Plan.

20. On October 19, 2017, FedLoan Servicing filed a response to the Motion. The DOE did not file a response to the Motion.

21. On October 23, 2017, Debtor filed correspondence with the Court indicating that she had reached a settlement with the DOE on the Motion. At the hearing on the Motion, it was indicated that the DOE agreed to pay Debtor $6,000 for her attorney's fees and costs.[14] This agreement was memorialized in a consent order entered by the Court. The consent order between Debtor and the DOE specifically provided that it constituted a full settlement between the DOE and Debtor only, and expressly recognized and preserved Debtor's right to pursue further relief against FedLoan Servicing.

22. Thereafter, the Court held a hearing on the Motion. At the hearing, Debtor sought relief under § 105.[15] At the hearing, a representative of FedLoan Servicing, Katelynn Bias, testified about Debtor's Loan and the guidelines regulating FedLoan Servicing's collection of the loan. After hearing arguments from the parties' counsels, the Court took the matter under advisement.

CONCLUSIONS OF LAW

Debtor seeks an award of attorney's fees and costs under 11 U.S.C. § 105 for FedLoan Servicing's failure to comply with the terms of the confirmed Plan. Specifically, Debtor alleges that FedLoan Servicing failed to timely and properly apply payments in accordance with the confirmed Plan and Confirmation Order, which resulted in Debtor incurring attorney's fees and costs in connection with the filing of the Motion to Enforce, related negotiations and entry of the Consent Order, and the filing and arguing of the present Motion.

Section 105(a) of the Bankruptcy Code provides that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court

[14] This amount appears to be approximately half of the attorney's fees and costs requested by the Debtor in her Motion ($12,574.80).

[15] Debtor's arguments under the Equal Access of Justice Act were mooted because she reached a settlement with the DOE.

> from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Both this Court and other courts have held that an award of attorney's fees under § 105 may be appropriate when a party violates the terms of a chapter 13 plan and the court's confirmation order. See, e.g., Fla. Dep't of Rev. v. Rodriguez (In re Rodriguez), 367 F. App'x 25 (11th Cir. 2010) (upholding a bankruptcy court's finding that an award of attorney's fees was appropriate when the State of Florida violated the terms of the debtor's confirmed plan and was in contempt of the confirmation order); In re Crawford, 532 B.R. 645, 655 (Bankr. D.S.C. 2015) ("[The Court's] authority to enforce its orders, including a confirmation order, under § 105(a) must necessarily include the ability to award fees to a debtor who is forced to bring an action, and thus incur attorney's fees, to compel a creditor's compliance with the binding plan and the order confirming the plan."); In re Ford, 522 B.R. 842, 848–49 (Bankr. D.S.C. 2015) (requiring a creditor to pay debtor's attorney's fees when the creditor's conduct constituted a violation of the confirmation order); FNB Bank v. Carlton (In re Carlton), C/A No. 10-40388-JJR-13, Adv. Pro. No. 10-40054-JJR, slip op., 2011 WL 3799885 (Bankr. N.D. Ala. Aug. 26, 2011) ("A willful violation of a chapter 13 confirmation order may be contemptuous, as it was in this case, and § 105(a) provides statutory authority for a bankruptcy court to award monetary sanctions to compensate a debtor for the resulting harm, and at the court's discretion, to further award attorney's fees incurred in successfully achieving enforcement of the offended order.").

Furthermore, the Court of Appeals for the Fourth Circuit has held that through § 105(a), Congress gave bankruptcy courts the statutory authority to hold parties in contempt for failing to comply with the Court's prior orders. See Burd v. Walters (In re Walters), 868 F.2d 665, 669 (4th Cir. 1989) ("We think an order holding [Debtor's counsel] in contempt for his failure to comply

with the previous order of the court was appropriate in carrying out the administration of the estate, and thus was authorized by 11 U.S.C. § 105(a)."); Workman v. GMAC Mortgage LLC (In re Workman), 392 B.R. 189, 194 (Bankr. D.S.C. 2007) (noting that "[b]ankruptcy courts within this Circuit have previously held creditors in civil contempt for violating a confirmation and a discharge order"). The District Court of South Carolina has held that "[i]t is clear from the very terms of [§ 105(a)] that Congress gave the Bankruptcy Court broad inherent discretionary powers to ensure that the motions made and issues raised before it are managed efficiently and justly[,]" including the authority to award attorney's fees. GE Capital Mortgage v. Asbill (In re Asbill), C/A No. 3:99-0773-19, slip op. at 3–4 (D.S.C. Feb. 23, 2000).

As an initial matter, to determine if an award of attorney's fees under § 105(a) is appropriate, the Court must determine the conclusive effect of the confirmed Plan in this case.

Violations of the Confirmed Plan

Debtor alleges that FedLoan Servicing is bound by her confirmed Plan and has violated the terms of the Plan under § 1327 and the Supreme Court's holding in United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 1367, 176 L.Ed.2d 158 (2010). Section 1327 of the Bankruptcy Code provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan." The Supreme Court in Espinosa held that a confirmed plan is a binding final judgment, which generally stands "'in the way of [a party] challenging [the plan's] enforceability.'" Id. at 269, 130 S. Ct. at 1376 (quoting Travelers Indemnity Co. v. Bailey, 557 U.S. 137, 140, 129 S.Ct. 2195, 2198, 174 L.Ed.2d (2009)). In Espinosa, the Supreme Court, addressing a plan that contained a legal error, determined that when there is proper service and otherwise sufficient due process, the confirmation order "remains

enforceable and binding on [the party] because the [creditor] had notice of the error and failed to object or timely appeal." Id. at 276, 129 S.Ct. at 1380. In other words, if a party was properly served with the chapter 13 plan, and that party does not object to the plan, the order confirming that plan is broadly binding on the party, regardless of whether the party agreed to that treatment and even if that treatment may otherwise constitute a legal error.

In the present matter, the Plan identifies FedLoan Servicing as the creditor or party acting for the creditor on Debtor's Loan.[16] Further, the Plan provided for Debtor to maintain her enrollment in the IDR plan and PSLF program and also provided clear instruction regarding how her loan payments should be applied. The language in the Plan regarding Debtor's Loan was clear and unequivocally applied to FedLoan Servicing. In addition, the language was highlighted to provide adequate notice of the proposed treatment of Debtor's Loan, with the applicable section header titled "Student Loans," and was the only section of the Plan that was in bold and italicized font.

The Plan was properly served on FedLoan Servicing and no party objected to confirmation.[17] The Plan was confirmed and the Confirmation Order became final as no party filed a motion to reconsider under Fed. R. Civ. P. 59 or 60 or appealed. Further, FedLoan Servicing does not dispute that it received copies of the Confirmation Order. Therefore, upon confirmation,

[16] On Schedule J, Debtor lists "Student Loan" as one of her expenses that she will pay directly. Debtor's Schedule E/F also indicates that FedLoan Servicing is the creditor for her student loan.

[17] At the hearing on the Motion, FedLoan Servicing raised for the first time that it records do not reflect that it received a copy of the Second Plan. However, under Fed. R. Bankr. P. 9006(e), service "by mail is complete on mailing." Debtor's certificate of service for the Second Plan indicates it was served on the address indicated for notices by FedLoan Servicing in the proof of claim for Debtor's Loan. This Court has held that mailing creates a presumption of receipt, and the party who disputes receipt must demonstrate that the document was not properly mailed. See In re De Weerd, C/A No. 16-05655-JW, slip op. at 5–6 (Bankr. D.S.C. Mar. 16, 2017). FedLoan Servicing has not raised any allegations or presented any evidence that the Second Plan was not properly mailed. Therefore, the Court must conclude from the evidence that the Second Plan was properly served on FedLoan Servicing.

FedLoan Servicing was bound to the terms of the Plan pursuant to § 1327 and according to the holding in Espinosa.[18] By failing to comply with the terms of the Plan, despite notice and Debtor's demand, FedLoan Servicing was in violation and contempt of the Court's Confirmation Order.[19]

Due to FedLoan Servicing's actions, Debtor was required to file the Motion to Enforce in order to compel compliance with the terms of the Plan, which resulted in her incurring additional attorney's fees and costs. As a result of the efforts of Debtor's counsel, the Motion to Enforce was settled between the parties, with the settlement recognizing the Plan's requirements of Debtor's continuing participation in the IDR plan and the PSLF program, and the proper application of all her post-petition payments to those programs. Not only did the parties agree that Debtor's Loan be treated as required by the terms of the Plan, but, in addition, they specifically anticipated and reserved Debtor's right to seek attorney's fees and costs for violations of the Plan.[20]

It does not appear that the fees and costs associated with the Motion to Enforce and this Motion would have been incurred if FedLoan Servicing has properly complied with the Plan and Confirmation Order. Therefore, the Court finds that an award of attorney's fees and costs to the

[18] As part of its argument at the hearing, FedLoan Servicing indicated that the Plan, on its face, violated law as it was contradictory to federal regulations regarding the servicing of student loans when the borrower has filed bankruptcy. As such, FedLoan Servicing argued that under Espinosa, the Court had a duty to not confirm the Plan, and therefore, the plan is not binding. However, the Court notes that FedLoan Servicing's own pleadings indicate that the asserted applicable regulations are conflicting, and "do not specifically identify . . . how a student loan that is subject to a pre-petition IBR plan should be administered during the course of a bankruptcy proceeding . . ." Furthermore, this Court should not be expected to know each industry's specific guidelines and regulations without it first being called to the Court's attention. Regardless, the holding in Espinosa is clear that, according to federal statute, a plan confirmed (after proper notice to the creditor and no objections filed) remains binding on the parties, even if the plan contains a legal error. Espinosa, 559 U.S. at 276, 129 S.Ct. at 1380. Therefore, this argument is without merit and overruled.

[19] The Court has also considered the factors for civil contempt as set forth by the Fourth Circuit Court of Appeals in Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000).

[20] It does not appear that the fees and costs associated with the Motion to Enforce would have been incurred if FedLoan Servicing had properly complied with the Confirmation Order when it was first entered.

Debtor is appropriate under § 105. While this holding concludes the issue, the Court will nonetheless consider the defenses raised by FedLoan Servicing in its objection.

FedLoan Servicing's Defenses

In its objection to the Motion and the Joint Statement of Dispute, FedLoan Servicing primarily argues two defenses for its non-compliance: (1) its contract with the DOE did not provide it with the authority to comply with the Plan and Confirmation Order, and (2) it did not act in bad faith because it was following applicable federal regulations.

Limited Authority Defense

FedLoan Servicing argues that it is only the servicer for Debtor's Loan on behalf of the DOE, and that the contract between it and the DOE limited the action it could take.[21] Specifically, FedLoan Servicing asserts that upon a borrower's bankruptcy filing, it is limited to the following actions: placing the loan in bankruptcy status (*i.e.* forbearance status, which defers collection activity), preparing a proof of claim, and providing any additional support needed to defend the loan against a bankruptcy discharge. In other words, FedLoan Servicing asserts that its non-compliance with the Plan and Confirmation Order should be excused because of its contract with and limited authorization from the DOE.

The Court disagrees.

First, the Court notes that, both prepetition and post-petition, FedLoan Servicing was designated and acted as the authorized representative of the DOE for purposes of servicing Debtor's Loan, communicating with Debtor, and managing and applying the student loan payments. It further appears from FedLoan Servicing's July 27 and August 30, 2016 letters that it made determinations, in fact incorrect determinations, regarding Debtor's qualification for her

[21] A copy of this contract was admitted into evidence without objection.

continued enrollment in the PSFL Program and IDR Plan. It considered Debtor disqualified because of her bankruptcy filing—even though Debtor provided for continued direct payments in the confirmed Plan in an effort to keep current on her loans.[22]

A review of the contract between the DOE and FedLoan Servicing demonstrates that FedLoan Servicing's responsibilities included among other things to: (1) "respond to written and email questions and requests timely and accurately[;]" (2) "respond and resolve customer complaints; and create and execute a plan to escalate complaints to [the DOE] and the Ombudsman[;]" and (3) "provide a means for [DOE] to make a final determination on eligibility of borrowers for entitlements, such as discharge due to Closed School, Death, etc., and compromise offers." See FedLoan Servicing Ex. 1, Servicing Contract at Attachment A-2, p. 11–12.

Furthermore, a review of FedLoan Servicing's internal bankruptcy procedural guides shows that FedLoan Servicing reviews all of the bankruptcy documents filed in a case on behalf of the DOE, including both initial and amended chapter 13 plans to determine if the plan includes "any objectionable language (such as student loan dischargeability) toward [FedLoan Servicing and the DOE] . . . ."[23]

In the Court's view, the contract and guides presented by FedLoan Servicing indicates that it had sufficient authority to comply with the requirements of the Plan and Confirmation Order or ensure that the DOE provided it with the necessary authority or instruction to ensure compliance.

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[22] There may also be a substantial question whether FedLoan Servicing's action on behalf of the DOE discriminated against Debtor in violation of 11 U.S.C. § 525(a) or (c). See 4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 525.02 (16th ed. rev. 2016) (noting that "the list of discriminatory acts that is included in section 525(a) is not meant to be exhaustive" and indicating that "[p]erhaps the clearest and most easily detectable type of discrimination prohibited by section 525 is discrimination based upon the commencement of the bankruptcy case itself" as it "obviously frustrates the purpose of Congress to make the fresh start or reorganization benefits provided by the Code freely available to debtors who may need them").

[23] The guides provided to the Court do not outline what is objectionable language.

Regardless, upon its receipt of the Plan, if FedLoan Servicing felt unable to comply, it should have objected. It did not. Nor was there any evidence that it reported the Plan's provisions to the DOE for action. Instead, FedLoan Servicing seeks immunity due to the alleged insufficiencies in its own servicing contract and asserts that its hands were tied. To accept FedLoan Servicing's arguments would allow it and other similarly situated creditors or parties-in-interest to escape the consequences of a duly noticed confirmed plan and § 1327 by simply limiting its or its agents' responsibility. As a matter of statutory construction and public policy, such a defense cannot be accepted.[24]

Bad Faith

FedLoan Servicing also alleges that an award of attorney's fees is not appropriate because it asserts that it did not act in bad faith as it believed it was following federal regulations when it did not comply with the confirmed Plan and Confirmation Order.

As an initial matter, the Court finds that bad faith is not a requirement for the Court to take action pursuant to § 105.[25] Section 105 provides a sweeping grant of authority to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy

[24] When a court orders an agent of an entity to take certain actions, the agent who has notice of the court's order may be held in contempt of court if the agent violates the order. See 17 C.J.S. Contempt § 57 (Dec. 2017 update) ("It is usual, in an order directed against a corporation, to lay the restraint or command, not only on the corporation itself, but also on its officers, agents, and servants, so that in the case of its violation not only the corporation itself is amendable to punishment, but also its officers, agents and servants, whether or not parties to the proceeding, provided they have knowledge of the terms of the order and disobey it willfully.").

[25] FedLoan Servicing cites to McGahern v. 1st Citizens Bank & Trust Co. (In re Weiss), 111 F.3d 1159 (4th Cir. 1997) for support of its arugment that the Court must find bad faith prior to awarding attorney's fees under § 105. However, in Weiss, the court addresses an award of attorney's fees under its inherent authority to regulate the litigants that appear before it, not a bankruptcy court's statutory authority under § 105. See Hardee v. Mitchell (In re Hardee), C/A No. 96-1968, slip op., 1998 WL 766699 at *3 (4th Cir. Oct. 20, 1998) (unpublished) (noting that bankruptcy courts have several avenues, in addition to "the inherent power to regulate litigants' behavior," for the authority to sanction, including the court's authority under § 105(a) as recognized in In re Walters, 868 F.2d 665, 670 (4th Cir. 1989)).

Code, including ensuring that parties comply with the terms of a confirmed chapter 13 plan under § 1327(a), and is not limited to bad faith conduct.

Secondly, the regulation on which FedLoan Servicing relies, 34 C.F.R. § 682.402(f)(2), does not appear to limit FedLoan Servicing or the DOE from complying with the terms of a confirmed chapter 13 plan or otherwise insulate it from respecting the Court's orders. This section of the federal regulations indicates that "[i]f the lender is notified that a borrower has filed a petition for relief in bankruptcy, the lender must immediately suspend any collection efforts *outside* the bankruptcy proceeding against the borrower . . . ."[26] 34 C.F.R. § 682.402(f)(2) (2017) (emphasis added). First, the Court notes that direct payments made pursuant to a confirmed plan are part of the bankruptcy proceeding. See In re Dowey, C/A No. 12-02002-JW, slip op. at 8 (Bankr. D.S.C. Feb. 9, 2017) (holding that post-petition payments made directly to a mortgage creditor that were included in a chapter 13 plan were payments under the plan). Second, the plain reading of this regulation does not prevent the acceptance and application of payments pursuant to the specific terms of a confirmed chapter 13 plan.[27]

The fallacy of FedLoan Servicing's argument is demonstrated by a portion of its objection:

> An inherent conflict exists within the regulations themselves, and between the regulations and the Bankruptcy Code, that suggests that a borrower cannot be both in bankruptcy and an [IDR] repayment plan at the same time. The federal regulations regarding [IDR] do not mesh with the provisions of Chapter 13 regarding the proposal and confirmation of a Chapter 13 plan, and the regulatory agencies have not taken appropriate steps to specifically consider how [IDR] plans should be treated in bankruptcy.

[26] It appears to the Court that the purpose of this regulation is to prevent possible violations of the automatic stay under § 362 due to affirmative demands for payment or other violation activity after a bankruptcy case is filed, rather than to indicate a policy that all student loans in which the borrower is in bankruptcy must be placed in an administrative forbearance for the entirety of the bankruptcy case, regardless of the terms of a confirmed plan.

[27] Certainly, by the filing of a proof of claim, FedLoan Servicing requested and expected payments to be made on Debtor's Loan after confirmation.

> Under Espinosa, the [] Plan is not binding on DOE because the [] Plan contained provisions that were contrary to the existing federal regulations that govern a loan such as [Debtor's] Loan that was in [IDR] pre-petition.

FedLoan Servicing Objection at 17, Oct. 19, 2017, ECF No. 56.

The language of § 1327 and the holding in Espinosa provide the opposite.[28] Furthermore, FedLoan Servicing's agreement in the Consent Order dated August 29, 2017 to allow Debtor to continue under the PSLF Program and IDR Plan from the petition date is directly contrary to this argument.

Under the circumstances of this case, it is necessary and appropriate for the Court to award Debtor's attorney's fees so as to enforce and implement its orders and to prevent an abuse of process.

Amount of Attorney's Fees and Costs

Debtor's attorneys submitted to the Court the time records in this matter, indicating attorney's fees and costs in the amount of $22,317.30. These fees include the time counsel spent contacting FedLoan Servicing to enforce the Plan and Confirmation Order through the filing of the Motion to Enforce and Motion, negotiating settlements for the motions, preparing for and attending the hearing on the Motion, and other related services. FedLoan Servicing did not challenge the amount of the Debtor's counsel's fees and costs, the rates charged or the nature and extent of services in its objection or the joint statement of dispute.[29] Based on a review of the time

[28] In addressing a Fed. R. Civ. P. 60(b)(4) motion to void a confirmed plan, the United States Supreme Court in Espinosa emphasized the binding effect of a confirmed chapter 13 plan after notice and an opportunity to object: "Where, as here, a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief." Espinosa, 559 U.S. at 276, 130 S.Ct. at 1376.

[29] At the hearing, FedLoan Servicing briefly argued that attorney's fees should not be awarded for the failure to comply with the First Plan because the language of that plan was too general, and did not specifically mention the PSLF Program and IDR Plan. However, that argument was not made in its written objection to the Motion, nor was it set forth or preserved in the Joint Statement of Dispute filed according to Chambers Guidelines. The Chambers

records of Debtor's counsel, the Court finds that the rate of Debtor's counsel, the number of hours spent, and the costs asserted to be reasonable. In making this determination, the Court considered the guiding factors in determining a reasonable attorney's fee award under the precedent set by the Court of Appeals for the Fourth Circuit.[30] See Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978) (setting forth a twelve-factor test for the court to consider whether an attorney's fee award is reasonable).

As Debtor has reached a settlement with the DOE for payment of $6,000.00 in attorney's fees and costs in this matter, the Court finds that the award of attorney's fees and costs against

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Guidelines prohibit a party submitting a Joint Statement of Dispute from reserving the right to materially alter or supplement the Joint Statement, and binds them to the positions and disclosures contained therein.

In addition, according to the evidence presented at the hearing, it appears that FedLoan Servicing did not apply Debtor's direct payments referenced by the First Plan because it held an erroneous belief that the filing of the bankruptcy case disqualified Debtor from continuance in and qualification for the PSLF Program and IDR Plan until "the bankruptcy concludes." See Debtor Ex. 3, FedLoan Servicing Letter dated Aug. 30, 2016 at 2; Debtor Ex. 6, American Education Services Letter dated June 15, 2017 at 1.

[30] The following factors under Barber favor a finding that counsel for the Debtor's attorney's fees and costs are reasonable:

(1) The time and labor expended: This was a prolonged matter that took more than a year to resolve between the parties.
(2) The novelty and difficulty of the questions raised: This matter presented the violation of a confirmation order in the context of student loan debt, which has not been previously presented to this Court.
(3) The customary fee for like work: The Court finds that counsel for the Debtor's fee is a customary rate for litigation within a chapter 13 consumer bankruptcy case.
(4) The time limitations imposed by the circumstances: Because of the urgency to continue Debtor's enrollment in her IDR plan and PSLF Program, Debtor' counsel was under certain time limitations to seek the relief sought by the Motion to Enforce.
(5) The amount in controversy and the results obtained: Debtor's counsel was successful in obtaining the relief sought in the Motion to Enforce as reflected by the terms of the settlement between the parties.
(6) The experience, reputation and ability of the attorney: The Court finds Debtor's counsel to have significant experience and ability and an excellent reputation among the bar.
(7) Attorney's fees awarded in similar cases: In reviewing this Court's prior orders awarding attorney's fees for a creditor's violation of confirmation orders, the fees requested by Debtor's counsel are on par with the fees awarded in those matters.

As to the remaining factors, the Court finds that those factors do not weigh against the Court's finding that the attorney's fees and costs requested by Debtor's counsel are reasonable.

FedLoan Servicing should be reduced by this amount. Therefore, the Court hereby orders that FedLoan Servicing shall pay $16,317.30 in attorney's fees and costs to Debtor as a result of FedLoan Servicing 's failure to comply with the terms of the Plan and Confirmation Order.

CONCLUSION

The Court hereby orders FedLoan Servicing to pay $16,317.30 in attorney's fees and costs to Debtor. FedLoan Servicing shall make payment of this amount to Debtor's counsel and file a certification of compliance with this Order (including proof of payment) no later than 14 days after the entry of this Order.

AND IT IS SO ORDERED.

Columbia, South Carolina
February 2, 2018

FILED BY THE COURT
02/02/2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Entered: 02/02/2018

John E Waites

US Bankruptcy Judge
District of South Carolina

Separate Classification

§ 1322. Contents of plan

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated;
…

Bentley Baseline Test in First Circuit:

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

See Judge Berger's article on separate classification of student loans for detailed discussion of various tests on unfair discrimination

THE STUDENT LOAN COLOSSUS: SEPARATE CLASSIFICATION OF STUDENT LOANS IN CHAPTER 13

Hon. Robert D. Berger
United States Bankruptcy Judge
District of Kansas

Forty-four million Americans owe $1.52 trillion of student loan debt. The average balance per borrower is $39,400.

Here, we discuss the separate classification and favorable treatment of student loan debt in a Chapter 13 plan. In Chapter 13, there is no requirement that all substantially similar claims in a plan be placed in the same class nor is there a prohibition against classifying substantially similar claims separately. That's the easy part. The more difficult issue is the nature of more favorable treatment for separately classified student loan debt and whether this treatment constitutes unfair discrimination. *See In re Engen*, 561 B.R. 523 (Bankr. D. Kan. 2016) (allowing separate classification and favorable discrimination of student loans in a Chapter 13 plan–much of this outline is borrowed from *Engen*).

A. Law

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

As to the dischargeability of most student loans, § 523(a)(8) provides:

> (a) discharge under section . . . 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (8) Unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for
>
> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit . . . ; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan . . .

Section 1122 provides:

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

Section 1129(b)(1) provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements

> of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> Section 1322 in pertinent part provides:
>
> The plan–
> > (3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class, . . .and
>
> (b) Subject to subsections (a) and (c) of this section, the plan may–
> > (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; . . .
> > (5) . . . provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due. . . .

Section 1325(a)(1) provides:

> (a) Except as provided in subsection (b), the court shall confirm a plan if–
> > (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

Under Chapter 13, a debtor uses post-petition disposable income to pay prepetition debts under a confirmed plan over a three- to five-year commitment period. Debtors who are above median income must propose a five-year commitment period. While debtors must provide for payment of priority claims under § 507 in full over the life of the plan,[1] they seldom pay nonpriority unsecured debt in full. A court may confirm a plan failing to pay nonpriority unsecured debt in full if "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."[2] Thus, confirmed plans failing to pay all nonpriority unsecured debts retain a debt balance at the end of the commitment period. A full compliance discharge under § 1328(a) discharges the

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[1] An exception to this requirement for assigned Domestic Support Obligations does not apply here. *See* § 1322(a)(4).
[2] § 1325(b)(1)(B).

remaining balance. However, a § 1328(a) discharge is subject to exceptions, and a debtor's liability for those debts excepted from discharge continues after plan completion. Student loans are one of those debts excepted from discharge under § 1328(a).[3]

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

"Despite the continued growth of student loan debt, Congress has increasingly restricted a debtor's ability to discharge his or her student loans through bankruptcy."[4] In 1978, Congress added § 523(a)(8), prohibiting the discharge of federal student loans in a Chapter 7 proceeding unless they were due and owing for five years. "Congress was primarily concerned about abusive student debtors and protecting the solvency of student loan programs."[5] Congress wanted "to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings."[6] In 1990, Congress extended the nondischargeability provision to Chapter 13 full compliance discharge cases and extended the five-year waiting period to seven years.[7] In 1998, a Code revision eliminated all waiting periods as a means to discharge a student loan. In 2005, Congress added § 523(a)(8)(B), extending nondischargeability to private student loans—not only government-related student loans.[8] Under § 523(a)(8), student loans are nondischargeable, "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[9]

Debtors seeking a § 523(a)(8) undue hardship discharge are required to file an adversary

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[3] § 1328(a) incorporates § 523(a)(8) by reference.
[4] Jennifer Grant & Lindsay Anglin, *Student Loan Debt: The Next Bubble?*, 32-DEC AM. BANKR. INST. J. 44, 44 (2013). *See also* Brendan Baker, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1218 (2012) ("[L]egislation . . . shows a clear progression towards complete nondischargeability of all forms of student loans in bankruptcy.").
[5] Educ. Credit Mgmt. Corp v. Polleys (*In re* Polleys), 356 F.3d 1302, 1309 (10th Cir. 2004). *See also* Santa Fe Med. Svcs., Inc. v. Segal (*In re* Segal), 57 F.3d 342, 348 (3rd Cir. 1995) ("Congress sought principally to protect government entities and nonprofit institutions of higher education . . . from bankruptcy discharge.").
[6] *Polleys*, 356 F.3d at 1306. *But see* Baker, *supra* note 44, at 1217 (indicating that when the 1970 Bankruptcy Act Commission considered the issue "less than one percent of government-backed loans were discharged in bankruptcy) (citing H.R. Doc. No. 93-137, pt. 1, at 178 n.5 (1973)).
[7] Grant, *supra* note 44, at 44.
[8] *Id*.
[9] § 523(a)(8).

proceeding under Fed. R. Bankr. P. 7001(6).[10] This "bankruptcy litigation is sufficiently expensive, and . . . so demanding, that debtors rarely even try to have student loan debt discharged."[11] In a Chapter 13 case, debtors cannot seek an undue hardship discharge under § 523(a)(8) until "after completion by the debtor of all payments under the plan."[12] Clearing § 523(a)(8)'s undue hardship hurdle is challenging and confusing for debtors because the Code does not define what constitutes undue hardship. Courts apply a variety of judicially formulated tests that are frequently criticized by commentators because debtors "must establish a certainty of hopelessness to achieve a discharge."[13]

For many debtors, achieving an undue hardship discharge is an exercise in futility. In 2010, a U.S. Bankruptcy Court found that a man suffering from diabetes and kidney disease leading to legal blindness had not shown the requisite certainty of hopelessness, despite the Social Security Administration's finding that his blindness constituted a permanent disability.[14] One bankruptcy court noted that "hardship discharges are rarely granted other than in the case of a debtor's death."[15] Section 523(a)(8) imposes harsher consequences on student loan debtors than those debtors who hold gambling debts or abuse most forms of consumer credit[16] or, for that matter, other debts owed to the federal government. "No other legitimately contracted consumer

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

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

[12] § 1328(a). *See also* Bender v. Educ. Credit Mgmt. Corp. (*In re* Bender), 368 F.3d 846 (8th Cir. 2004) (stating that undue hardship should be determined at the time of discharge, not at commencement of the § 523(a)(8) proceeding); Raisor v. Educ. Loan Serv. Ctr., (*In re* Raisor), 180 B.R. 163 (Bankr. E.D. Tex. 1995) (dismissing as premature a student loan dischargeability action when filed seven months after the Chapter 13 plan, but three years before the plan's scheduled completion).

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

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

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

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

loan . . . is subjected to the assumption of criminality. . . ."[17] The result is that § 523(a)(8) "renders student loan debt presumptively nondischargeable" while other § 523(a) debts are "presumptively *dischargeable*."[18] For student loan debts, debtors must prove dischargeability as opposed to other § 523(a) exceptions which require creditors to prove nondischargeability. Section 523(a)(8) sets a "near-impossible burden for which reform is needed."[19]

C. Chapter 13 Separate Classification and Discrimination

Section 1322(b)(1) is permissive and allows debtors to designate and discriminate between general unsecured creditors in a Chapter 13 plan as provided by § 1122.[20] However, debtors may not discriminate unfairly.[21] Section 1122(a) allows the separate classification of claims that are substantially similar. In a Chapter 11 case, § 1129(b)(1) requires that a plan "not discriminate unfairly, and is fair and equitable."[22] In Chapter 13, § 1322(b)(1) contains the prohibition that the plan may not discriminate unfairly against any class designated for separate classification. The Code allows fair discrimination.[23] Section 1122(a) only requires that "dissimilar claims not be classified together."[24] "There is no requirement that all substantially similar claims be placed in the same class nor is there a prohibition against classifying substantially similar claims separately."[25] "Classification is simply the grouping together of claims with respect to which the plan proposes a common treatment."[26] The fact that some unsecured creditors will receive more than others does not mean that discrimination is unfair;

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[17] Baker, *supra* note 44, at 1217 (quoting H.R. Rep. No. 94-1232, at 75 (1976), reprinted in H.R. Rep. No. 95-595, at 149 (1977), and 1978 U.S.C.C.A.N. 5963, 6110).
[18] United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 277 n.13 (2010) (italics in original); 3 BANKR. SERVICE L. ED. § 27:1524 (citing cases holding that student loans are presumptively nondischargeable).
[19] Grant, *supra* note 44, at 88.
[20] *See* § 1322(b)(1).
[21] *Id.*
[22] § 1129(b)(1).
[23] Stephen L. Sepinuck, *Rethinking Unfair Discrimination in Chapter 13*, 74 AM. BANKR. L.J. 341, 341 (2000).
[24] 7 COLLIER ON BANKRUPTCY ¶ 1122.03[1], at 1122-6 to 1122-7 (Alan N. Resnick & Henry J. Sommer, eds. 16th ed. 2016).
[25] *In re* City of Colorado Springs Spring Creek Gen. Improv. Dist., 187 B.R. 683, 687 (Bankr. D. Colo. 1995).
[26] *In re* Bentley, 266 B.R. 229, 236 (B.A.P. 1st Cir. 2001).

"[e]ach case must be decided on its own merits."[27]

Separate classification and fair treatment of general unsecured claims make "Chapter 13 flexible and more attractive to Debtors . . . [and] encourage[s] debtors to file Chapter 13 proceedings instead of Chapter 7."[28] On motion and after notice and a hearing, bankruptcy courts may rule on the classification of claims under Rule 3013.[29] Several cases have held that the nondischargeable nature of student loan debt is sufficient to allow separate classification.[30] "[C]ourts have allowed the separate classification of debts that would be nondischargeable in a chapter 7 case, reasoning that Congress itself indicated a policy choice to distinguish such debts."[31] Public policy also supports the separate classification of student loans.[32] Student loans adversely affect a debtor's ability to pay debt before and after bankruptcy. This difficulty is amplified by the loan's nondischargeable nature and negatively impacts the economy and lenders. Failing to allow separate classification and favorable treatment of student loans leads to a disharmonious outcome under the Code in which student loans are special enough not to discharge unless the rigorous undue hardship test is met, but not sufficiently special to separately classify. This seems facially irreconcilable. Separate classification is proper under the Code and student loans "can be classified separately from other types of Schedule F nonpriority unsecured

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[27] *In re* Kovich, 4 B.R. 403, 407 (Bankr. W.D. Mich. 1980).
[28] James B. McLaughlin, Jr., and Robert W. Nelms, *Classification of Unsecured Claims in Chapter 13 of the Bankruptcy Reform Act of 1978: What is Fair?*, 7 CAMPBELL L. REV. 329, 346 (1985).
[29] This is a seldom used procedure in Chapter 13.
[30] *See In re* Gregg, 179 B.R. 828 (Bankr. E.D. Tex. 1995) (finding that separate classification for nondischargeable student loans was not unfairly discriminatory against other unsecured creditors); *In re* Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991) (holding that a Chapter 13 plan properly placed an educational loan into a special class and allowed payment at a higher rate than other unsecured debts); *In re* Freshley, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (holding that Congressional intent encouraging repayment of student loans is a sufficient basis for separate classification and is not unfairly discriminatory to other unsecured creditors); *In re* Engen, 561 B.R. 523 (Bankr. K. Kan. 2016) (holding that debtors' separate classification and favorable treatment of student loans was not unfairly discriminatory).
[31] 8 COLLIER ON BANKRUPTCY ¶ 1322.05[2], at 1322-18–19 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2016). *See also Freshley*, 69 B.R. at 98.
[32] *See In re* Sullivan, 195 B.R. 649 (Bankr. W.D. Tex. 1996) (prompt payment of some student loans may warrant separate classification and more favorable treatment because nonpayment of federally guaranteed loans imposes a direct burden on taxpayers); *Freshley*, 69 B.R. 96 (underlying policy choices of Congress to encourage repayment of student loans provides a sufficient basis for the debtor's separate classification).

debt."[33] The issue is whether plan's separate classification and favorable treatment of the Student Loan Claims is unfairly discriminatory under § 1322(b)(1).[34] Debtors bear the burden to show their Proposed Plan passes § 1322(b)(1) scrutiny.[35]

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

Both Chapter 11 and Chapter 13 allow separate classification of general unsecured debt but prohibit unfair discrimination[36] and "many courts have looked to cases interpreting one for assistance in applying the other."[37] Support for this analysis stems from § 1322(b)'s specific reference to § 1122. However, unfair discrimination should be less stringent in Chapter 13 than in Chapter 11.[38] First, in Chapter 11, voting class gerrymandering is a concern. In contrast, in Chapter 13, creditors do not vote and are protected by their ability to object to confirmation of a plan without fear of waiver from other creditors. Thus, "unfair discrimination should be a less strict requirement in Chapter 13, to avoid giving each creditor the power to unduly hold up confirmation."[39] Second, "the allegations of unfair discrimination [in Chapter 11] are likely to involve very different issues than those that arise in Chapter 13 and the results of a refusal to confirm the plan are drastically different."[40] Chapter 13 unfair discrimination issues commonly include nondischargeable claims while nondischargeability infrequently affects unfair

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[33] DANIEL A. AUSTIN & SUSAN E. HAUSER, GRADUATING WITH DEBT: STUDENT LOANS UNDER THE BANKRUPTCY CODE 69–70 (ABI, 2013). *See also In re* Potgieter, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010) ("[T]he separate classification of the debtor's student loan obligations does not violate Section 1122."); *In re* Coonce, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) (separate classification of student loan debt is permissible).

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

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

[36] §§ 1129(b) and 1322(b).

[37] Sepinuck, *supra* note 63, at 348.

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

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

[40] Sepinuck, *supra* note 63, at 351.

discrimination issues in Chapter 11.[41] Under § 1141(d)(2), the § 523(a) exceptions to discharge do not apply to a non-individual Chapter 11 plan of reorganization. Finally, if confirmation is denied, a business debtor under Chapter 11 may terminate operations and liquidate while an individual Chapter 13 debtor cannot simply cease to exist.[42] Therefore, the unfair discrimination analysis under Chapter 13 should be more lenient than under Chapter 11.

Within the context of Chapter 11, much of the litigation regarding separate classification of claims arises from a debtor's efforts to separately classify large deficiency claims associated with the strip down of debts secured by commercial real estate. These efforts are seldom met with success,[43] but in another aspect of Chapter 11 proceedings, unsecured creditors who are critical to a debtor's reorganization efforts are frequently paid in order to keep the doors of a business open.[44] A Chapter 11 debtor requests this special treatment in what are colloquially referred to as First Day Motions.[45] As a result, prepetition creditors may be paid for prepetition debts at the onset of Chapter 11 proceedings, well before it is determined whether the debtor-in-possession will successfully reorganize or liquidate its assets under a plan or under a § 363 sale. It is disconsonant to allow such relief to a Chapter 11 business, but not to allow a debtor to separately classify a student loan debt. Chapter 11 business debtors are not entitled to greater benefits of reorganization than Chapter 13 consumer debtors.

Cases have reached varying outcomes on whether a Chapter 13 plan that separately classifies *and* provides favorable treatment to student loan creditors is unfairly discriminatory under § 1322(b)(1). The Code does not define unfair discrimination and "courts have struggled

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[41] *Id*.
[42] *Id*.
[43] ROBERT J. ROSENBERG, ET AL., A LENDER'S PARTICIPATION IN A CHAPTER 11 CASE § 13[2] at 72-73 n.5 (2009); DAVID R. KUNEY & ALEX R. ROVIRA, THE SINGLE ASSET REAL ESTATE CASE BASIC PRINCIPLES AND STRATEGIES 127-131 (2012).
[44] *See* 2 COLLIER ON BANKRUPTCY ¶ 105.02[4][a], at 105-20 to 105-24 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2016).
[45] DEBRA I. GRASSGREEN, ET AL. FIRST DAY MOTIONS 58-68 (3rd ed. 2012).

to define the limits of unfair discrimination under § 1322(b)(1)."[46] Courts "have developed a variety of tests, criticized them, and then continued to apply them."[47] "[D]ecisions have run the gamut of everything goes to nothing is allowed."[48] It has been observed that, "a majority of courts have reached the wrong result in a significant percentage of the cases involving claims of unfair discrimination" regarding debtors favoring nondischargeable student loan claims.[49] Determining fairness is best left to the discretion of the "first-line decision maker, the bankruptcy judge"[50] and "[t]he Court has wide discretion in determining whether proposed discrimination is unfair discrimination."[51]

E. Chapter 13 Tests to Determine Unfair Discrimination

There are two components: the first, separation classification, is easy; the second, whether the favorable treatment of separately classed unsecured claims is fair discrimination, is hard. This second factor drives the litigation and a multitude of judicially created methods that examine when discrimination is unfair. The Strict Approach from *Iacovoni*[52] forbids any discrimination unless explicitly authorized by the Code. *Iacovoni's* specific holding was superseded by statute.[53] The Flexible Approach advanced in *Sutherland*[54] treats § 1322(b)(1)'s unfair discrimination provision as requiring no more than compliance with § 1325(a)(4)'s best interests of the creditors test. However, the *Sutherland* holding "effectively renders the prohibition [against unfair discrimination] meaningless, reading it out of the Code entirely"[55] and

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[46] *In re* Knowles, 501 B.R. 409, 415 (Bankr. D. Kan. 2013); *In re* Bentley, 266 B.R. 229, 237 (B.A.P. 1st Cir. 2001). *See also* Sepinuck, *supra* note 63, at 342.
[47] Sepinuck, *supra* note 63, at 342.
[48] *In re* Hill, 4. B.R. 694, 697 (Bankr. D. Kan. 1980).
[49] Sepinuck, *supra* note 63, at 342.
[50] *Knowles*, 501 B.R. at 416 (*quoting In re* Crawford, 324 F.3d 539, 542 (7th Cir. 2003)).
[51] *Knowles*, 501 B.R. at 415.
[52] 2 B.R. 256 (Bankr. D. Utah 1980).
[53] In 1984, Congress amended § 1322(b)(1) allowing separate classification of codebtor claims as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), H.R. 5174, 98th Cong. (1984).
[54] 3 B.R. 420 (Bankr. W.D. Ark. 1980).
[55] Sepinuck, *supra* note 63, at 353. *See also In re* Cook, 26 B.R. 187, 189 (D.N.M. 1982); *In re* Dziedzic, 9 B.R. 424, 426 (Bankr. S.D. Tex. 1981).

"courts have shown no enthusiasm for this approach."[56] The Balance Approach in *McCullough*[57] requires the debtor to "place something material onto the scales to show a correlative benefit to the other unsecured creditors."[58] The Balance Approach has not received much deference and "fails to provide a way to consider other strong public policies that may justify discriminatory treatment."[59] The Reasonableness Approach examines whether the proposed discrimination is reasonable.[60] This test "leaves the matter to the personal views and values of the judges without providing any real guidance, predictability, or consistency."[61] The Reasonableness Approach fails because it "simply replaces the vague term 'unfair' with the equally vague term 'reasonable.'"[62] The Bright-Line Approach,[63] Percentage of Repayment Approach,[64] and Interest of Debtor Approach[65] have also attracted minority attention. However, the Multifactor Approach is the most common method of examining unfair discrimination.[66]

The Multifactor Approach comprises factors initially developed in *Kovich*.[67] In approving discriminatory Chapter 13 plans favoring a codebtor and a claim for back rent, the *Kovich* court held:

> Each case must be decided on its own merits. [1] Is there a reasonable basis for the classification? [2] Is the debtor able to perform a plan without the classification? [3] Has the debtor acted in good faith in the proposed classifications? . . . [4] Are they [the class being discriminated against] receiving

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[56] Sepinuck, *supra* note 63, at 353.
[57] McCullough v. Brown (*In re* Brown), 162 B.R. 506 (N.D. Ill. 1993).
[58] *Id*. at 517–18.
[59] Sepinuck, *supra* note 63, at 354.
[60] *See*, *e.g.*, *In re* Alicea, 199 B.R. 862, 866 (Bankr. D.N.J. 1996); Lawson v. Lackey (*In re* Lackey), 148 B.R. 626, 632 (Bankr. N.D. Ala. 1992); *In re* Lawson, 93 B.R. 979, 982 (Bankr. N.D. Ill. 1988); *In re* Furlow, 70 B.R. 973, 978 (Bankr. E.D. Pa. 1987).
[61] Sepinuck, *supra* note 63, at 360.
[62] *Id*.
[63] Courts advanced various bright-line tests so creditors would know when discrimination was unfair to avoid litigating every disparate treatment. *See In re* Chandler, 210 B.R. 898 (Bankr. D.N.H. 1997); *In re* Taylor, 137 B.R. 60 (Bankr. W.D. Okla. 1992); *In re* Strickland, 181 B.R. 598 (Bankr. N.D. Ala. 1995); *In re* Colley, 260 B.R. 532 (Bankr. M.D. Fla. 2000).
[64] Courts apply tests based on the percentage of repayment of student loan debt and other unsecured debt to determine when unfair discrimination occurs. *See In re* Sullivan, 195 B.R. 649 (Bankr. W.D. Tex. 1996), *In re* Williams, 253 B.R. 220 (Bankr. W.D. Tenn. 2000).
[65] Courts allowed discrimination as fair if it rationally furthered an articulated, legitimate interest of the debtor. *See In re* Hamilton, 102 B.R. 498 (Bankr. W.D. Va. 1989), *In re* Lawson, 93 B.R. 979 (Bankr. N.D. Ill. 1988).
[66] Sepinuck, *supra* note 63, at 354.
[67] *In re* Kovich, 4 B.R. 403 (Bankr. W.D. Mich. 1980).

a meaningful payment or is the plan just a sham?[68]

These judicially created factors do not originate in the Code, nor did *Kovich* explain their origin.[69] While *Sutherland*[70] and *Iacovoni*[71] "attempt to read sections of the Code out of existence or ignore them completely,"[72] the Multifactor Approach "appear[s] to read sections *into* the Code."[73] Nevertheless, subsequent decisions embraced similar factors because the Multifactor Approach provided a way to analyze unfair discrimination "somewhere between total whim and an Act of God."[74] As courts applied the Multifactor Approach, it evolved into a Four-Part Test:

> (1) whether the discrimination has a reasonable basis;
> (2) whether the debtor can carry out a plan without the discrimination;
> (3) whether the discrimination is proposed in good faith; and
> (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination.[75]

The Four-Part Test also elicited criticism with "wildly disparate results" because "the test relies upon abstract, undefined notions of reasonableness, legitimacy, and good faith."[76] None of the tests are without detractors and all seem too inflexible to accommodate the diversity of cases that the Court considers. A totality of the circumstances standard may be more appropriate.

The Tenth Circuit has not considered unfair discrimination under § 1322(b)(1).[77]

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[68] *Id*. at 407 (bracketed numbers added).
[69] Sepinuck, *supra* note 63, at 355. *See also* McLaughlin, *supra* note 69, at 345.
[70] 3 B.R. 420.
[71] 2 B.R. 256.
[72] McLaughlin, *supra* note 69, at 344–45.
[73] *Id*. at 345 (emphasis in original).
[74] *In re* Hill, 4 B.R. 694, 698 (Bankr. D. Kan. 1980).
[75] *In re* Thibodeau, 248 B.R. 699 (Bankr. D. Mass. 2000); *In re* Christophe, 151 B.R. 475 (Bankr. N.D. Ill. 1993); *In re* Chapman, 146 B.R. 411 (Bankr. N.D. Ill. 1992); *Matter of* Keel, 143 B.R. 915 (Bankr. D. Neb. 1992);(*In re* Labib-Kiyarash), 271 B.R. 189 (B.A.P. 9th Cir. 2001); McDonald v. Sperna (*In re* Sperna), 173 B.R. 654 (B.A.P. 9th Cir. 1994); *In re* Bernal, 189 B.R. 507 (Bankr. S.D. Cal. 1995); *In re* Carlson, 276 B.R. 653 (Bankr. D. Mont. 2002); *In re* Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993); *In re* Anderson, 173 B.R. 226 (Bankr. D. Colo. 1993); *In re* Pora, 353 B.R. 247 (Bankr. N.D. Cal. 2006); *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007); *In re* Brown, 500 B.R. 255 (Bankr. S.D. Ga. 2013); *In re* Leser, 939 F.2d 669 (8th Cir. 1991); *In re* Wolff, 22 B.R. 510, (B.A.P. 9th Cir. 1982).
[76] *In re* Bentley, 266 B.R. 229, 238 (B.A.P. 1st Cir. 2001) (internal quotations omitted).
[77] *In re* Knowles, 501 B.R. 409, 416 (Bankr. D. Kan. 2013); *In re* Mason, 300 B.R. 379, 383 n.9 (Bankr. D. Kan. 2003).

Bankruptcy courts in the Tenth Circuit have used the aforementioned Four-Part test from *Leser*[78] and *Wolff,*[79] along with the Baseline Test from *Bentley*.[80] *Bentley* established the Baseline Test which looks at whether, despite the different treatment for each classification, the plan nevertheless offers each class benefits and burdens equivalent to those the class would receive under a Chapter 13 plan without separate classification.[81] The Baseline Test considers the following principles:

(1) equality of distribution;
(2) nonpriority of student loans;
(3) mandatory versus optional contributions; and
(4) the debtor's fresh start.[82]

Several courts applying the aforementioned examinations have found the separate classification of student loan debt in Chapter 13 fair under § 1322(b)(1).[83]

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[78] 939 F.2d 669.
[79] 22 B.R. 510.
[80] 266 B.R. 229.
[81] *Knowles*, 501 B.R. at 415.
[82] *Bentley*, 266 B.R. at 240–43.
[83] *See In re* Brown, 500 B.R. 255 (Bankr. S.D. Ga. 2013) (debtor curing default complies with §1322(b)(1) when separate classification pays 78 percent of student loan debt and only 1 percent of unsecured debt); *Matter of* Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012) (discriminatory classification favoring student loan that decreased general unsecured recovery from 20 percent to 15 percent allowed to preserve debtor's participation in the Public Service Loan Forgiveness program); *In re* Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009) (separate classification and more favorable treatment of long-term student loan debt over general unsecured creditors was not unfairly discriminatory, at least not when debtor's default would potentially jeopardize her professional license); *In re* Webb, 370 B.R. 418, 425–26 (Bankr. N.D. Ga. 2007) (confirming debtors' separate classification "because Debtors will suffer needless accrual of interest and penalties . . . and unsecured creditors will enjoy a disproportionally small benefit otherwise."); *In re* Cox, 186 B.R. 744 (Bankr. N.D. Fla. 1995) (while debtors' proposal to pay nondischargeable student loans outside their plan may be discriminatory, it is not unfair since such treatment is specifically allowed by § 1322(b)(5)); *In re* Willis, 189 B.R. 203, 205 (Bankr. N.D. Okla. 1995) (quoting *Lawson*, 93 B.R. at 984) ("discrimination is 'fair,' and therefore permissible, to the extent, and only to the extent, that is rationally furthers an articulated, legitimate interest of the debtor"); *In re* Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993) (holding that a Chapter 13 plan providing a 29 percent payment to unsecured creditors and 100 percent to student loan creditors did not discriminate unfairly because the unsecured creditors would receive nothing if debtors' case were converted to a Chapter 7); *In re* Dodds, 140 B.R. 542, 543 (Bankr. D. Mont. 1992) (holding that the debtors' plan satisfied §§ 1322(b)(1) and (5) because treating student loan debt as a long-term obligation is one possibility of satisfying the confirmation standard against unfair discrimination); *Matter of* Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992) (holding that a Chapter 13 plan's placement of student-loan debt in a separate class that provided for payment of that debt before other unsecured creditors did not unfairly discriminate against unsecured creditors because the plan provided for 100 percent of all unsecured claims and the student loan claims were nondischargeable); *In re* Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991) (allowing a Chapter 13 plan to place student loans in a separate class and pay them 100 percent while only paying 15 percent to unsecured creditors as long as the unsecured creditors do not receive less than they would in a Chapter 7 liquidation); *In re* Freshley, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (holding that Congressional intent encouraging the repayment of student loans is sufficient grounds for a debtor's separate classification of those debts in a Chapter 13 plan and that such classification does not unfairly discriminate against unsecured creditors).

The various tests seem too inflexible to properly reflect the discretion that bankruptcy court have with respect to confirmation of a Chapter 13 plan that contains a separately classified creditor. Judge Posner acknowledged the difficulty of establishing a test for separate classification and favorable treatment:

> We haven't been able to think of a good test ourselves. We conclude, at least provisionally, that this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decision maker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of the relevant law, which in this case is Chapter 13 of the Bankruptcy Code; and to uphold his determination unless it is unreasonable (an abuse of discretion).[84]

None of the above tests should stand as a rigid barrier to confirmation of a debtor's plan. If such were the case, then the discretion of bankruptcy courts would be the unfortunate victim. First, we review separate classification under the Bentley Baseline Test. We will then move on to a broader discussion of separate classification.

F. THE *BENTLEY* BASELINE TEST

Bankruptcy courts frequently apply the Baseline Test when considering § 1322(b) challenges to the separate classification of student loans.[85] The *Bentley* factors are:

1. Equality of Distribution

Favored treatment is discriminatory—that is the point of separate classification. The Code permits fair discrimination.[86]

2. Nonpriority of Student Loans

This seems a rather curious factor since if student loan debt were a priority claim, then a the debtor's plan would have to provide for payment in full of the debt; clearly § 1322(b)(1) contemplates separate classification of non-priority unsecured claims. Student loan debts are not entitled to priority status under § 507(a). Additionally, Student loan debts are presumptively

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[84] *In re* Crawford, 324 F.3d 539, 542 (7th Cir. 2003).
[85] *In re* Salazar, 543 B.R. 669, 673–76 (Bankr. D. Kan. 2015); *Knowles*, 501 B.R. at 416–18; *In re* Stull, 489 B.R. 217, 220–21 (Bankr. D. Kan. 2013); *Mason*, 300 B.R. at 386–87.
[86] § 1322(b)(1). Sepinuck, *supra* note 63, at 341.

nondischargeable under the Code.[87] "The choice Congress made to impart student loan debt with nondischargeable status sends a strong signal of intent that should not be easily ignored."[88] Thus, Congress intended the Student Loan Claims to receive *favored* status.[89]

The *Bentley* court opined that:

> . . .nondischargeability is not, and does not entail, priority as to any distribution in or through bankruptcy; it merely permits the holder to continue to enforce the debt after bankruptcy . . . . Accordingly, as far as the Code is concerned, nothing in the nature of the claims at issue here warrants or justifies treating student loans more favorably than the others.[90]

This seems an errant analysis. The policy behind many nondischargeable claims is based on society's interest in preventing mischievous debtors from usurping prior bad acts—false pretenses or fraud,[91] embezzlement and larceny,[92] intentional torts,[93] criminal restitution,[94] tax debts,[95] and domestic support obligations.[96] These debts are logically nondischargeable as they were: (a) wrongfully incurred--such as those for fraud, embezzlement, restitution, and other wrongdoing; (b) to protect innocent children to ensure an orderly society—child support obligations; or (c) to provide for other familial obligations such as alimony and division of debts and property. The rationale behind nondischargeability of these debt groups is either punitive in nature, or designed to curtail rewards for "certain socially undesirable behaviors."[97] Unlike most of these nondischargeable debts, "the policy behind the non-dischargeability of student loans is fundamentally different from the policies behind the Code's other non-dischargeability

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[87] Absent a showing of undue hardship. *See* § 523(a)(8). *See also* § 1322(b)(1). Of course, the shadow of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), looms over Chapter 13 plan confirmation and the binding effects of confirmation.
[88] *In re* Webb, 370 B.R. 418, 426 (Bankr. N.D. Ga. 2007).
[89] *In re* Knowles, 501 B.R. 409, 419 (Bankr. D. Kan 2013). *See also* Sepinuck, *supra* note 63, at 386 ("[T]he vast majority of courts have recognized that at least in some contexts a nonpriority claim may be favored in Chapter 13.").
[90] 266 B.R. at 241.
[91] § 523(a)(2).
[92] § 523(a)(4).
[93] § 523(a)(6).
[94] § 523(a)(13).
[95] § 523(a)(1).
[96] § 523(a)(5).
[97] DEANNE LOONIN & PERSIS S. YU, ET AL., STUDENT LOAN LAW § 11.9.3, at 234 (National Consumer Law Center, 5th ed. 2015, updated at http://www.nclc.org).

designations."[98] Congress acknowledged the uniqueness that is student loan debt while drafting the Bankruptcy Reform Act of 1978.

> [E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and relying for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future. In addition, there have been abuses of the system by those seeking freedom from educational debts without ever attempting to repay.[99]

Among § 523(a)'s nondischargeable debts, student loans stand alone as the only debt "incurred for a supposedly socially beneficial purpose."[100] If repayment of the loans relies upon Debtors' future income, then a Chapter 13 plan seems an appropriate means to accomplish this task.

Debtors with student loan obligations face a quagmire. Without separate classification and favored treatment of student loan obligations, debtors may face a higher debt burden after bankruptcy than before. A rule that, without more, nondischargeability of student loans is an insufficient reason for discriminating in favor of Student Loans[101] seems misplaced. Favored treatment may result in a smaller potential dividend to the Student Loan Claims. Student Loan debts will most likely increase during the pendency of a Chapter 13 case since nondischargeable interest accumulates.[102] Thus, a large portion of nondischargeable debt could remain. Many debtors may owe more on their Student Loans after completing their Chapter 13 case and may owe more debt than before filing.[103] This hardly seems a result Congress intended. Student loans are nondischargeable because "Congress wishes to protect the government's fiscal health

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[98] *Id.*
[99] H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 133, *reprinted* in 1978 U.S. Code Cong. & Ad. News 5963, 6094.
[100] Roger Roots, *The Student Loan Crisis: A Lesson In Unintended Consequences*, 29 SW. U. L. REV. 501, 513 (2000).
[101] *See In re* Simmons, 288 B.R. 737 (Bankr. N.D. Tex. 2003).
[102] AUSTIN AND HAUSER, *supra* note 74.
[103] *In re* Knowles, 501 B.R. 409, 419 (Bankr. D. Kan. 2013) (acknowledging that the nondischargeability rule combined with the nondiscrimination rule may result in debtors "owing more on their student loans after completion of their plan than before filing for Chapter 13 relief because of accumulation of equally nondischargeable interest that will accrue."); *In re* Salazar, 543 B.R. 669, 670 (Bankr. D. Kan. 2015) (noting that "[b]ecause interest on nondischargeable debts continues to accrue while a debtor is performing under a Chapter 13 plan but cannot be paid unless the debtor is paying all the unsecured claims in full, a debtor with student loan debts runs a very real risk of paying into a plan for three to five years only to find that she finishes her plan owing more on those debts than she did when she filed bankruptcy.").

as a guarantor (or lender) of these loans."[104] Allowing debtors to treat their student loans favorably ahead of other general unsecured creditors furthers Congressional intent and protects the government's and the student loan program's fiscal health.[105]

Some courts that deny separate classification rely on the negative inference that "Congress has not granted student loan claims a priority in the bankruptcy distribution scheme, but it did bestow such status on support claims."[106] This seems wrong. This reasoning could render the separate classification provision superfluous if it were so construed, a disfavored outcome.[107] This erroneous interpretation ignores case law that approved separate classification of familial support before that obligation was awarded priority status. Just because student loans are not entitled to priority under § 507(a) does not preclude debtors from separately classifying them with more favorable treatment under § 1322(b)(1). There are many reasons why Congress may have excluded student loans from § 507(a)'s priority treatment. First, granting student loans priority status may disqualify many debtors from Chapter 13 relief as § 1322(a)(2) requires full payment of § 507(a) priority claims. "[I]t would be impossible for many debtors with outstanding student loans to pay them all off during a three-year or five-year plan."[108] Unlike other § 507(a) priorities, many student loans are not incurred based on the debtor's ability to pay.[109] "Support obligations are created under judicial auspices after taking into account the

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

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

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

[107] Geiger v. Kawaauhau, 523 U.S. 57, 62 (1998).

[108] Sepinuck, *supra* note 63, at 385.

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

(continued...)

debtor's income and expenses. Income taxes necessarily represent a fraction of income."[110] Some debtors carry large support and tax debts, "but such should not be the norm."[111] However, increasingly large and problematic student loan debt is increasing. Additionally, "student loans . . . are usually incurred without regard to the debtor's current budget and may well prove to be beyond the debtor's short-term budget once the education is over."[112] A blanket grant of priority status that precludes debtors from qualifying for Chapter 13 relief runs afoul of "Congress's preference that individual debtors use Chapter 13 instead of Chapter 7."[113] Notably, prior to the Code's 1994 amendments, "most courts permitted favored treatment of support claims before they were accorded priority."[114] Equally, the Code does not disallow separately classifying student loan claims even though they are not priority.[115] The Code and public policy also allow separate classification and favorable treatment of § 523(a)(15) obligations even though non-support familial obligations are dischargeable under 1328(a).[116]

3. Mandatory Versus Optional Contributions

Generally, this factor examines a debtor's disposable income under the means test. The result of this test sets the mandatory contributions an above median income debtor must make to a Chapter 13 plan. Courts have looked favorably on debtors contributing additional funds to separate classification creditors in excess of what the means test requires.[117]

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[109] (...continued)
http://www.finaid.org/loans/creditscores.phtml (italics in original).
[110] Sepinuck, *supra* note 63, at 385 n.241. Some courts allowed the separate classification of domestic support claimants before BAPCPA defined domestic support obligations under § 101(14A) and granted them priority status under § 507(a)(1). 198 A.L.R. Fed. 605 (originally published in 2004).
[111] Sepinuck, *supra* note 63, at 385 n.241.
[112] *Id*. at 385–86 n.241. They are usually incurred by young college students who are not at the pinnacle of their financial acumen, or by parents who are desperate to support their children's aspirations for higher education.
[113] *In re* Bateman, 515 F.3d 272, 279 (4th Cir. 2008) (quoting McDonald v. Master Financial (*In re* McDonald), 205 F.3d 606, 614 (3d Cir. 2000) (internal quotations omitted)). *See also In re* Jackson, 2006 Bankr. LEXIS 4327, at *3 (Bankr. N.D. Ga. Mar. 16, 2006).
[114] Sepinuck, *supra* note 63, at 386.
[115] *Id*.
[116] HENRY J. SOMMER & MARGARET DEE MCGARITY, COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 8.07[3], at 8-65 (2016).
[117] *See In re* Stull, 489 B.R. 217, 224 (Bankr. D. Kan. 2013) (plan does not unfairly discriminate by allowing debtor to pay his student loan claim from funds he receives in excess of his projected disposable income); *In re* Knowles, 501 B.R. 409, 419–20 (Bankr. D. Kan. 2013) (Debtors' discretionary income above their Code-computed projected (continued...)

4. The Debtor's Fresh Start

A fundamental goal of the Code is allowing an honest, but unfortunate debtor a fresh start.[118] The Code is comprised of statutes of equity, and the "bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be 'inconsistent' with the Bankruptcy Code."[119] The fresh start is not absolute,[120] and bankruptcy courts must provide fair treatment to creditors. Congress intended more debtors to seek relief under Chapter 13 instead of Chapter 7.[121] Debtors not permitted to favor student loans in Chapter 13 risk not receiving a fresh start and may elect conversion to Chapter 7 in which unsecured creditors typically receive little to nothing.

Debtors have a legitimate interest in reducing the burden of their nondischargeable student loan claims.[122] "The amendment making such [student] loans nondischargeable in chapter 13 cases came as part of a federal budget balancing package, which suggests that its purpose was to serve a societal interest in maximizing the payments on such [student] loans."[123] Further, "the Code specifically permits debtors to cure defaults and maintain payments on long-term debts on which the final payment is due after the final payment of the plan, [and] a number of courts have permitted debtors to separately classify student loan debts for the purpose of providing them that specified treatment in a plan."[124]

Bentley stated that nondischargeability "*merely* permits the holder to continue to enforce the debt after bankruptcy."[125] In this context, use of the word *merely* is misplaced because a full compliance discharge is one of the most important aspects of the Debtors' bankruptcy. A

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[117] (...continued)
disposable income can be voluntarily contributed to payment of student loans).
[118] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007).
[119] *In re* Beaty, 306 F.3d 914, 922 (9th Cir. 2002) (citing *In re* Myrvang, 232 F.3d 1116, 1124 (9th Cir. 2000)).
[120] Grogan v. Garner, 498 U.S. 279, 286–87 (1991).
[121] *In re* Bateman, 515 F.3d 272, 279 (4th Cir. 2008).
[122] 8 COLLIER ON BANKRUPTCY, *supra* note 72, ¶ 1322.05[2][a], at 1322-20.
[123] *Id*. (Footnote omitted.) *See also* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990).
[124] 8 COLLIER ON BANKRUPTCY, *supra* note 72, ¶ 1322.05[2][a], at 1322-20.
[125] *Bentley*, 266 B.R. at 241 (emphasis added).

discharge benefits not only the debtor and his family, but imparts a benefit to the economy and society as a whole. Many student loan claims are long-term debts under § 1322(b)(5).[126] A student loan's nondischargeability, coupled with the government's collection powers, tips the scales in favor of separate classification.

Separately classifying debtors' Student Loans is permitted if Congress intended § 1322(b)(1) to have any meaning--and if not student loans, then what debt? We allow separate classification of other creditors "with a special relationship to the debtor or with claims of a special nature. Courts have sometimes approved more favored treatment for doctors, landlords, trade creditors necessary for continued operation of a business, attorneys, and even banks from which future credit is needed"[127]

G. THE STUDENT LOAN COLOSSUS AND HOW STUDENT LOANS ARE SIGNIFICANTLY DIFFERENT FROM OTHER GENERAL UNSECURED DEBT

> The U.S. government over the last 15 years made a trillion-dollar investment to improve the nation's workforce, productivity and economy. A big portion of that investment has now turned toxic, with echoes of the housing crisis.[128]

Much has changed in the years since the *Bentley Baseline* Test was adopted, and it is appropriate to look beyond the confines of that test. Student loans are unique and should be separately classified as the Code permits. Both the text and purpose of the Code point to this conclusion.

Student loans are different because unlike other nondischargeable debts, it is not the debtor's misconduct in acquiring the loans that supports nondischargeability.[129] Although acquiring an education without intending to pay for it is wrongful, "any such 'wrongdoing' is a

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[126] *In re* Jackson, 2006 Bankr. LEXIS 4327, at *10 (Bankr. N.D. Ga. Mar. 16, 2006).
[127] HENRY J. SOMMER, ET AL., CONSUMER BANKRUPTCY LAW AND PRACTICE § 12.4.3 at 339 (National Consumer Law Center, 11th ed. 2016) (citing *In re* Hill, 4 B.R. 694 (Bankr. D. Kan. 1980) (physicians, dentists, lawyers); *In re* Kovich, 4. B.R. 403 (Bankr. W.D. Mich. 1980) (landlord); *In re* Sutherland, 3 B.R. 420 (Bankr. W.D. Ark. 1980) (trade creditors, medical debts, banks)).
[128] Josh Mitchell, *THE OUTLOOK: College Loan Glut Turns Sour*, WALL STREET JOURNAL, June 6, 2016, at A2.
[129] *See supra* Analysis subpart C.

function of the discharge itself, it was not what created the debt."[130] Further, the Code's fraud[131] and good faith provisions,[132] combined with the Chapter 13 trustee's powers, are intended to flush out such misdeeds.[133] Thus, the idea that student loans are nondischargeable to avoid fraud and a free ride is inaccurate. The Code already contains ample provisions to address fraud and debtors are allowed to keep other services or property acquired on unsecured credit. Further, as discussed *supra*,[134] student loans are unlike other types of § 523(a) debt where the dischargeability rationale is based on society's interest in preventing mischievous debtors from usurping prior bad acts.

Student loans are also different because Congress has an interest in protecting the fiscal health of the federal student loan program.[135] In furtherance of this goal, the government has enormous collection powers on federal student loans. The government may:

> garnish a borrower's wages without judgment, seize the borrower's tax refund (even an earned income tax credit), seize portions of federal benefits such a Social Security, and deny the borrower eligibility for new education grants or loans . . . and charge fees that often create ballooning balances. . . .[136]

Under § 1095a of the Higher Education Act, holders of defaulted student loans may garnish up to ten percent of the debtor's disposable income.[137] Further, the ten percent limit applies to a single garnishment by an individual note holder, not the cumulative maximum limit on a debtor's disposable income.[138] While the Consumer Credit Protection Act provides a cumulative limit of 25 percent on multiple garnishments,[139] practicality may limit cooperation

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[130] Sepinuck, *supra* note 63, at 381.
[131] § 523(a)(2).
[132] *See* §§ 1325(a)(3) and (a)(7). Debtors must propose plans and file petitions in good faith.
[133] It has been suggested that bankruptcy courts have a duty to review chapter 13 bankruptcy plans. *See* United Student Aid Funds, Inc., v. Espinosa, 559 U.S. 260, 276–77 (2010) ("the Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of §§ 1328(a)(2) and 523(a)(8)).
[134] Analysis.C.2.
[135] Santa Fe Med. Svcs., Inc. (*In re* Segal), 57 F.3d 342, 348 (3rd Cir. 1995). *See also* Sepinuck, *supra* note 63, at 382.
[136] *Supra* note 131, § 6.1.3.1, at 74.
[137] 20 U.S.C. § 1095a.
[138] Halperin v. Reg'l Adjustment Bureau, Inc., 206 F.3d 1063 (11th Cir. 2000).
[139] 15 U.S.C. § 1673.

between multiple claim holders without the debtor's intervention. Additionally, the government may reach further than private lenders by setting off tax refunds, Social Security, and other government benefits. Student loan debts have been subject to pernicious scams and collection efforts.[140]

Further, "[u]nlike any other type of debt, there is *no statute of limitations*. The government can pursue borrowers to the grave."[141] Congress stated that "[i]t is the purpose of this subsection to ensure that obligations to repay loans . . . are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced."[142] Conversely, the Internal Revenue Service generally may only pursue collection on assessed taxes "within 10 years after the assessment of the tax."[143] Demanding student loan repayment helps assure the fiscal integrity of the federal student loan program as taxpayers are left on the hook when debtors default. "Thus, to the extent that courts regard efforts to favor student loans as focusing 'solely on the interests of the debtor,' and the debtor's fresh start they miss the point."[144] Separate classification and favored treatment of student loans furthers the congressional goal of protecting the federal student loan program.

Originally, the federal student loans were "intended as a program of last resort for college students seeking to finance their educations."[145] Now, "[n]o longer can the average student from the lower middle classes hope to enter and exit a postsecondary institution with a valuable degree without, to some extent, participating in the guaranteed student loan program."[146] The increasing student loan burden has far reaching implications from recent graduates to the elderly.

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[140] Michael J. Bologna, *CFPB, Ags Confront Student Debt-Relief Scams*, BNA'S BANKRUPTCY LAW REPORTER (March 24, 2016), http://www.bna.com/cfpb-ags-confront-n57982068778/.
[141] *Supra* note 131, § 6.1.3.1, at 75 (emphasis added). The Higher Education Technical Amendments of 1991 (HETA) eliminated all statutes of limitations on actions to recover on defaulted federally guaranteed student loans. *See also* 20 U.S.C. § 1091a.
[142] 20 U.S.C. § 1091a.
[143] 26 U.S.C. § 6502(a)(1).
[144] Sepinuck, *supra* note 63, at 383 (footnote omitted).
[145] Roots, *supra* note 143, at 504.
[146] *Id*. at 523.

For many recent graduates it delays marriage,[147] defers car purchases,[148] postpones home ownership,[149] inhibits saving for retirement,[150] and even hinders dating after college.[151] "[S]everal studies show that debt is also associated with significant mental and physical health problems, particularly in young people."[152] One study "linked debt to high blood pressure as well as poor self-reported mental and general health."[153] These stressors are not isolated on the debtor as their reach negatively impacts a debtor's family. Graduates saddled with high student loan debt are less likely to serve the public as they seek out high-income post-graduation employment opportunities.[154] "Those pursuing careers in securities or licensed professionals, such as attorneys and accountants, may face difficulties with licensing boards who can and do regard financial insolvency as a valid reason for the refusal to grant a license to work in a chosen profession."[155] For the elderly, student debt is becoming a growing concern as those 65 and older in 2013 had outstanding education loans of $18.2 billion compared with $2.8 billion in 2005.[156] For Americans age 65–74, 27 percent of student loans were in default; for those age 75 and older more than half of student loans were in default.[157] The elderly are particularly at risk

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[147] Rebecca Ungarino, *Burdened with Record Amount of Debt, Graduates Delay Marriage* (Oct. 7, 2014), http://www.nbcnews.com/business/personal-finance/burdened-record-amount-debt-graduates-delay-marriage-n219371.
[148] Halah Touryalai, *Backlash: Student Loan Burden Prevents Borrowers From Buying Homes, Cars* (June 26, 2013), http://www.forbes.com/sites/halahtouryalai/2013/06/26/backlash-student-loans-keep-borrowers-from-buying-homes-cars/#6d8275a477c5.
[149] *Id*. Bob Bryan, *Young Americans have gone from being home owners to student debt holders*, (Dec. 1, 2015), http://www.businessinsider.com/student-debt-prevents-house-buying-2015-11.
[150] American Student Assistance, *Retirement Delayed: The Impact of Student Debt on the Daily Lives of Older Americans*, at 3 (2015), http://www.asa.org/site/assets/files/3680/retirement_delayed.pdf.
[151] Karen Farkas, *Student loan debt is viewed as 'baggage' in relationships, survey shows,* CLEVELAND.COM (August 9, 2016 at 10:20 a.m.), http://www.cleveland.com/metro/index.ssf/2016/08/student_loan_debt_is_viewed_as.html.; Nicole Audrey, *Student Debt Puts a Damper on Dating After College*, NBCNEWS.COM (August 7, 2016 at 2:25 p.m. ET, http://www.nbcnews.com/feature/college-game-plan/student-debt-puts-damper-dating-after-college-n623871.
[152] Abby Abrams, How Student Loan Debt Hurts Your Health (June 11, 2014), http://time.com/2854384/student-loan-debt-health/.
[153] *Id*.
[154] Roots, *supra* note 143, at 522.
[155] *Id*. at 519.
[156] Natalie Kitroeff, *Student Debt May Be the Next Crisis Facing Elderly Americans* (Dec. 18, 2015), http://www.bloomberg.com/news/articles/2015-12-18/student-debt-may-be-the-next-crisis-facing-elderly-americans.
[157] *Id*.

because the government may garnish Social Security payments.[158] Borrowers of all ages are also subject to abusive collection practices as evidenced by the Consumer Financial Protection Bureau's acknowledgement to "clean up the student loan servicing market."[159] Separate classification is the right answer for student loan debt as "Chapter 13 protection increases annual earnings by $5,562, decreases five-year mortality by 1.2 percentage points, and decreases five-year foreclosure rates by 19.1 percentage points."[160]

As of June 30, 2018, outstanding student loan debt reached $1.52 trillion and comprised ten percent of household debt—ahead of credit card debt at six percent and automobile debt at nine percent.[161] To place this aggregate student loan balance in perspective, it exceeds the annual gross domestic product of all but the 11 largest economies in the world, including the economies of Russia, Spain and Mexico.[162] "Student loans are by far the fastest growing component of non-housing consumer debt."[163] Student loans ranked first in the percent of balances that were more than 90 days delinquent—ahead of credit cards, mortgages, auto loans, and home equity lines of credit.[164] Many student loan borrowers now "shoulder educational debt loads that were unimaginable to their parents' generation."[165] Notably, "borrowers with the smallest debts are most likely to default," indicating that borrowers who run up six figure debts are not the source of trouble.[166] This predicament "now threatens the nation's economic

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[158] *Id*.
[159] Maggie McGrath, *Discover Slammed By CFPB For Illegal Student Loan Servicing Practices* (July 22, 2015), http://www.forbes.com/sites/maggiemcgrath/2015/07/22/discover-slammed-by-cfpb-for-illegal-student-loan-servicing-practices/#52662dcdc17c.
[160] Will Dobbie & Jae Song, *Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection*, 105(3) AMERICAN ECONOMIC REVIEW 1272 (2015).
[161] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, August 2016, available at: https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2016Q2.pdf.
[162] Statistics Times, *Projected GDP Ranking (2015-2020)*, http://statisticstimes.com/economy/projected-world-gdp-ranking.php (last visited Nov. 23, 2016).
[163] Austin, *supra* note 51, at 577.
[164] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, August 2016, available at: https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2016Q2.pdf.
[165] Roots, *supra* note 143, at 502.
[166] Susan Dynarski, *Why Students With Smallest Debts Have the Larger Problem* (Aug. 31, 2015), http://www.nytimes.com/2015/09/01/upshot/why-students-with-smallest-debts-need-the-greatest-help.html?_r=0.

growth"[167] and potentially widens the wealth and income disparity. The massive shift of the skyrocketing costs of college education to the middle class over the last three decades has replaced the decreased government subsidization of public colleges and universities. It is accurate to classify student loan debt as singular in identity since borrowers are in effect compensating for the reduced tax revenue allocated to post-secondary education. Adjusted for inflation, the cost to attend a four-year public university has increased 331% since 1983.[168] This societal tax burden has created what is in effect individual taxation to the public university attendee, much of which is funded by student loan borrowing.

In 2007, Congress attempted to alleviate student debt stress by introducing the income-based-repayment plan.[169] The income-based-repayment plan allows borrowers to make reduced loan payments based on a percentage of income regardless of the borrower's chosen occupation.[170] The outstanding balance is then forgiven after 20-25 years of timely payments.[171] Importantly, unlike other government sponsored forgiveness programs,[172] the forgiven debt is considered taxable income under the Internal Revenue Code.[173] Borrowers with forgiven debt under the income-based-repayment plan may easily face enormous tax burdens.[174] "Thus the debtor is asked to exchange one non-dischargeable debt, a student loan debt, for another non-

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

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

[169] 20 U.S.C. § 1098(e).

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

[171] *Id*. at 151–52.

[172] 20 U.S.C. § 1078. *See* Layman, *supra* note 215, at 137–38.

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

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

dischargeable debt, a tax debt, which is not much progress towards the fresh start envisioned by the Bankruptcy Code."[175] For many borrowers, and especially parent Direct PLUS borrowers, this tax burden occurs at or near retirement—one of the worst possible times. Additionally, this tax bill is due in full immediately as the Internal Revenue Service does not have an income-based-repayment plan.[176] Here, some debtors do not even have the option to participate in an income-based-repayment plan on some student loans as "[t]he only federal student loans clearly not eligible for the [income-based-repayment] plan are those loans made to the parents of students under the PLUS program."[177] The public service loan forgiveness program allows the tax free forgiveness of unpaid student loan balances after the borrower has paid for 120 months. The purpose of the program is to encourage graduates to work in modestly paid positions in the public sector. The irony is that perhaps the greatest beneficiaries of this student loan forgiveness program will be physicians; it is estimated that each participant will discharge $131,000 in student loan debt under the program.[178]

What's more, "[b]illons of dollars worth of bonds backed by student loans could soon face downgrades as bond ratings agencies react to borrowers revising their repayment plans."[179] "Should these bonds default, the federal government and ultimately the U.S. taxpayers could be stuck with billions of dollars in bad loans."[180] The recent projections of surpluses for student loan programs have melted away,[181] intensifying the need for borrowers to repay the loans as

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[175] Demmons v. R3 Educ. Inc. (*In re* Demmons), 2016 WL 5874831, at *9 note 47 (Bankr. E.D. La. Oct. 7, 2016).
[176] Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later* (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/your-money/for-student-borrowers-a-tax-time-bomb.html?_r=0.
[177] Layman, *supra* note 215, at 152. *See also* 34 C.F.R. § 682.215(a)(2). *See supra* note 17.
[178] Josh Mitchell, *Government on Track to Forgive Up to $131,000 Each in Student Debt for Thousands of Doctors*, THE WALL STREET JOURNAL (July 20, 2016, 10:45 a.m. ET), http://blogs.wsj.com/economics/2016/07/20/government-on-track-to-forgive-up-to-131000-in-student-debt-for-thousands-of doctors/ (last visited Aug. 8, 2016).
[179] Charles Bovaird, *Bonds Based On Student Loans Face Downgrades* (JPM, NAVI) (Oct. 20, 2016) (quoting Mark Heppenstall, chief investment officer of Penn Mutual Asset), http://www.investopedia.com/news/bonds-based-student-loans-face-downgrades-jpm-navi/.
[180] *Id*.
[181] Josh Mitchell, *U.S. to Forgive at Least $108 Billion in Student Debt in Coming Years*, THE WALL STREET JOURNAL (Nov. 30, 2016) http://www.wsj.com/articles/u-s-to-forgive-at-least-108-billion-in-student-debt-in-coming-years-1480501802

they are able–such as the Debtors propose in their plan.

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

Notably, the United States Constitution provides that Congress shall establish uniform laws on the subject of bankruptcies.[182] John Adams, who signed into law the first Federal Bankruptcy Act in 1800, considered bankruptcy and debt a major issue as our citizens were losing farms and going to debtors' prisons. Nondischargeable student loans may create a virtual debtors' prison, one without physical containment, but assuredly a prison of emotional confinement.

Student loans serve a valuable purpose beyond mere consumerism. They allow individuals the opportunity to obtain an education, an education that will hopefully allow student loan recipients to contribute to a prosperous society, an education that unfortunately is becoming harder to achieve without the assistance of government-backed student loans. At the same time, it is understandable that Congress demands repayment. The Code generally prevents debtors from discharging their student loans and leaving taxpayers with the bill. Student loan creditors deserve separate classification in bankruptcy because the taxpayer-funded student loan system is critical to society's future welfare. It is one thing to not allow delinquent debtors an escape hatch from their student loans, but it is quite another to forbid debtors with limited resources

[182] U.S. CONST. art. I, § 9.

from favoring a taxpayer backed nondischargeable obligation incurred for society's benefit. If bankruptcy is, in part, the art of compromise, then a Chapter 13 plan that fairly discriminates in favor of the Student Loan Claims is a permissible compromise under § 1322(b)(1).

Many consumer bankruptcies are filed by individuals who are financially, emotionally and physically exhausted. Sometimes lost in the discussion that the bankruptcy discharge provides a fresh start is that it provides a benefit to society and the economy: People are freed from emotional and financial burdens to become more energetic, healthy participants. Of course, this beneficial effect is properly curtailed by the existence of debts that are excepted from discharge. It may be fairly observed that with a plan that provides separate classification and favorable treatment of student loan debt, a debtor does not seek to escape liability for student loans, but to the contrary, she seeks to pay them.