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Student Loans: An Overwhelming Problem in Need of Some Solutions

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Student Loan Considerations in Chapter 13

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> "There is no mistaking that student loan debt in the United States is reaching crisis levels. According to Business Week in January of [2014], '[o]utstanding student debt topped $1 trillion in the third quarter of 2013, and the share of loans delinquent 90 days or more rose to 11.8 percent, according to the Federal Reserve Bank of New York. By contrast, delinquencies for mortgage, credit card, and auto debt all have declined from their peaks.'[1]

To say nothing has changed since 2014 would be disingenuous – the crisis is here. The crisis is now.

Treatment of student loan debt in Chapter 13 plans has historically been limited to the same treatment afforded general unsecured debts such as credit cards, automobile deficiencies, past due utility bills, and the like. Unfortunately, this historic approach has not kept pace with the growing amount of student loan debt many consumer debtors are saddled with or the fact that prorata payment of this type of debt will, with increasing frequency, leave debtors owing more on that debt at the end of their plans than at the beginning. But, while the tides have been slow to turn, they appear to be doing so to some degree in the Chapter 13 arena by way of classification of the debt.

Part I

TREATMENT OF STUDENT LOAN DEBT IN CHAPTER 13 PLANS IN THE EASTERN DISTRICT OF MICHIGAN, A BRIEF IN SUPPORT OF CLASS 4 CONTINUING CLAIM TREATMENT OF A STUDENT LOAN CLAIM[2], [3]

Original Brief

[1] Lassner, Caralyce M., *Treating Student Loans in Chapter 13 - Direct pay, special unsecured status, interest, and so on. A case in favor of allowing different treatment.*, Veteran's Day Conference 2014, citing Caroline Salas Gage and Janet Lorin, *Student Loans, the Next Big Threat to the U.S. Economy?*, http://www.businessweek.com/articles/2014-01-16/student-loans-the-next-big-threat-to-the-u-dot-s-dot-economy (January 16, 2014)

[2] *In re Quinn*, Case 17-32180-DOF (Bankr ED MI 2018)

[3] Note that the plan in the case at bar was drafted under Model Plan 3.0. The current plan is Local Form Plan 10-24-17 v 1 and the proposed treatment, under the arguments asserted herein, would arguably be Class 4.3 (Continuing Payments other than on a claim secured by the debtor's principal residence that come due on and after the date of the Order for Relief.)

Mr. and Mrs. Client filed for protection under Chapter 13 of the bankruptcy code on September 21, 2017 to address their growing inability to pay their compounding unsecured debt. Creditors have filed unsecured claims in this case in the amount of $219,773.71. Of that amount, $192,936.15 is owed to the federal government for student loans which are generally not dischargeable in bankruptcy pursuant to 11 USC 523(a)(8). This debt owed to the federal government represents approximately 88% of the total filed unsecured claims and due to multiple factors, including the balance of the debt, the contractual monthly payments, the maturity date, and the constant capitalization of interest, the Clients propose to treat this debt as a Class 4 Continuing Claim[4].

The Chapter 13 Trustee objects to the Clients' treatment of this claim as "discriminatory and contrary to 11 USC 1322 (b)(1) and §1322(b)(10) [and] relies on this Court's prior opinion in *In re Miller* 05-24735 dated November 18, 2005 [sic] and *In re Bentley* 266 B.R. 229 (1st Cir. BAP 2001)." No creditors have objected to the Debtors' Chapter 13 Plan.

Based on the facts of this case and the true nature of the student loan claim, the Trustee's objection must be overruled.

Trustee's Objection

The Trustee asserts an objection to the Debtors' treatment of the student loan claim based on two sections of the bankruptcy code, 11 USC 1322(b)(1) and 11 USC 1322(b)(10), and supports his objection with two cases.

The first code section Trustee cites in support of his objection is 1322(b)(1). 1322(b)(1) allows a plan to designate multiple classes of unsecured claims, as provided in 11 USC 1122, but such classification may not discriminate unfairly against any class so designated. The majority of courts having addressed arguments regarding 1322(b)(1), regardless of where the decision of the case landed, have agreed that 'discrimination' simply means different and have focused their analysis on trying to decipher the meaning of 'unfair'[5]. The Trustee asserts only that Debtors' proposed treatment of the student loan

[4] This Class designation was created pursuant to the Local Model Plan and is not established under Title 11 or the Official Form 113 (Chapter 13 Plan); nor does it appear such designation was established by the Judicial Conference Committee.

[5] Additionally, it is noted that in earlier case law on this subject courts have often focused on whether or not there is unfair discrimination against the pooled general unsecured creditors, but this analysis fails to address whether or not

claim as a Continuing Claim is discrimination. Yes, it is[6]. However, in light of the current state of affairs, advancing case law, and more in-depth analyses of student loan debt in recent years, this discrimination is not unfair and therefore the Trustee's objection must fail.

The second code section Trustee asserts in support of his objection is 1322(b)(10), which allows for the plan to provide for payment of interest accruing after the date of the filing on a nondischargeable unsecured claim but only if the plan is funded to pay 100% of all allowed claims. Debtors are unclear as to the relevance of Trustee's objection in this case as the principal amount originally due on this claim was approximately $168,000.00 with a full debt of $192,936.15 as of the date of the petition, and as Debtors' plan is expected to result in only approximately $56,800.00 payable on this claim, Debtors do not propose to pay post-petition interest during the Chapter 13 plan and therefore believe this portion of Trustee's objection to be without merit in this case. "It would be impossible for a debtor to pay interest on a long-term debt as part of a cure and maintenance of that debt under section 1322(b)(5), even if the debt is not nondischargeable under any provision of section 523(a)."[7]

The Trustee also cites two cases in his Objection to Confirmation. The first case Trustee cites is this Court's opinion in *In re Miller*[8]. As the Court is well aware, it evaluated the relevant facts of the case in *Miller* using the Baseline Test established in *In re Bentley*[9] and found that Debtor's plan did not overcome the modifier 'unfair' under 11 USC 1322(b)(1). Since this Court decided *Miller*, it has been presented with additional cases in which it has determined that different treatment of student loan claims has been appropriate on a case by case basis[10]. It does not appear from the records that the Court

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there is unfair discrimination against the separately classified unsecured creditor, which in this case is the federal government on behalf of the taxpayers. If the proposed treatment is not permitted, the student loan creditor, whose debt is nondischargeable will be required to wait at least five years to begin receiving any meaningful payment. This is detrimental to the federal student loan program and thus to the taxpayers.

[6] For the purposes of this portion of Debtors' response to the objection only, Debtors will presume that student loan debt is properly included in 11 USC 1322(b)(1) despite 11 USC 1122.

[7] *In the Matter of Freeman*, 2006 WL 6589023 (Bankr ND GA 2006).

[8] *In re Miller*, 05-24735 (ED MI 11/18/08).

[9] *In re Bentley*, 266 BR 229 (1st Cir BAP 2001).

[10] *In re Atchley*, 17-32184 (Bankr ED MI 1/16/18), *In re Boyer*, 17-31538 (Bankr ED MI 10/17/17). The facts of these cases differ from the case at bar but support the Debtors' contention that a new evaluation method is in order. There may be additional cases but they are unknown to the Debtors at this time.

evaluated these more recent cases using *Bentley* as the standard but rather on an individual case basis while searching to come up with an appropriate standardized method of evaluation.

Further, the Trustee's reliance on *Bentley* must fail for several reasons. First, while the facts of the case differ materially from the facts of this case as the Debtors in *Bentley* sought to pay the student loan obligation, which represented 50% of all unsecured debt, in full while paying the remaining unsecured creditors approximately 3% of their allowed claims, the *Bentley* court's analysis of 1322(b)(1) is incorrect and incomplete. While the court correctly states that 1322(b)(1) permits the separate classification of unsecured claims, it stops short of being correct as the court skipped any analysis of the separate classification under 1122 as required by 1322(b)(1), moving directly to the issue of whether or not the proposed discrimination is unfair.

11 USC 1122(a) states that "except as provided in subsection (b)…a plan may place a claim … in a particular class only if such claim … is substantially similar to the other claims …of such class." The exception set forth in 11 USC 1122(b) is that "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." Debtors aver that for all the reasons set forth within this pleading, there can be no logical conclusion that student loan debt is substantially similar to any other unsecured claim and therefore under 1322(b)(1), as restricted by 1122, Debtors are actually prohibited from treating student loan debt in the same class as other unsecured creditors. It does not appear the *Bentley* court considered this limitation.

Understanding that bankruptcy is, by its very nature, unfair to creditors – they do not receive that to which they are contractually entitled – the *Bentley* court attempts, as many others did before and have since, to discover the meaning of the modifier 'unfair' as used in 1322(b)(1). As neither the Code nor the legislative history provide any groundwork, the court was forced to look at other judicial creations and conclusions for guidance though, as the court ultimately established its own test in *Bentley*, it clearly was not persuaded by earlier incarnations.

Bentley established a four-prong test under which it evaluated the fairness of the debtors' proposed treatment of their student loans as a separate class. The four prongs of

the test and the court's articulated inquiries were:

1. Equality of Distribution. As a general rule, fairness in Chapter 13 requires equality of distribution among nonpriority unsecured creditors, and the burden of justification is on those who propose plans to the contrary.
2. Nonpriority of Student Loans. Student loan obligations are not given priority status under 11 USC 507 and therefore should not be given any preferential treatment under a Chapter 13 plan.
3. Contributions: Mandatory vs Optional. Do the debtors devote all of their projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan? If so, are the debtors proposing to pay any additional funds into the plan?
4. The Fresh Start. Is the discrimination warranted to further the fundamental purpose of Chapter 13 and the Bankruptcy Code in general?

As the outlined factors were evaluated within the *Bentley* decision, the test is crafted in such a way that it is certain to always lead to only one conclusion: any proposal to treat student loan debt must fail. And for that reason, to call this analysis a test is delusory and as such, it is counterintuitive to the purpose of Chapter 13. Ironically, the court itself recognized the limitations its own test in Footnote 19 when it noted, "[i]t is not clear whether there are factors outside the contemplation of Chapter 13 that might fairly justify departures from the baseline. None are offered or evident in this case, but we hesitate to conclude that the standard of fairness we propose is exhaustive and adequate to every manner of discrimination between classes."

While in *Miller* this Court utilized the test set forth in *Bentley*, it further contemplated Judge Lundin's treatise, Chapter 13, Volume 2 and three rules articulated therein by Professor Douglass Boshkoff[11]. For the reasons articulated throughout this pleading, Debtors submit that despite the wisdom and knowledge of the esteemed

[11] Rule 1: A debtor's proposal concerning the classification of unsecured claims should be accepted as long as it represents a plausible decision with regard to the debtor's personal or business obligations.
Rule 2: During the first 36 months of a plan, separate classification and favored treatment of insider or nondischargeable claims should not be permitted except with respect to claims that are nondischargeable under §§ 523(a)(5) (alimony and support) or 1328(a)(3)(restitution).
Rule 3: Between months 37 and 60 of a plan, separate classification and favored treatment of insider and nondischargeable claims should be permitted.

Professor, the rules promulgated and subsequently considered by this Court are inapplicable given the current environment of student loans and more comprehensive analysis of how different they are from any other type of debt treated in a bankruptcy.

Additionally, the *Bentley* court focused on whether or not the Debtors' interests in a fresh start was a sufficient basis to overcome the issue of fairness, which has been a standard focus across the country for many years. Debtors submit that this is actually only a minor factor to evaluate when Debtors seek to treat this claim as a Continuing Claim as the Debtors' interest in a fresh start will remain overshadowed by the significant balance which will remain owing on the student loan claim at the end of Debtors' case, regardless of how the claim is treated during the term of the plan.

Lastly, reliance on *Bentley* is outdated given the current state of student loan debt in the United States, most clearly articulated by the court itself when it shortsightedly stated that "the only consequence of nondischargeability is that, to the extent the debt is not paid through the Chapter 13 plan, it must be paid after completion of the plan, or at least from a source other than the funds devoted to the plan."[12] There are far more serious and lasting consequences related to student loan debts than merely the fact that they are nondischargeable in bankruptcy. Debtors submit that *Bentley* is no longer relevant nor persuasive given the shortcomings of the analysis, more recent case law, and the current state of affairs in the arena of student loan obligations.

In today's reality, we must look beyond the benefit to the Debtor, and put aside any attempts to restrict such benefits at the expense of addressing a national problem, and look at the benefit all parties will receive when substantial student loan debt is treated differently in Chapter 13. Consider that *Bentley* was decided in 2001; that was seventeen years ago. At that time the total outstanding student loan portfolio was significantly less than $516 billion[13], compared with today's almost-tripled portfolio balance of $1,366.9 billion[14]. The court was not deciding the *Bentley* case in the face of a national crisis and so did not delve into the true characteristics of this type of debt and much has been written on the subject in the years since, providing a much more comprehensive understanding of the

[12] *In re Bentley*, supra at 235.
[13] End of fiscal year 2007. Federal Student Loan Portfolio Summary of Federal Student Aid, an Office of the US Department of Education. https://studentaid.ed.gov/sa/about/data-center/student/portfolio.
[14] 1.3669 trillion, through Q4 2017, id.

idiosyncrasies of student loans compared to other types of debt. This is a reality that should be given substantial weight when considering whether or not *Bentley* remains a relevant guideline. In recent years, bankruptcy judges across the country have been struggling with the proper treatment of student loan debt when Chapter 13 plans propose nontraditional treatment.

The Proposed Treatment is Not Unfair:

Student Loan Debt is Completely Unlike Any Other Debt a Debtor Could Have

As is often the case, common sense has outpaced Congress in addressing the fact that student loans are so drastically different from other unsecured consumer credit that different treatment should be compulsory in a Chapter 13 Plan for a multitude of reasons, many of which have been articulated in bankruptcy cases across the country as consumer debtor attorneys have attempted to actively address this imminent national crisis. Reasons supporting a determination that student loans are distinctive and require different treatment include:

- That the debt, from its inception and by design, is a continuing claim as the majority of loans provide for a 10 – 30 year repayment period,
- That this is a debt owed to the Federal government,
- That the loans giving rise to the debt required little or no credit-worthiness,
- That the loans are based only on the expectation of future earnings, not the borrower's ability to pay at the time the loan is given; at least one court noting that Congress has recognized that "the loan is viewed as a mortgage on the debtor's future."[15]
- That the loans are given with an initial payment due, in an undetermined amount and on an undetermined date, known only to be several years in the future, subject to further extensions of that date under deferment or forbearance agreements,
- That as student loan balances continue to capitalize interest at a rate outpacing borrowers' ability to pay, it will bring the consumers' participation in commerce to a grinding halt,

[15] *In re Engen*, 561 BR 523 (Bankr D KS, 2016), citing H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 133, *reprinted* in 1978 U.S. Code Cong. & Ad. News 5963, 6094.

- That, unlike other unsecured debt, default on the student loan will result in garnishment of wages, commenced simply by ordering a borrower's employer to withhold up to 15 percent of disposable pay to collect the defaulted debt without a court order[16],
- That, unlike other unsecured debt, default on the debt will also result in garnishments against federal income tax refunds and benefits paid through the Social Security Administration[17],
- That public policy supports more prompt repayment of debts owed to the United States government under the student aid program over those to privately issued credit cards and other consumer debt,
- That on the higher end of the borrowing spectrum, one must typically die in order to exit repayment of substantial student debt as there is no statute of limitations on student loan debt[18], and
- That Congress established such debt to be non-dischargeable.

For all of these reasons, it is appropriate to begin recognizing that different treatment of student loans in Chapter 13 plans is not unfair. Student loan claims are so unmistakably distinct from all other claims, including general unsecured claims, that they dictate more favorable treatment in a Chapter 13 plan.

Owing Student Loan Debt Should Not be Punitive in Bankruptcy

<u>However, Evolution of the Law Has Made It So</u>

In the course of developing bankruptcy laws in their most current form, the Committee on the Judiciary noted in the Bankruptcy Reform Act of 1999[19], "[u]nlike chapter 7, the purpose of chapter 13 is to rehabilitate financially-troubled consumers by using future earnings to repay debts in exchange for a discharge of the unpaid portions of those debts." How is it then that the current state of the law leans precariously in the

[16] https://studentaid.ed.gov/sa/repay-loans/default/collections#how-debt-collected.
[17] Unless such benefits are being paid due to medical disability; but if later converted to retirement benefits, garnishment will resume. https://studentaid.ed.gov, supra.
[18] <u>Policy Brief</u>, Student Loan Borrower Assistance, a program of the National Consumer Law Center. http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/statuteoflim.pdf. See also <u>No Way Out: Student Loans, Financial Distress and the Need for Policy Reform</u>, Loonin, D. National Consumer Law Center, June 2006, VI. Bankruptcy Relief. http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/nowayout.pdf.
[19] Senate Bill 625, S REP NO 106-49, at 4 (1999).

direction of punishing these same financially-troubled consumers rather than allowing them to truly rehabilitate all of their debts?

In its efforts to halt the perceived[20] trend of the times of discharging student loans in bankruptcy, in 1976 Congress passed legislation to curb the practice and attempted to insure that those who elected to incur student loan debt would make a sincere and earnest attempt to repay that debt. So, as part of larger amendments to United States bankruptcy laws enacted that year and effective in 1978, Congress deemed that loans made by the federal government or a non-profit institution for higher education could not be discharged during the first five years of repayment.[21] This exception to discharge has continued to become more and more restrictive in the years since, including the enactment of the Student Loan Default Prevention Initiative Act of 1990[22,23] and brings us to the current state of affairs in which both the Code and the case law has evolved to a point that most deem it nearly impossible to obtain relief from student loan debt if you are alive.

Additionally, a close reading of 11 USC 523(a) reveals that while all other provisions of 523(a) require the creditor to take an affirmative action in order to have a claim determined to be non-dischargeable, when it comes to (a)(8), the burden rests on the Debtor to assert the debt to be dischargeable and is coupled with a near impossible threshold to overcome. The result is a debt that has gained stature exceeding that of criminal activities, the exceptions appearing to be only federal crimes punishable by death[24], terrorism resulting in death or serious bodily injury[25], and sex crimes involving a minor[26].

This history is offered not because the Clients seek to discharge this debt but to

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[20] The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?, Mueller, P. Emory Bankruptcy Developments Journal, Volume 32, 2015; pg 230-264. http://law.emory.edu/ebdj/content/volume-32/issue-1/comments/non-dischargeability-private-student-loans-looming-crisis.html.
[21] Id., specifically Section 1.A.
[22] Pub.L. 101-508, §§ 3001, 3007, 104 Stat. 1388, 1388-25, 1388-28 (eff.Nov.5, 1990).
[23] Student Loans, Chapter 13, Classification of Debt, Unfair Discrimination and the Fresh Start After the Student Loan Default Prevention Initiative Act of 1990, Pollak, O. & Hicks, D. 1999 Det. D.L.Rev. 1617, 1629 (Winter 1993). (Establishing further restrictions regarding defaulted student loans created an incentive for debtors "to classify student loans as either payable in full (like a priority claim) or substantially payable (to the extent that 100% disposable income could afford to pay)…[in order to maximize] the debtor's fresh start following discharge.")
[24] 18 USC 3281.
[25] 18 USC 3286.
[26] 18 USC 3283.

provide the background which has led to the current state of the law and to illustrate the punitive restrictions on the treatment of student loans in Chapter 13 plans. It is time to stop the nonsense.

Public Policy and Proper Considerations

The Trustee presumes the historical approach to the classification of claims in this District to be a correct and foregone conclusion and does not consider that 1322(a)(3), which is a compulsory provision of the Code, provides that if a plan classifies claim, the plan must provide the same treatment for all claims within that class. In this case, the plan classifies the student loan debt as a Continuing Claim and provides the same treatment on that claim as it does to the other Continuing Claim treated in Class 4. There is nothing in the bankruptcy code which dictates that the unsecured status of a student loan trumps its simultaneous status as a Continuing Claim, as defined by the Local Model Plan of this District.

In further support of their contention that 1322(a) 'trumps' 1322(b) to the extent its provisions are mandatory rather than permissive, Debtors note that neither 1322(b) nor 11 USC 1325(a) set forth any allowances for payment of unsecured income tax claims in a different class than other unsecured claims, regardless of the claim's priority status under 11 USC 507, and therefore, it would stand to reason that the treatment of those claims in this District as a separate class must have also been under the scrutinized under 1322(b)(1) at some point.[27] And while the Trustee may assert that 1322(a)(2) provides the basis for this different treatment on income tax claims, Debtors submit that 1322(a)(3) provides that same basis for their proposed treatment of this student loan claim. Debtors are willing to research this apparent anomaly in more detail if the Court believes such history is necessary to recognize that the treatment on unsecured income tax claims in the Local Model Plan does not, on its face, differ in its compliance under 1322(b)(1) from Debtors' proposed treatment of this student loan claim.

Case law across the country has developed in favor of the principle that perhaps the Court should balance the amount paid on the student loan claim against the amounts being paid to the rest of the consumer debt pool. This principle is grounded in an incomplete

[27] In contrast to local practices, see *In re Copeland*, 742 F 3d 811 (8th Cir 2014), finding separate classification of priority income tax debt to be unfair discrimination.

analysis and therefore must fail. The principle of measuring the payments made under the Chapter 13 Plan against a stationary amount of student loan debt is a disingenuous, if not duplicitous, evaluation given that all parties to such an evaluation know for a fact that student loans are not dischargeable and continue to accumulate interest, which is capitalized, throughout the Chapter 13 Plan. To compare nondischargeable student loan debt to dischargeable unsecured consumer debt as equivalent debts is a fallacy that has been allowed to ferment for far too long.

Among the many differences previously outlined herein, Debtors remind the Court that student loan credit is extended without consideration as to the creditworthiness of the borrower, must be used for a specific and limited purpose, does not require immediate payments, may not begin to accrue interest so long as the borrower is in school, may have a deferment period following end of studies, is owed to the United States government, is specifically identified as non-dischargeable in bankruptcy without consideration of how the debt was accumulated, is subject to no statute of limitations, and interest paid on the debt may be claimed as an adjustment to income on the student's income tax return[28]. These same characteristics do not apply to any other consumer credit.

The student loan obligation in this case was $192,936.15 as of September 21, 2017[29]. The student loan obligation accounted for 88% of the unsecured claims filed, based on the balance due as of the petition date, but the percentage is higher as of today due to the ongoing interest accumulating on the debt and the balance on this obligation is now believed to be approximately $196,913.75[30].

The contractual obligation on this claim is $1,894.00 per month. The balance will continue to grow at the rate of $24.86 per day, which is approximately $769.00 per month. The Chapter 13 Plan proposes to pay a minimum of $850.00 per month on the claim for the duration of the Chapter 13 Plan. This will result in payments totaling an estimated $56,800.00 to be made on this claim. Based on the balance as of the date of filing, the continuing capitalizing interest, and the estimated minimum payments, the balance on this

[28] IRS Pub 970 (2017), Chapter 4. https://www.irs.gov/publications/p970#en_US_2017_publink1000178230.
[29] Of note, by comparison, Debtors' mortgage obligation was only $100,650.61.
[30] The daily interest on this loan is $24.86 (Claim 6, Part 2, Page 1) and thus from September 21, 2017 through February 28, 2018, an estimated $3,977.60 has accumulated and has been added to the principal balance as capitalized interest.

debt at the end of a 60 month plan will be $192,720.37, which is just $215.78 less than which was owed on the date of filing. (See Exhibit 1, attached hereto and incorporated by reference.)

To the contrary, should the Court sustain the Trustee's objections and require this claim to be paid prorata with general unsecured creditors, Debtors will emerge from this Chapter 13 plan owing at least $6,006.22 more on this claim after discharge than what was owed on the date of filing. (See Exhibit 2, attached hereto and incorporated by reference.) Exiting bankruptcy with a student loan balance $6,000.00 higher than when the case is filed is certainly in contravention of the Debtors' fresh start.

Chapter 13 itself was not born by the hand of Congress but by the practical necessity of the day. While Congress was busy discussing and debating the concept of Chapter 13, which would not be codified until 1938, a former special referee recognized the need and benefit to allowing Debtors to establish a repayment plan.[31] The same necessity for judicial innovation is present in this case today and that innovation must go beyond the attempts made by others thus far.

The Plan Complies with Applicable Code Sections

Treatment of student loan debt as a Continuing Claim is appropriate and permissible pursuant to 11 USC 1322(a)(3), 1322(b)(1), (2), (4), (5), (8), and (11), and 1325(a)(4) at the very least.

1322(a)(3) provides that "if the plan classifies claims, [it] shall provide the same treatment for each claim within a particular class." It appears that over time, the significance of the words of the (a)(3) have been lost. The code section specifically states that if the *plan* classifies claims, not the Trustee, not the customary practices of the District, not the Court, but the plan itself, it is limited only by the requirement that such classification provide the same treatment for each claim within the class. Here, the plan classifies this student loan claim as part of the Continuing Claim class, as this obligation has a 20 – 30 year repayment period, and therefore is an accurate and proper classification of the claim.

[31] "By the time it was enacted in 1938, Chapter XIII codified informal practices which had developed without explicit statutory authorization. In the mid 1930's in Birmingham, AL a former special referee in bankruptcy, Valentine Nesbitt, first developed a ''repayment option'' which was the model for Chapter XIII. See Weinstein, The Bankruptcy Law of 1938 (1938)." Senate Bill 625, supra at 5.

In contrast to the mandates of 1322(a), the provisions of 1322(b) are permissive in nature to the extent that each provision may, but is not required to, be provided for in the plan. Specifically, Debtors assert that the proposed treatment of the student loan claim in this case is permitted as, in pertinent part, 1322(b) states that the plan may do any or all of the following[32]:

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

(2) modify the rights of … holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim …;

(5) … provide for … maintenance of payments while the case is pending on any unsecured claim … on which the last payment is due after the date on which the final payment under the plan is due; …

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor; …; and

(11) include any other appropriate provision not inconsistent with this title.

Debtors' plan complies with 1322(b)(1) in that not only is the student loan claim designated as a Continuing Claim in the plan, which is consistent with the claim structure identified within the approved Local Model Plan[33], the Code reference within same, and historic practice in this District to allow claims with installment payments which exceed the 36 – 60 month plan to be treated as Continuing Claims, but it is clearly and grossly different than any other secured or unsecured claims. While the Trustee asserts that this treatment discriminates against unsecured creditors as this claim is also unsecured, Trustee's argument fails to recognize or ignores that this claim, while unsecured in only the most common sense of the word, is also a Continuing Claim and is most properly treated as such as a) there is no provision of the Code which prioritizes a claim's status as unsecured over it's status as a Continuing Claim, and b) the characteristics of the student loan claim

[32] Subject to the limitations set forth in 1322(a) and 1322(c).
[33] The Model Plan identifies Class 4.1 as "Secured Claims on which the last contractual payment is due beyond the length of the plan. 11 USC §1322(b)(5)". Debtors' plan simply removes the word "secured" as 11 USC 1322(b)(5) contains no such restriction.

are so unequivocally distinguishable from other unsecured claims that they cannot reasonably be considered more similar in nature to those unsecured claims than they are to any other class of claims.

Based on the foregoing, Debtors submit that the issues raised within 1322(b)(1) are not applicable in this case as the student loan claim is so substantially different from any other claim than there is no discrimination between it and general unsecured creditors. Should the Court determine that there is in fact discrimination, then Debtors further submit that, based on the factors set forth herein, the exclusively unique characteristics of the student loan claim overcomes any blush of unfairness.

Debtors' plan complies with 1322(b)(2) as Debtors' plan does elect to modify the rights of the general unsecured creditors and provides that such creditors shall receive 0% of their allowed claims, which is what those creditors would have received if Debtors' estate was liquidated in a Chapter 7 proceeding, which is permissible pursuant to the subsection.

Debtors' plan complies with 1322(b)(4) as Debtors' plan may, and does, provide for concurrent payments on both of Debtors' Continuing Claims, Debtors' mortgage and student loan claims. It is possible that Debtors' plan could more fully comply with (b)(4) if Debtors were remitting payments directly to the student loan creditor rather than having such payments made by the Chapter 13 Trustee as Debtors are making their mortgage payments directly.

Debtors' plan complies with 1322(b)(5) as the Debtors' plan proposes to maintain regular periodic payments on the student loan claim, which has a maturity date of 20 – 30 years after repayment began[34] which is far in excess of the duration of this Chapter 13 plan.

Debtors' plan complies with 1322(b)(8) as the Debtors' plan proposes to pay part of the student loan claim, which is *a* claim, and the subsection does not require such payment on *all* claims.

Debtors' plan does not expressly invoke 1322(b)(11) and Debtors reference it herein only to the extent that the proposed treatment of the student loan claim is consistent with all provisions of the Code.

[34] Based on the total balance on the claim, it is expected that the repayment term is the full 30 years.

11 USC 1325(a)(4) requires the court to confirm a Chapter 13 plan if "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date…..," subject to exceptions set forth in 11 USC 1325(b)[35]. Debtors' plan complies with the requirements of 1325(a)(4).

Case Law

"There have been numerous opinions written discussing 'unfair' discrimination in the treatment of student loan obligations in a Chapter 13 context,"[36] however for the most part, many still miss the mark. Fortunately, there are cases which have recognized the true underlying issues and have done a remarkable job in providing significant resources to assist the Court in resolving the issues in this case.

"[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."[37] With an eye toward this result, Judge Robert D. Berger of the District of Kansas authored a well-articulated opinion in *In re Engen*[38], in which he recognizes the multitude of 'unfair discrimination' tests which have developed, identifying no less than ten different tests[39] which might be utilized to evaluate unfair discrimination. While *Engen* is factually different than the case at bar as to pre-petition payments made to unsecured creditors by the Debtors in that case, the analysis in *Engen* is relevant and on-point for a modern evaluation of unfair discrimination as it relates to treatment of student loan claims in the Chapter 13 context.

[35] The only portion of 11 USC(b) which appears to have bearing on the issues remaining is 1325(b)(1)(B) which states: "If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan…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."
[36] *In re Boscaccy*, 442 BR 501, 508 (Bankr ND MS 2010).
[37] 8 COLLIER ON BANKRUPTCY ¶ 1322.05[2], at 1322-18-19 (Alan N. Resnick & Henry J. Sommer, eds., 16th Ed 2016), see *also In re Sullivan*, 195 BR 649 (Bankr WD TX 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); *In re Freshley*, 69 BR 96 (Bankr ND GA 1987)(underlying policy choices of Congress to encourage repayment of student loans provides a sufficient basis for the debtor's separate classification); *In re Brown*, 500 BR 255 (Bankr SD GA 2013).
[38] *In re Engen*, 561 BR 523 (Bankr D KS 2016).
[39] The tests identified in *Engen* include: Strict, Flexible, Balance, Reasonableness, Bright-Line, Percentage of Repayment, Interest of Debtor, Multifactor, Four-Part, and Baseline.

Amidst its lengthy and well-researched discussion, the *Engen* court articulates several key points. "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…, but not sufficiently special to separately classify."[40] Yet despite efforts to reconcile this disharmonious outcome with the provisions of the Code, historically courts have continued, for the most part, to perpetuate those very outcomes[41], with only the most recent emerging case law appearing to be turning tide.

It is important to note that while all of the unfair discrimination tests are judicially created, "determining fairness is best left to the discretion of the first-line decision maker, the bankruptcy judge and [that] Court has wide discretion in determining whether proposed discrimination is unfair...."[42] In that spirit, the *Engen* court endeavored to analyze the case in light of the *Bentley* test and then entered into a broader discussion of the issue to most accurately address the facts of the case before it. In its analysis under *Bentley*, the court found it difficult to agree with several portions of the prior court's findings in that case, most notably disagreeing with the *Bentley* court's conclusion that "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."[43]

The *Engen* court went on to explain that "[s]tudent loans are nondischargeable because the Congress wishes to protect the government's fiscal health as a guarantor (or lender) of these loans. Allowing Debtors to treat their Student Loan Claims favorably ahead of other general unsecured creditors furthers Congressional intent and protects the government's and the student loan program's fiscal health."[44] The court further reasoned that while Congress may have omitted student loans from priority status under 11 USC 507, a conclusion that Congress did not intend for such loans to be treated more favorably is misguided as there may have been other considerations in play when Congress did not include student loans as priority debt under 507.[45]

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[40] *In re Engen*, supra at 533.
[41] *In re Engen*, supra at 538 ("The various tests seem too inflexible to properly reflect the discretion that this Court has with respect to confirmation of a Chapter 13 plan that contains a separately classified creditor.").
[42] *In re Engen*, supra at 535. Internal citations omitted.
[43] *In re Engen*, supra at 540. Internal citations omitted.
[44] *In re Engen*, supra at 541-542. Internal citations omitted.
[45] *In re Engen*, supra at 542-543. Internal citations omitted. (Congress may have intentionally omitted student loan

The *Engen* court also discussed the current state of affairs of outstanding student loan debt as a national concern and gave not only a history of student lending, tuition trends, and effects on individuals and their quality of life, but also outlined some congressional efforts to address the growing concerns by way of modified repayment programs.[46] In the end, the court concluded that based on all the factors of the instant case and in light of all other factors known to it, that the discrimination proposed by the debtors was not unfair.

In late 2017, Judge Aron of the Middle District of North Carolina considered this issue in *In re Hotchkiss-Price*[47] and though she found the proposed discrimination to be unfair as the Debtors "did not provide the Court with any extenuating factors justifying the separate classification of the student loan debt", she further opined that "the unfair discrimination determination should be made on a case by case basis, considering the totality of the circumstances,"[48] and found that based on the facts of the case, that the proposed treatment of the student loan claim was not unfair.

In ruling on a consolidation of cases, the court in *In re Boscaccy*, [49] relying on the reasoning of *In re Chandler*[50], found that discrimination was not necessarily unfair and dependant on the individual facts of the case. In ruling on the Boscaccy facts, the court found that

If the debtors are not permitted to maintain the payments on their sizeable student loan debts, the interest accrual on these debts during the life of their Chapter 13 plan will likely render their bankruptcy filing meaningless. Consequently, although there will be discrimination against the general unsecured creditor class under the debtors' proposal, considering the totality of the circumstances, this discrimination is not considered 'unfair'

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debt from 507 because such classification would have required payment of the debt in full within the 3 to 5 year plan term.)

[46] Which have been fashioned in a manner only designed to allow borrowers to reduce payments or delay those payments even further which only serves to allow the student loan balances to continue to grow as none of the programs in place today stop the accrual of interest.

[47] *In re Hotchkiss-Price*, 17-10488, (Bankr MD NC 2017).

[48] *In re Hotchkiss-Price*, supra, citing *In re Crawford*[48], 324 F3d 539 (7th Cir 2003); See also Footnote 6, "[t]he Court makes no ruling herein as to whether a debtor can ever separately classify a student loan debt under § 1322(b)(1). This opinion and order is, as advised, heavily dependent upon the specific facts and circumstances of the case."

[49] *In re Boscaccy*, 442 BR 501 (Bankr ND MS 2010).

[50] *In re Chandler*, 210 BR 898 at 904 (Bankr D NH 1997).

by the court.[51]

And based on the facts on the George case, the court found that "[s]ince the monthly student loan payment is relatively substantial, if it were not permitted to be made, the debtor would emerge from bankruptcy, insofar as this nondischargeable debt is concerned, in a much worse position than the debtor was in prior to filing."[52]

Allowing separate classification of student loan claims "must be the result intended by Congress; otherwise, how could a debtor's plan provide for the 'maintenance of payments' on 'unsecured' claims under section 1322(b)(5) if it were considered 'unfair discrimination' under section 1322(b)(1). In order to give meaning to both subsections,…the discrimination … is not unfair."[53]

An Appropriate Test

If a test must be used, perhaps the best evaluation is that which was outlined in *In re Bird*[54], which provided that the proposed discrimination is best weighed against the following factors:

(1) whether the discrimination substantially enhances or is necessary to the feasibility of the plan; (2) whether the discrimination reflects chapter 7 liquidation priorities; (3) whether the discrimination is otherwise contemplated by the Code; (4) whether the creditor discriminated against will receive more under the plan than it would in a hypothetical chapter 7 liquidation; (5) if the creditors as a whole will receive more under the plan than in a hypothetical chapter 7 liquidation, will the discrimination encourage the use of chapter 13; (6) will the discrimination reduce the chances that the debtor will be forced to file bankruptcy in the future; (7) does the discrimination enhance an interest of the debtor which is otherwise protected or furthered by the Code; and (8) the extent of the discrimination.

This test has been utilized in other cases to evaluate the fairness of the separate treatment of student loan debts in Chapter 13 and appears to be the most comprehensive

[51] *In re Boscaccy*, supra.
[52] *In re Boscaccy*, supra.
[53] *In re Chandler*, supra at 904. See also *In re Truss*, 404 BR 329 at 334 (Bankr ED WI 2009) ("If the plan provides for the cure of a default and maintenance of payments on a debt, the terms of which extend beyond the term of the plan, it is not for the court to determine whether this is fair to the other creditors or not. Such a provision is authorized by statute.").
[54] *In re Bird*, No 9401012, 1994 WL 738644, at 4 (Bankr D ID, 12/23/94).

of the judicial tests given the facts of this case. Notwithstanding any other assertions regarding the true nature of student loans made herein, absent a rule set by the Sixth Circuit, Debtors submit that the *Bird* test provides the most complete basis for evaluation of all relevant factors in a Chapter 13 case.

Conclusion

As the parties to consumer cases under Chapter 13 continue to see a growing issue in this arena, spawned by many many factors, not the least of which is the virtual student loan prison created by the almost absolute elimination of the ability to discharge these debts, we will continue to take a closer and closer look at the debt itself and will likely continue to identify many more ways in which student loans are markedly different than other unsecured consumer debt. And we all must remember that just because courts en mass have traditionally not done so does not mean they have come to correct conclusions. This Court has the opportunity to recognize these substantial differences between student loan debt and other unsecured consumer debt and the imminent crisis the national student loan program has inadvertently created and address it accordingly.

Unequal does not mean unfair. In addition to the legal arguments advanced herein, practically speaking, the treatment Debtors' propose is not unfair to Class 9 General Unsecured Creditors. Considering that at conclusion of a Chapter 13 plan, "there is a balance owing on [all] unsecured debts paid through the plan, and as to this balance 'the court shall grant the debtor a discharge,'"[55] and that the projected payments on the student loan claim during this plan will create no measurable windfall for the Debtors when comparing the pre-petition and post-discharge balances, the discrimination is not unfair. After payments of $56,800.00 to be disbursed under this Chapter 13 plan and upon entry of a discharge, due to the non-dischargeability of the student loan claim and the continuing accumulation of interest, Debtors' financial obligation on that claim will be only $215.78 less than what was owed on the date of filing.

Debtors submit that based on the significant differences between student loan debt and other unsecured debt as well as the specific facts presented, treatment of the student loan claim is proper in this case as a Class 4 Continuing Claim and respectfully request that

[55] *In re Sharp*, 415 BR 803 (Bankr D CO 2009)

the Court overrule the Trustee's objection and confirm their Chapter 13 Plan.

Supplemental Brief

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF DEBTORS' PROPOSED CLASS 4 CONTINUING CLAIM TREATMENT OF STUDENT LOAN CLAIM

Pursuant to the Order of this Court, Debtors Mr. and Mrs. Client, by and through their counsel, and the Trustee have filed briefs in support of their respective positions regarding the Trustee's objections to confirmation of Debtors' plan, specifically as to the Class 4 treatment of the student loan claim. This Supplemental Reply Brief is filed pursuant to the same Order.

Mr. and Mrs. Client incorporate the contents of their original Brief herein and further state in response to the Trustee's Brief in Support:

11 USC 1321 states: "The debtor must file a plan." It does not permit the Trustee, a creditor, or any other party in interest to file a plan[56]. The ***debtor*** must file a plan. Therefore, the contents of the plan, as required under 11 USC 1322, are for the ***debtor*** to elect, and in the case of classification of claims, for the ***debtor*** to define and designate. In this case, the Clients have elected to designate a class of Continuing Claims. The class is comprised of two claims which, under the contractual terms of each, will extend beyond the length of the Chapter 13 Plan and are therefore properly classified as such.

Trustee's Statement of Facts

Nonpriority Unsecured Creditors

The Trustee states that the proposed Plan "divides nonpriority unsecured creditors into two classes and proposes to treatment them differently." First, as the Plan does not divide the student loan claim into a separate class but merely classifies it in a different class than the General Unsecured Claims, the Trustee's statement is misleading. Second, the addition of the qualifier of "nonpriority" to describe the different classification of the student loan debt, while an accurate statement as to the claim's priority status, is incomplete and serves only to add a false distinction as no such distinction appears in 11

[56] Unlike other provisions of Title 11, which permit certain parties to take actions in the event the debtor does not. Statutory construction requires that absence of such permission in 11 USC 1321 must be read as intentional.

USC 1322 or 11 USC 1325.

The Plan, pursuant to the approved Model Plan[57] of this District, identifies the following classes of claims to receive payments, in order of appearance in the Plan[58]:

1. Trustee Fees,
2. Administrative Claims,
3. Continuing Claims on Which the Last Contractual Payment is Due Beyond the Length of the Plan[59],
4. Secured Claims on Which the Last Payment Will Become Due Within the Plan Duration,
5. Executory Contracts and Unexpired Leases,
6. Priority Unsecured Claims,
7. Separately Classified Unsecured Claims, and
8. General Unsecured Claims.

Aside from the fact that the Clients' Plan actually does not propose two classes for treatment of "nonpriority unsecured debt", assuming for a moment that the Trustee's statement of facts is accurate, if the Plan does that, it must be equally true that the Clients' Plan proposes three classes of treatment of priority unsecured debt: Trustee Fees, Administrative Claims, and Priority Unsecured Claims, which is not expressly authorized under 1322 or 1325 either but is expected in this District pursuant to the Model Plan. This is because specific express authority to classify claims under 1322 is not required so long as the Plan as a whole complies with 1322 and 1325.

In fact, following Trustee's reasoning and that which is set forth in the case law cited by him in support of his position, such separate classification of priority unsecured debt is a violation of 1322(b)(1), as the Trustee's fees are not only paid prior to payment of any other priority unsecured claims but prior to confirmation as well, and Debtor's counsel's fees are paid after payment of Trustee's fees and prior to payment of priority income tax debt and domestic support obligations. Yet, this treatment has been adopted in this District

[57] Model Plan, Version 3.0. The Plan at issue was filed prior to the effective date of the Local Model Plan required pursuant to Administrative Order 17-04.
[58] Of note, every District-created Class set forth in the Model Plan includes a Code section reference; with the exception of the "General Unsecured Claims".
[59] The word "Secured" was removed from the proposed Plan and such change was noted in I.B.

and the Trustee makes no argument against it as "unfair discrimination" so on what basis can the Trustee advance a good faith argument that treating the ongoing student loan claim as a Continuing Claim is actually an impermissible division of nonpriority unsecured creditors into two classes if the Trustee does not also argue against the division of priority unsecured creditors into three classes? Or against the division of any unsecured creditors, priority or nonpriority, into any separate classes?

Further, on what authority does Trustee rely that the student loan claim is more like a General Unsecured Claim than a Continuing Claim? The Trustee does not address this issue in his Brief. Instead he ignores the Clients' argument regarding this issue completely.

Claims in This Case

The Trustee asserts that "the only creditors in this plan are unsecured and the Debtors propose only to make payments to 1 (one) unsecured creditor." (Trustee's Brief at page 16) As evidenced by the Plan, this statement is incorrect.

The Clients' Plan proposes to pay the following, specifically identified claims:

1. Trustee Fees,
2. Administrative Claims,
3. Two Continuing Claims; the mortgage and the student loans,
4. An Executory Contract/Unexpired Lease,
5. A Priority Unsecured Claim for child support, and
6. General Unsecured Claims.

Of these claims, only the Trustee Fees, Administrative Claims, one Continuing Claim (the student loans), and the General Unsecured Claims are to be paid by the Trustee while the remainder of the Claims will be paid direct by the Clients. That the "disbursing agent" for certain claims in the Plan is the Clients and not the Trustee does not change the fact that the Plan treats these claims.

Trustee's Argument A

11 USC 1322(b)

The Trustee asserts that the relevant Code section to the issue at hand is 1322(b)(1). The Trustee does not respond or otherwise address the Clients' arguments regarding the other provisions of 1322(b).

As stated by both parties previously, 1322(b)(1) permits the designation of "a class

or classes of unsecured claims." The Clients' plan does not do that. Relevant to the issue at bar, the Clients' plan designates a class of Continuing Claims and a class of General Unsecured Claims.

While the Trustee acknowledges that the Clients may treat student loan debt as a separate class, he fails to recognize that that isn't what is being proposed. The Clients propose to classify the student loans in a District-established class based on the continuing nature of the debt rather than based on the unsecured nature of the debt. They do not seek to classify the student loans as a separate class, only to classify the claim in a different class than that which the Trustee believes is appropriate.

Notwithstanding the foregoing, the Trustee asserts that the "student loan debt, is substantially similar to other unsecured debt…" (Trustee's Brief at page 4), but fails to articulate how the student loans are so substantially similar to general unsecured claims and is silent as to all of ways the student loans are not, as outlined in the Clients' Brief. The Clients maintain that the student loans are less similar to general unsecured claims compared to other classification options available to them, that they did not establish two separate classes of unsecured claims as identified under 1322(b)(1), and that even if the Court finds that the proposed treatment *is* subject to scrutiny under 1322(b)(1), the Clients submit that the treatment is not unfair.

In re Chapman

The Trustee cites *In re Chapman*, 146 BR 411 (Bankr ND IL 1992), in support of his contention that a student loan claim may not be classified separately if it unfairly discriminates against other unsecured creditors. *Chapman* is so clearly distinctive from the case at bar that it is inapplicable. In *Chapman*, the debtor proposed three classes of unsecured claims: a) unsecured with a co-debtor, b) student loans, and c) other unsecured debt. In this case, the Clients propose to classify the student loans as a Continuing Claim, which is a classification established in this District in the Model Plan, they do not seek to create a separate class. That possibility is not before the Court and is best left to another day.

However, notwithstanding the foregoing, the *Chapman* court did recognize that in classifying claims, "[a]ll that is required is that all claims included in any given class be substantially similar." Here, the student loans are more substantially similar to a

Continuing Claim than to a General Unsecured Claim. To illustrate:

Characteristics of the Other Continuing Claim	Similar	Dissimilar
Secured debt.		X
Last payment due is beyond the length of the plan.	X	
Interest continues to accrue during term of the plan.	X	
Debt is not discharged upon entry of a discharge in the case.	X	
Specific repayment period exists under the contract.	X	
Specific monthly payment amount exists under the contract.	X	

Characteristics of the General Unsecured Claims	Similar	Dissimilar
Unsecured debt.	X	
Claim will not extend beyond the length of the plan.		X
Interest does not continue to accrue during the term of the plan.		X
Pre-petition, revolving extension of credit.		X
Pre-petition, variable monthly payment due under contract.		X

Clearly, the student loan claim is more substantially similar to the other Continuing Claim than to the General Unsecured Claims and therefore the proposed classification is appropriate and not forbidden by law.

In re Bentley

The Clients note that since being decided in 2001, *In re Bentley*, 266 BR 229 (1st C BAP 2001), has been cited in a published bankruptcy decision in this Circuit only 4 times[60] in 17 years, twice by Ohio courts and only twice in opinions issued in this District. Aside from not being precedence in this Circuit, such limited reliance on the reasoning set forth in *Bentley* gives rise to a question of the wisdom to continue to rely on it today. The Clients would urge the Court to rely on the case law set forth in their Brief as more accurately reflecting the state of the law following enactment of BAPCPA and in light of the current state of affairs as to student loan debt.

Rather than rehashing their position herein, the Clients rely on their original Brief as

[60] *In re Miller*, 05-24725 (Bankr ED MI 2008); *In re Rooney*, 436 BR 454 (Bankr ND OH 2010); *In re Russell*, 503 BR 788 (Bankr SD OH 2013); and *In re Parker*, 16-54696 (ED MI 2017).

to the factors set forth in *Bentley* and reiterate only that the test outlined in *Bentley* is crafted in such a way that it is certain to always lead to only one conclusion: any proposal to treat student loan claims differently from general unsecured claims will always fail as *Bentley* isn't a test, it is a sentence. For that reason, *Bentley* should not be held by this Court to be the standard against which we review the classification of student loan claims outside of the General Unsecured Claims pool.

In re Miller

The Court issued an opinion in the case of *In re Miller*, supra (FN 5), on November 18, 2008. Upon further review of the underlying pleadings, it is clear that the decision issued in *Miller* is not applicable to this case. In *Miller*, the Debtor did not propose *any* treatment of the student loan claim in the Chapter 13 Plan[61]. The original plan itself was silent as to that claim. It was only the debtor's Schedule J which identified that the debtor desired to pay her student loans directly during the term of the plan.

No argument was advanced in *Miller* regarding the treatment of the student loan in a District-established classification of a Continuing Claim, rather than as a General Unsecured Claim, as such a classification was not present in the Northern Division of the Eastern District of Michigan at that time. Further, the only claim specifically identified in the *Miller* plan was a secured auto claim. Lastly, creditors objected to confirmation of the plan in that case; which is not so in the case before this Court.

All Unsecured Creditors, as Classified by the Trustee, Receive 0%

The Trustee has impermissibly attempted to classify the student loan claim and in doing so, has classified it as a general unsecured claim. The Trustee's resulting perspective is that treating the student loan claim as a continuing claim will allow that creditor to receive "approximately $68,806.00 amounting to 35.663% of its claim while the other general unsecured creditors would receive 0%." (Trustee's Brief at page 13) First, to reiterate, the Trustee is not permitted to classify the claims of the Plan. However, even if the Trustee is allowed to do so in this case, the Trustee's assertion is a misleading statement and not ground in full fact. If the student loan claim was frozen as of the date of filing, as the general unsecured claims are, the Trustee's statement would be true.

[61] 05-24725, Docket 238, filed 7/10/18.

However, that is not the case.

Just like any other Continuing Claim, the student loan claim will continue to accumulate interest during the life of the Chapter 13 Plan. Because of this fact, the student loan claim, while receiving an estimated minimum of $56,800.00, but potentially as much as $68,806.00 according to the Trustee's calculations, during the term of the Plan will have a remaining balance of approximately $192,720.37 at the end of the Plan. This is $215.78 less than that which was owed on the date of filing. Therefore, while the Clients' position is that comparing the student loan claim to general unsecured creditors is not applicable here, in consideration of the Trustee's position, the practical result of this fact is that essentially neither the student loan claim nor the general unsecured creditors actually receive any dividend as the net result of the currently proposed classification results in the student loan creditor receiving 0.0011184%[62] of its claim[63] compared to the general unsecured creditors receiving 0%.

The Trustee asserts that the additional language in Class 4.1 which states, in capitalized 12 pt bolded font, "[b]ut in any event, for the duration of the plan, this claim shall be paid all available funds prior to disbursements on any subsequent level as set forth in V.F."… "attempts to take away any hope of the Class 9 creditors ever seeing a penny in this Chapter 13 plan." (Trustee's Brief at page 13) The Clients remind the Court that all creditors received notice of this Plan, which was served on November 29, 2017, and not one has filed objections to confirmation, either timely or not. An argument could be made that general unsecured creditors have not objected because they too *want* the student loan claim to be paid; their reason being to better situate the Clients to reenter the world of consumer borrowing, a world that will remain foreclosed to them so long as the student loan debt continues to grow.

The Trustee opines that if $262.40 per month were permitted to be paid to General Unsecured Creditors, Trustee's perceived unfair discrimination would be resolved. While that would be beneficial to the General Unsecured Creditors, the Clients cannot agree. As stated previously, the "unfair discrimination" analysis does not come into play when the

[62] The estimated reduction of $215.78 on the debt owed at the end of the Plan as proposed, divided by the Proof of Claim amount of $192,936.15.
[63] Amount of the claim being the amount anticipated to remain owing at plan expiration despite payments received by creditor during the term of the Plan.

plan does not establish multiple classes of unsecured claims, which the Clients' Plan does not.

Trustee's Administrative Issues Related to Fluctuations

in Amount to be Paid on 4.1 Claims

The Clients can appreciate that the Trustee's plan management system may not be capable of accommodating monthly adjustments necessitated by fluctuations in the amount paid into the plan but note that perhaps the Trustee's issue could be resolved by a permanent escrow designation for excess funds, such funds to be disbursed quarterly, semi-annually, or annually for the duration of the Plan.

Another alternative is increasing the proposed permo in the Order Confirming Plan to assist the Trustee's administration, with the understanding that future attorney fees may reduce that amount. No additional notice to creditors would be required as there would be no negative impact on any creditors resulting from an increased permo given the clear and obvious language in Class 4.1 of the Plan as filed.

In re Osorio

The Trustee cites *In re Osorio*, 522 BR 70 (Bankr D NJ 2014) in support of the proposition that 11 USC 1325(b)(1)(B) requires that a debtor's projected disposable income be disbursed to *general* unsecured creditor*s*. This is not what is required and further, that position cannot be reconciled with Chapter 13 plans in this District which propose only to pay priority income tax debt but not pay anything to general unsecured creditors. For purposes of 1325(b)(1)(B), disposable income is any amount beyond that which is required for a) the maintenance or support of the debtor and any dependants, b) payment of domestic support obligations, or c) qualified charitable contributions not to exceed 15% of gross income. 11 USC 1325(b)(2)(A). It does not include amounts to be paid on priority income tax debt.

The Trustee opines that 1325(b)(1)(B) "certainly does not allow payments to one class of general unsecured claims while ignoring payments to another class of unsecured claims…." (Trustee's Brief at page 17-18) Actually, it does. Because if it doesn't, every confirmed Chapter 13 plan in this District which is funded to provide only enough to cover payment of Class 7 income tax priority claims fails to comply with 1325(b)(1)(B) as there is no exception for priority tax debt in that provision of the Code.

Trustee's Argument B

11 USC 1322(b)(5)

The Trustee argues that 11 USC 1322(b)(2) and 1322(b)(5) are mutually exclusive but provides no authority in support of his position and the Clients disagree for all the reasons set forth in their Brief.

Trustee's Argument C

11 USC 1322(b)(10)

As the Clients asserted in their original Brief, the Debtors are unclear as to the basis of Trustee's objection in this case as the principal amount originally due on this claim was approximately $168,000.00, which grew to $192,936.15 with capitalized interest as of the date of the petition. As Debtors' plan is expected to result in only approximately $56,800.00 payable on this claim, Debtors do not propose to pay post-petition interest during the Chapter 13 plan and therefore believe this portion of Trustee's objection to be without merit in this case.

In order for the Clients' plan to fail to comply with 11 USC 1322(b)(10) as the Trustee asserts, the Clients would have to first pay $192,936.15 on the claim in question. The Clients' Plan does not propose to do so and therefore the Trustee's objection is without merit.

Conclusion: Likeness To One Type Of Claim

Does Not Trump Likeness To Another Type Of Claim

While the Trustee fails to address this point as raised in the Clients' Brief, the Clients remind the Court that claims do not always fall into a single category. For instance, a debt to the Internal Revenue Service may be a priority claim, a secured claim to be paid within five years, a continuing claim to be paid in excess of five years, and/or a general unsecured claim; an auto claim may qualify for Continuing Claim treatment but may be treated as a Class 5 claim; or a non-residential mortgage, which may contractually qualify for Continuing Claim treatment, may be treated as a Class 5 claim; and as such, such a claim may be treated in a different class, as determined by the *debtor*, than that which is traditional or convenient for a Chapter 13 Trustee.

The Trustee offers no argument or case law in defense to the Clients' position there is nothing in the bankruptcy code which dictates that the unsecured status of a student

loan trumps its simultaneous status as a Continuing Claim, as defined by the Local Model Plan of this District. Or, stated more simply, that likeness of one type of claim to other claims does not trump likeness of that claim to another type of claim and that based on that, the Clients have classified the student loan claim as a Continuing Claim despite it also being an unsecured debt.

Again, the Clients rely on their original Brief, supplemented with the arguments set forth herein, and submit that based on the significant differences between student loan debt and other unsecured debt as well as the specific facts presented, treatment of the student loan claim is proper in this case as a Class 4 Continuing Claim and respectfully request that the Court overrule the Trustee's objection and confirm their Chapter 13 Plan.

Respectfully Submitted by Counsel, Spring, 2018.

In the foregoing case, the plan proposed to pay the student loan creditor as a Class 4 claim with a "base" monthly amount with any additional payments into the plan to be paid on that claim and -0- to general unsecured creditors. The Trustee had two main objections: 1) Debtor could not treat the student loan claim as a Class 4, and 2) Payment of -0- to Class 9 creditors was unfair discrimination.

The Court ultimately overruled the Trustee's objection as to the Class 4 treatment of the student loan claim[64] and sustained the Trustee's objection as to the amount of money to be paid to the Class 9 creditors[65]. Taking both decisions together so that they could co-exist in this case, the plan was confirmed to provide for a monthly payment of $850.00 on the student loan claim and a minimum dividend of 10% to Class 9 creditors.

Practitioners should keep in mind that the foregoing briefs[66] were based on the research conducted[67] and arguments formulated only through the time it was written and is provided as a thought-provoking tool that might help with further development of arguments which may advance the cause of the client strapped with tens, if not hundreds, of thousands of dollars in student loan debt. One might note the changes or evolution of

[64] See 17-32180-DOF, Docket 68 (ED MI 6/19/18).
[65] See 17-32180-DOF, Docket 66 (ED MI 6/5/18), see also Docket 71.
[66] See Docket 45, 50, and 61.
[67] Counsel found the opinion in *In re Engen*, 561 BR 523 (Bankr D KS 2016) to be the most well developed and helpful opinion to the development of her arguments.

thought present in the Supplemental Brief as the arguments continue to develop and advance. The Trustee's counsel also drafted extensive briefs[68] and it would be prudent to review those briefs as well in developing arguments in your client's favor.

Part II

THE LOCAL AND NATIONAL PLANS CONTEMPLATE SEPARATE CLASSIFICATION

The National Plan became effective on December 1, 2017 and appears to contemplate treatment of student loan debt in a class separate from general unsecured claims to the extent that the National Plan provides for maintenance of payments on nonpriority unsecured claims in Class 5.2 (continuing claims) and 5.3 (other).

Similarly, the Local Model Plan adopted in our District also contemplates treatment of student loan debt in a class separate from general unsecured claims as the Plan provides for "Continuing Payments other than on a claim secured by the debtor's principal residence that come due on and after the date of the Order for Relief" in Class 4.3 and treatment of any arrearages of those claims in Class 4.4. In contrast, the last plan did not break out such classes. Parties in opposition may argue that the heading of Part II.D., by including the word "secured", actually prevents such treatment, but this writer would disagree as any plan drafter is permitted to make changes and disclose those changes in Part I and Part IV of the plan.

Practitioners should note that the discussion herein has been limited to treatment of student loans as continuing claims but that there are other options available which may be better suited to the individual client's situation and needs.

Part III

A WORD OR TWO ON DEBT LIMIT CONSIDERATIONS

Does substantial student loan debt, which sends a client north of the $394,725 unsecured limit imposed under 11 USC 109(e), prevent the client from obtaining relief under Chapter 13 and force that client into Chapter 11? When objections are filed, courts

[68] See Docket 49 and 65.

appear to be saying 'yes'[69] based on the plain language of 109(e) and the necessity of reading every Code section in conjunction with all others.[70] However, at least one court has recognized that the requirements of 109 are not jurisdictional and therefore, unless a party in interest objections, dismissal is not compulsory.[71]

If the client is ineligible for Chapter 13 relief but otherwise has the ability to fund a plan of reorganization, you may wish to consider a personal Chapter 11 which is not subject to the limitations of 109(e).

In addition to not being subject to 109(e), Chapter 11 may have other advantages[72] when substantial student loan debt is at issue but such a discussion is best saved for another day. Absent significant reform in the very near future, such a discussion is surely on the horizon.

Conclusion

It is the writer's hope that in reading through these materials and the cited case law that debtor's counsel will find new and innovative ways to treat student loan debt in Chapter 13 plans in such a way that a debtor will be better off at the end of the case than at the beginning. Hopefully the foregoing information provides a launch pad for those new approaches and that together we can create a standard to help combat the continued growth of this national crisis, at least in the realm of bankruptcy relief.

[69] See *Stearns v. Pratola,* No. 1:2018cv00213, Docket 20 (ND IL 8/31/18), underlying Case No. 17-11668.
[70] *Stearns*, supra. Of note, Debtor Pratola abandoned his argument regarding the contingent nature of the student loan debt on appeal and therefore that argument was not considered by the District Court.
[71] *In re Petty*, No. 18-40258 (Bankr ED TX 4/24/18), citing *In re Phillips*, 844 F2d 230, 236 (5th Cir 1988) (in a case involving ineligibility under § 109(g), the Fifth Circuit held that "eligibility does not raise an issue of subject matter jurisdiction").
[72] Including the Trustee fees: This fee schedule for the United States Trustee Program applies for calendar quarters beginning January 1, 2018 through September 30, 2018 and may be extended. This is an excerpt of the full schedule.

TOTAL QUARTERLY DISBURSEMENTS	QUARTERLY FEE
$0 to $14,999.99	$325.00
$15,000 to $74,999.99	$650.00
$75,000 to $149,999.99	$975.00

See https://www.justice.gov/ust/chapter-11-quarterly-fees for more information.

LITIGATING STUDENT LOAN DISCHARGE UNDER 11 U.S.C. §523

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Many consumer debtors commence their cases under the assumption that their student loan debt is a "non-dischargeable" obligation. Generally, that assumption is valid. A brave few will test the waters and file an adversary proceeding seeking to discharge their student loan debt. This essay provides a brief overview of the applicable law in the Sixth Circuit regarding the discharge of student loan obligations, and the available alternative administrative remedies.

A. A Steep Climb Towards Discharge

A student loan discharge determination must be sought through an adversary proceeding within the debtor's bankruptcy case. This is a formal litigation proceeding – a lawsuit. *See,* National Consumer Law Center, "The Truth About Student Loans and the Undue Hardship Discharge", April 2013. As an initial matter, a debtor must be aware that: (i) his prospects of prevailing in a student loan discharge proceeding are slim and worse than in typical civil litigation; (ii) student loan holders and their agents, (e.g., Sallie Mae, and Educational Credit Management Corp.), very aggressively fight discharge cases and are far less likely to settle out of court than in typical civil litigation; (iii) the majority of consumer debtors need representation by an attorney to bring a hardship discharge adversary proceeding; and, (iv) most consumer debtors cannot afford the litigation costs attendant to litigating a hardship discharge adversary proceeding. *Id.* A debtor hoping to achieve an out-of-court settlement of his student loan debt should know that a far greater

percentage of debtors must proceed to trial and to a verdict in a student loan discharge case than compared to other civil litigation. *Id*.

B. Applicable Law: Bankruptcy Code Section 523(a)(8) and the *Brunner* Test

Title 11 United States Code (the "Bankruptcy Code") Section 523(a)(8) governs exceptions to discharge of debt in a bankruptcy proceeding and allows discharge of student loans only if determined that repayment "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

The Sixth Circuit Court of Appeals (and most Circuits) follow a three-part analysis for determining whether an "undue hardship" exists: "(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. Serv. Corp.,* 831 F.2d 395 (2d Cir.1987). The Sixth Circuit formally adopted the *Brunner* test in *In re Oyler*, 397 F.3d 382, 385 (6th Cir. 2005).

To prevail according to the *Brunner*, the debtor must prove **each** of the factors by a preponderance of the evidence. *Goulet v. Educ. Credit Management Corp.,* 284 F. 3d 773, 777 (7th Cir. 2003).[1]

[1] *See also,* Mark E. Shure, "You Got an Education, Now Pay the Bill: The Dischargeability of Student Loans" (American Bankruptcy Institute, Central States Bankruptcy Workshop 2013).

1. Current Income and Expenses and "Minimal Standard of Living"

Pursuant to the first prong of the *Brunner* test, the debtor must prove that having to repay the loans would cause the standard of living of the debtor and his or her dependents to fall below a "minimal" lifestyle. Under this tough test, many courts begin the analysis of what is a "minimal" standard of living, by examining the debtor's income compared to the federal poverty guidelines. *See, e.g., O'Hearn v. Educ. Credit Mgmt. Corp*., 339 F.3d 559, 564 (7th Cir. 2003). As a reference point, the current poverty guideline for a family of four in Michigan is $25,100. A plaintiff's household income, according to her household's size, would be analyzed. Income earned by Plaintiff's spouse, or by a live-in non-spouse, must be considered. *In re Garybush,* 265 B.R. 587, 591 (Bankr.S.D.Ohio 2001); *see ECMC v. Davis,* 373 B.R. 241 (W.D.N.Y.2007)(holding "total household income, including that of a…live-in companion…and contributing co-habitant, must be considered"); *In re Archibald,* 280 B.R. 222 (S.D.Ind.2002)(live-in boyfriend). The analysis will often include the combined income of all the family members - including non-debtors, who may impact the debtor's lifestyle. *See, e.g., In re Pobiner*, 309 B.R. 405, 416 (Banker. E.D. N.Y. 2004). Moreover, courts routinely disregard expenses that are not necessary to maintain a "minimal standard of living". These can even include cell phones, internet and satellite TV. *See, e.g., Educational Credit Management Corp. v. Mosko*, 515 F. 3d 319, 325 (4th Cir. 2008); and *Miller v. Pennsylvania Higher Educ. Assistance Agency*, 377 F.3d 616, 623 (6th Cir. 2004).

2. Additional Circumstances Exist

In considering the second prong, that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment

period of the student loans, the Sixth Circuit has found that "such circumstances must be indicative of a 'certainty of hopelessness, not merely a present inability to fulfill financial commitment.'" *In re Oyler*, 397 F.3d 382 (other citations omitted). These circumstances must also be beyond the debtor's control. *See Fischer v. State Univ. of New York* (*In re Fischer*), 23 B.R. 432, 434 (Bankr.W.D.Ky.1982). Choosing a low-paying job cannot merit undue hardship relief. *See Healey v. Massachusetts Higher Educ.* (*In re Healey*), 161 B.R. 389, 395 (E.D.Mich.1993) ("A resolute determination to work in one's field of dreams, no matter how little it pays, cannot be the fundamental standard from which 'undue hardship' ... is measured.")

Consider *Matter of Sands*, 166 B.R. 299, 310 (Bankr. W.D. Mich. 1994) where the it was found that the "Debtor has had more than his share of medical problems …ulcers on both of his feet ... he had undergone six surgeries … Debtor testified that at the time of trial, he could not see out of his left eye." *Id.* at 166 B.R. 310-311. It was found that the Debtor had "shown current financial hardship coupled with serious health problems. However, he has failed to prove by a preponderance of the evidence that he has adequately sought employment and that his current financial and physical problems will persist for a significant portion of the loan repayment period." *Id.* at 314. Thus, a discharge of the student loan debt was denied. *Id.*

Courts also reject the argument that a person who takes out loans later in life can claim advanced age as an additional circumstance. *In re Jones,* 376 B.R. 130, 139 (W.D. Tex. 2007); *ECMC v. DeGroot,* 339 B.R. 201, 212 (D. Or. 2006).

In sum, as to any alleged additional circumstance, *Brunner* requires Plaintiff to demonstrate how the "condition would impair her ability to work in the future." *In re*

Tirch, 409 F.3d 677, 681 (6th Cir. 2005); see also, In re Barrett, 487 F.3d 353, 359 (6th Cir. 2007)("student loans are nondischargeable where the debtor fails to demonstrate how her physical condition prevented her from working").

3. Good Faith Effort to Repay

Finally, the debtor must also show that he has made a good faith effort to repay his student loan debt. This consideration includes analysis of the debtor's efforts to maximize income, minimize expenses and whether the debtor has made consistent efforts to repay the loan debt. *See Goulet* v. *Educ. Credit. Management Corp*., 284 F.3d 773, 776 (7th Cir. 2003). Several courts have suggested that good faith requires a debtor to enter long term repayment plans to avoid a discharge. *In re Douglass*, 237 B.R. 652, 657 (Bankr. N.D. Ohio 1999) (Baxter, J.) (The U.S. Department of Education also offers a number of student loan repayment options…The Debtor's attempt to obtain a discharge of her student loans under these circumstances is tantamount to an abuse of the bankruptcy process. She has failed to satisfy the good faith test in repaying her loan"); *In re Wolph*, 479 B.R. 725, 733 (Bankr. N.D. Ohio 2012) (Speer, J.), citing *In re Tirch,* 409 F.3d at 682 ("while not a 'per se indication of a lack of good faith, a debtor's decision not take advantage of one of these programs is probative on the issue of a debtor's intent to repay the student loan obligation").

If the Plaintiff fails to satisfy any of the three *Brunner* prongs, "the Bankruptcy Court's inquiry must end there, with a finding of no dischargeability." *Conner v. U.S. Dep't of Edu. and ECMC*, 2016 WL 1178264, at *1 (E.D. Mich. 2016). As you can see, this is a tough standard, and the availability of administrative remedies, like income

driven repayment plans make it even tougher to meet the *Brunner* standard and to discharge loans in bankruptcy.

******Something to Consider******

The Department of Education published a memo calling for public comments on the factors to be considered in evaluating undue hardship claims in adversary proceedings per *Brunner*, or per the "totality of the circumstances" test. The latter test is less burdensome than *Brunner*. It considers the debtor's financial resources, calculation of living expenses, and any relevant facts in the case. Comments were requested on the factors considered in evaluating "undue hardship," how much weight should be given to each factor, and if the existence of two standards across the states creates inequalities across borrowers. Comments were due May 22, 2018.

As recently as July of this year, the Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals reaffirmed that in this jurisdiction, *Brunner* remains the governing standard.

> Finally, the Debtor argues that the bankruptcy court should not have applied the *Brunner* test. He says that requiring a debtor to show the existence of unique or extraordinary circumstances amounting to a certainty of hopelessness is not supported by the text of § 523(a)(8). **He states that a better, more reasonable test can be found in the First and Eighth Circuits in the form of a "totality of the circumstances test."** *See Long v. Educ. Credit Mgmt. Corp. (In re Long*), 322 F.3d 549, 553 (8th Cir. 2003); *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon*), 435 B.R. 791, 801 (B.A.P. 1st Cir. 2010). **Nevertheless, the Sixth Circuit Court of Appeals has adopted the Brunner test, not a totality of the circumstances test.** *See Oyler,* 397 F.3d at 385. **Even assuming the time has come to revisit Brunner, unless and until the does so, the bankruptcy courts in this circuit, as well as this**

> **Panel, are obligated to apply it.** Thus, in reviewing whether a complaint states a cause of action under § 523(a)(8), it is appropriate and necessary for a bankruptcy court to determine whether a debtor has stated sufficient facts to establish each element of the *Brunner* test…
>
> *Chenault v. Great Lakes Higher Educ. Corp. (In re Chenault*) (B.A.P. 6th Cir. 7-15-2018)(emphasis added).

C. Avoiding an Adversary Proceeding, Discharge by Declaration

A debate emerged as to whether a debtor can bypass filing an adversary proceeding and achieve a discharge of student loan obligations through express language in a chapter 13 plan. The argument ultimately reached the U.S. Supreme Court in *United Student Aid Funds v. Espinosa*, 130 S.Ct. 1367 (2010). In *Espinosa*, the debtor's confirmed Chapter 13 plan contained an express provision to pay the principal of a student loan debt and discharge the accrued interest on that debt even though the debtor had never initiated an adversary proceeding. *Espinosa*, 130 S.Ct. at 1374-75. The creditor had received notice of the plan, but failed to object. *Id*. The bankruptcy court confirmed the plan. The creditor later sought to vacate the confirmation order.

The Supreme Court affirmed the Ninth Circuit's judgment reversing the district court's order in favor of student loan creditor, holding that: 1) creditor's actual notice of the filing and contents of the debtor's plan more than satisfied its due process rights, and thus debtor's failure to make the required service did not entitle creditor to relief under Fed. R. Civ. P. 60(b)(4); 2) although the bankruptcy court's failure to find undue hardship in this case was a legal error, the confirmation order was enforceable and binding on

creditor because it had actual notice of the error and failed to object or timely appeal; but 3) the Ninth Circuit erred in holding that bankruptcy courts must confirm a plan proposing the discharge of a student loan debt without an undue hardship determination in an adversary proceeding unless the creditor timely raises a specific objection. FindLaw (a Thomson Reuters business) Staff blog "*United Student Aid Funds, Inc. v. Espinosa*, No. 08-1134" (March 23, 2010, 3:28 PM).

Note that under this narrow ruling, the debtor was successful only because of the lender's failure to object and the bankruptcy court's erroneous approval of the plan. Many bankruptcy judges have stated that they would not approve plans that discharge student loans, whether the lender objected, because they are clearly contrary to the Bankruptcy Code. *See* Asher Hawkins, "Bankruptcy: New Haven for Student Borrowers?" FORBES (Oct. 20, 2009, 2:25 PM), [2]

Thus, as discussed herein, an adversary proceeding remains the proper – and tenuous – course that a debtor must take to pursue discharge of student loan obligations.

D. Pursuing Administrative Remedies[3]

Although *Brunner* is often an insurmountable burden for plaintiffs to meet, Borrowers should carefully consider the plethora of programs administered by the U. S. Department of Education for managing and resolving their student loan debt.

[2] http://www.forbes.com/2009/10/20/student-loan-discharge-supremecourt-personalfinanceespinosa.html
[3] Excerpted from Patti Turczynski, Paralegal, Office of the U.S. Attorney, Eastern District of Michigan, "Administrative Relief for Federal Student Loans" (American Bankruptcy Institute, Veterans Day Conference 2013).

1. **Loan Consolidation**

Loan consolidation can simplify loan repayment by centralizing a borrower's loans into one bill and can lower monthly payments by giving the borrower up to 30 years to repay their loans. A borrower may also have access to alternative repayment plans that he/she would not have had before and will be able to switch a variable interest rate to a fixed interest rate.

Most federal student loans, including the following, are eligible for consolidation:

- Direct Subsidized Loans
- Direct Unsubsidized Loans
- Subsidized Federal Stafford Loans
- Unsubsidized Federal Stafford Loans
- Direct PLUS Loans
- PLUS loans from the Federal Family Education Loan (FFEL) Program
- Supplemental Loans for Students (SLS)
- Federal Perkins Loans
- Federal Nursing Loans
- Health Education Assistance Loans (HEAL)
- some existing consolidation loans

Private education loans are not eligible for consolidation with federal student loans.

There are some things to consider when consolidating. If the length of the repayment period is increased, borrowers will be making make more payments and paying more interest. Borrowers should compare their current monthly payments to what monthly payments would be if they consolidated their loans. Borrowers should also consider the impact of losing any benefits offered with the original loans, such as interest rate discounts, principal rebates, or some loan cancellation benefits, which can significantly reduce the cost of repaying the loans. Borrowers may lose those benefits if they consolidate. Once the loans are combined into a Direct Consolidation Loan, they cannot be removed. The loans that were consolidated are paid off and no longer exist.

To make payments more affordable, repayment plans can give borrowers more time to repay their loans or be based on their income. Borrowers should work with their loan servicer to choose a federal student loan repayment that is best for them. Although a payment plan was selected or assigned when the borrower first began repaying their student loan, they can change repayment plans at any time.

There are several repayment plans available to help borrowers manage repayment of their student loans. However, Federal Perkins Loans have different repayment options. The payment depends on the amount borrowed, but the minimum is $40 per month. Borrowers should check with their school for more information on Perkins Loan repayment plans.

2. **Income Driven Repayment Plans**

Borrowers must repay their loans even if they do not complete their education, cannot find a job related to their program of study, or are unhappy with the education they paid for with their loan. However, certain circumstances might lead to their loans being forgiven, canceled, or discharged. The list below is a quick view of the types of forgiveness, cancellation, and discharge.

Type of Forgiveness, Cancellation or Discharge	Direct Loans	FFEL Program Loans	Perkins Loans
Total and Permanent Disability (TPD) Discharge	x	x	x
Death Discharge	x	x	x
Discharge in Bankruptcy (in rare cases)	x	x	x
Closed School Discharge	x	x	
False Certification of Student Eligibility or Unauthorized Payment Discharge	x	x	
Teacher Loan Forgiveness	x	x	
Public Service Loan Forgiveness	x		
Perkins Loan Cancellation and Discharge (includes Teacher Cancellation)			x

OVERVIEW OF REPAYMENT PLANS

Repayment Plan	Eligible Loans	Monthly Payment and Time Frame	Quick Comparison
Standard Repayment Plan	• Direct Subsidized and Unsubsidized Loans • Subsidized and Unsubsidized Federal Stafford Loans • All PLUS loans	Payments are a fixed amount of at least $50 per month. Up to 10 years.	You'll pay less interest for your loan over time under this plan than you would under other plans.

Repayment Plan	Eligible Loans	Monthly Payment and Time Frame	Quick Comparison
Extended Repayment Plan	• Direct Subsidized and Unsubsidized Loans • Subsidized and Unsubsidized Federal Stafford Loans • All PLUS loans	Payments may be fixed or graduated. Up to 25 years.	• Your monthly payments would be lower than the 10-year standard plan. • If you are a - ◦ Direct Loan borrower, you must have more than $30,000 in outstanding Direct Loans. ◦ FFEL borrower, you must have more than $30,000 in outstanding FFEL Program loans. ▸ For example, if you have $35,000 in outstanding FFEL Program Loans, and $10,000 in Direct Loans, you can use the extended repayment plan for your FFEL Program loans, but not for your Direct Loans. • For both programs, you must also be a new borrower as of October 7, 1998. • You'll pay more for your loan over time than under the 10-year standard plan.
Graduated Repayment Plan	• Direct Subsidized and Unsubsidized Loans • Subsidized and Unsubsidized Federal Stafford Loans • All PLUS loans	Payments are lower at first and then increase, usually every two years. Up to 10 years.	You'll pay more for your loan over time than under the 10-year standard plan.

Repayment Plan	Eligible Loans	Monthly Payment and Time Frame	Quick Comparison
Income-Contingent Repayment Plan	• Direct Subsidized and Unsubsidized Loans • Direct PLUS loans made to students • Direct Consolidation Loans	• Payments are calculated each year and are based on your adjusted gross income, family size, and the total amount of your Direct Loans. • Your payments change as your income changes. • Up to 25 years.	• You'll pay more for your loan over time than you would under the 10-year standard plan. • If you have not repaid your loan in full after making the equivalent of 25 years of qualifying monthly payments, any outstanding balance on your loan will be forgiven. • You may have to pay income tax on any amount that is forgiven.
Income-Based Repayment Plan (IBR)	• Direct Subsidized and Unsubsidized Loans • Subsidized and Unsubsidized Federal Stafford Loans • All PLUS loans made to students • Consolidation Loans (Direct or FFEL) that do not include Direct or FFEL PLUS loans made to parents.	• Your maximum monthly payments will be 15 percent of discretionary income, the difference between your adjusted gross income and 150 percent of the poverty guideline for your family size and state of residence (other conditions apply). • Your payments change as your income changes. • Up to 25 years.	• You must have a partial financial hardship. • Your monthly payments will be lower than payments under the 10-year standard plan. • You'll pay more for your loan over time than you would under the 10-year standard plan. • If you have not repaid your loan in full after making the equivalent of 25 years of qualifying monthly payments, any outstanding balance on your loan will be forgiven. • You may have to pay income tax on any amount that is forgiven.
Income-Sensitive Repayment Plan	• Subsidized and Unsubsidized Federal Stafford Loans • FFEL PLUS loans • FFEL Consolidation Loans	• Your monthly payment is based on annual income. • Your payments change as your income changes. • Up to 10 years.	• You'll pay more for your loan over time than you would under the 10-year standard plan. • Each lender's formula for determining the monthly payment under this plan can vary.

Repayment Plan	Eligible Loans	Monthly Payment and Time Frame	Quick Comparison
Pay As You Earn Repayment Plan	• Direct Subsidized and Unsubsidized Loans • Direct PLUS loans made to students • Direct Consolidation Loans that do not include (Direct or FFEL) PLUS loans made to parents	• Your maximum monthly payments will be 10 percent of discretionary income, the difference between your adjusted gross income and 150 percent of the poverty guideline for your family size and state of residence (other conditions apply). • Your payments change as your income changes. • Up to 20 years.	• You must be a new borrower on or after October 1, 2007, and must have received a disbursement of a Direct Loan on or after October 1, 2011. • You must have a partial financial hardship. • Your monthly payments will be lower than payments under the 10-year standard plan. • You'll pay more for your loan over time than you would under the 10-year standard plan. • If you have not repaid your loan in full after making the equivalent of 20 years of qualifying monthly payments, any outstanding balance on your loan will be forgiven. • You may have to pay income tax on any amount that is forgiven.

Generally, high student loan balances mean high monthly payments. However, income driven plans may allow student debtors to meet their loan obligations without pursuing an adversary proceeding and attempting to meet the "undue hardship standard" by receiving a customized plan with monthly payments based upon household income and family size instead.

***A student debtor could lower his/her monthly student loan payments significantly, and may even qualify for a $0 payment per the Direct Loans payment calculator at the Department of Education's website:

https://studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action

Each year, the student loan debtor must have his/her plan recertified, and payments will accordingly change relative to updated proof of income. Debt that is ultimately forgiven is taxed as income that year.

E. Filing an Adversary Proceeding[4]

As an alternative to pursuing administrative remedies (that merits much advance consideration), the Supreme Court made clear in its *Espinosa* decision that an adversary proceeding is the procedurally required means of obtaining a hardship discharge – no "discharge by declaration." Adversary proceedings are commenced by the filing of a complaint and proper service of the complaint and summons, as required by Bankruptcy Rule 7004. Identifying who should be named and served as a defendant is first step in resolving student loan debt. But, identifying the proper defendants in a student loan hardship discharge proceeding can be a time-consuming and challenging process. Debtors often have a hodgepodge of loans dating back years. Their recordkeeping may be poor. Moreover, the structure of the student loan lending and servicing is complex, making the identification of proper defendants difficult. Understanding the kinds of loans and the players in the collection of student loans can help debtor's counsel to identify a client's student loans and who to serve.

[4] Julia A. Caroff, Esq, Asst. U.S. Attorney, Eastern District of Michigan, "*Student Loan Hardship Discharge Complaints Who to Sue?"* (American Bankruptcy Institute, Veterans Day Conference 2013).

FOUR CATERGORIES OF LOANS:

- Direct Department of Education loans
- Federally Guaranteed Loans – institution or privately originated, but federally guaranteed. This program ended in 2010.
- Private Loans
- Consolidation loans. These loans can be either public or private.

PLAYERS IN THE COLLECTION OF STUDENT LOANS

- **LOAN ORIGINATORS AND HOLDERS – Who Owns the Loans?**
  - United States, on behalf of Department of Education
  - Guaranty Agencies
  - Private lenders

- **SERVICERS – Service the Loans**
  - Servicers collect payments and undertake collection action on delinquent loans, but do not own the loan or have an ownership interest in the loan.
  - SallieMae, Nelnet, AES of PHEAA are examples of loan servicers.

- **GUARANTY AGENCIES – Acquire Defaulted Federal Guaranteed Loans**
  - Guaranty agencies purchase defaulted federally guaranteed student loans from the private loan holders, try to collect the loan, receive reimbursement from the federal government, and then continue to collect the loan.
  - ECMC (Educational Credit Management Corporation), MHEAA (Michigan Higher Education Assistance Authority) and PHEAA (Pennsylvania Higher Education Assistance Authority) are guarantors.

NOTE: Many of these entities have multiple roles, servicing and owning loans, or servicing and guaranteeing loans.

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Need an 800 number? We have several contact centers, so check below to find the one that can help you.

- Parents
- Loan Repayment and Forgiveness
- Applying for and Receiving Aid
- Giving Feedback

Parents

Topic	Contact
• FAFSA® submission, correction, or signature • FSA ID (username and password)	Federal Student Aid Information Center 1-800-433-3243 Chat and email are available Note: The contact center can discuss FSA ID issues **only with the owner** of the FSA ID
• Parent PLUS loan application on StudentLoans.gov	Student Loan Support Center 1-800-557-7394

Loan Repayment and Forgiveness

Topic	Contact

Topic	Contact
• Make a loan payment • Repayment plans, including general questions about income-driven repayment • Deferment and forbearance • Teacher loan forgiveness • Closed school loan discharge application	Student Loan Servicer
• Public Service Loan Forgiveness (PSLF) • *PSLF Employment Certification Form*	FedLoan Servicing 1-855-265-4038 You can mail your completed *PSLF Employment Certification Form* to this address: U.S. Department of Education FedLoan Servicing P.O. Box 69184 Harrisburg, PA 17106-9184 You may also fax the form to 717-720-1628
• Borrower defense • Apply for borrower defense to loan repayment	Borrower Defense Customer Support: 1-855-279-6207 You may email or mail your completed *Application for Borrower Defense to Loan Repayment* to: BorrowerDefense@ed.gov U.S. Department of Education – Borrower Defense to Repayment P.O. Box 1854 Monticello, KY 42633
• Income-driven repayment plan application on StudentLoans.gov • Loan consolidation	Student Loan Support Center 1-800-557-7394
• Defaulted loan • Wage or tax refund garnishment	Default Resolution Group 1-800-621-3115 1-877-825-9923 TTY
• Loan dispute (after taking all steps on Resolving Disputes page of this site)	Federal Student Aid Ombudsman Group 1-877-557-2575

Applying for and Receiving Aid

Topic	Contact
• FAFSA process • Using FSA ID (username and password) during FAFSA process	Federal Student Aid Information Center 1-800-433-3243 Chat and email are available Note: The contact center can discuss FSA ID issues **only with the owner** of the FSA ID
• Getting aid (grants, loans)—how much and when • Loan cancellation within 120 days of disbursement • Withdrawing from school or transferring	Your school financial aid office
• Loan agreement (MPN) • Student PLUS loan application on StudentLoans.gov • Entrance or exit counseling • Using FSA ID on StudentLoans.gov	Student Loan Support Center 1-800-557-7394
• Closed school	Closed school resource page

Giving Feedback

Action	Contact
• Get help with a response you received about an aid dispute (response is incorrect, or you disagree with it)	Federal Student Aid Ombudsman Group 1-877-557-2575
• Submit a complaint • Report suspicious activity • Report broken links or something else not working on this site • Suggest website improvements • Send a compliment	Federal Student Aid Feedback System

CODE AND PLAN COMPLIANCE FOR SEPARATE CLASSIFICATION OPTIONS IN CHAPTER 13

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***In re Quinn*, Case No. 17-32180-DOF, 586 B.R. 1 (Bankr. E.D. Mich. June 5, 2018)**

The opinion addresses the treatment of a student loans within a Chapter 13 plan.

Issue: Whether Debtors' Chapter 13 plan discriminated unfairly between two classes of unsecured creditors?

Held: Although student loan debt may be given favorable treatment in a Chapter 13 plan, the Court held that the plan proposed by the Debtors was unfairly discriminatory towards the remaining general unsecured creditors.

In *Quinn*, the Debtors filed for relief under Chapter 13 of the Bankruptcy Code on September 21, 2017. Unsecured creditors filed claims in the amount of $227,193.33. Of that amount, $192,936.15 was owed to the federal government for student loans incurred by the Debtor, Ms. Quinn. The plan proposed a 60 month term with payments of $1,200.00 per month reflecting the "Monthly net income" shown on Debtors' Schedule J. The plan proposed to separately classify the student loan creditor as a 4.1 continuing claim creditor, while the remaining unsecured creditors are classified in Class 9. The Debtors' plan further provided that the Class 4.1 student loan creditor would receive a minimum monthly payment of $850.00 and "shall be paid all available funds prior to disbursements on any subsequent level." The Trustee objected to the proposed plan in that the treatment to the student loan creditor constituted unfair discrimination under 11 U.S.C. §1322(b)(1) and §1322(b)(10). The Court required briefing regarding the separate classification of the student loan debt. Debtors argued that the plan should be confirmed due to the magnitude of and unique nature of their student loan debt. Debtors argued that the contractual obligation on their student loans was ~ $1,894.00 per month. Under their proposed plan they estimated that $56,800.00 would be paid on the debt which is only

$215.78 less than what they owed on the date that they filed their petition. The Trustee objected to the proposed plan in that the treatment to the student loan creditor constituted unfair discrimination under 11 U.S.C. §1322(b)(1) and §1322(b)(10).

The Court recognized the fact that national student loan debt has tripled in the last decade to more than $1.3 trillion dollars. *Quinn* at 3 citing *In re Engen*, 561 B.R. 523, 544-45 (Bankr. D. Kan. 2016) (citations omitted). Student loan debt is generally exempted from discharge. The Court explained that "under 11 U.S.C. §523(a)(8), educational loans, scholarships and stipends are nondischargeable, 'unless excepting such debt from discharge . . . would impose an undue hardship determination on the debtor and the debtor's dependents.' If a debtor does not affirmatively secure an undue hardship determination, the discharge order will not include a student loan debt." Id. citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004) (citation omitted).

The Court recognized that the Code's treatment of student loan debt puts Chapter 13 debtors in quite a predicament. Debtors may be faced with the realization that not only will the student loan debt survive discharge, but due to continuing interest, the amount of the student debt may actually be more after completion of the plan than it was on the date of the filing of the bankruptcy petition. Id. In an effort to avoid this dilemma, more debtors are proposing Chapter 13 plans that pay a greater amount towards the student loan debt as compared to other unsecured creditors. Many Courts agree and allow favorable treatment for the following reasons:

> (1) a debtor will not be afforded a fresh start in bankruptcy if the debtor is defaulting on student loan payments over the term of a 3-5 year plan, considering that on-going plan payments are likely to be less than the amount owed on the student loan debt, interest is accruing, and the debts survive the debtor's discharge; (2) strong public policy support the repaying of education loans; (3) Congress prefers Chapter 13 over Chapter 7, and debtors in Chapter 7 fare better with making post-bankruptcy payment on student loan debts because a Chapter 7 debtor will not have been in forced default of student loan debt obligations for 3-5 years; and (4) other unsecured creditors in Chapter 13 are not harmed

> by the preferential treatment for student loan debt because unsecured creditors must receive a return in Chapter 13 that is equivalent to what they would receive in Chapter 7 pursuant to 11 U.S.C. §1325(a)(4).
> Id. 3-4 citing *In re Mason*, 456 B.R. 245, 248 (Bankr. N.D. W. Va. 2011) (Citing *Seth J. Gerson, Note: Separate Classification of Student Loans in Chapter 13*, 73 Wash. U.L.Q. 269, 290-92 1995)).

Moreover, not only will the allowance of favorable treatment of student loans help debtors, favorable treatment is also in line with Congress's intent to protect the fiscal health of our country's student loan programs. Id. at 4 citing *Engen*, 561 B.R. at 541-42. The *Quinn* Court found these reasons to be persuasive and agreed that student loans may be given more favorable treatment in a Chapter 13 plan. Id.

The governing Code section for the favorable treatment is found under 11 U.S.C. §1322 which provides in pertinent part:

(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; however, such plan may treat claims for consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims[.]

The Court determined that the plan may provide for favorable treatment and separate classification of the student loan claim, now the question becomes does the separate classification rise to the level of unfair discrimination as against the class of general unsecured creditors being discriminated against. A majority of courts agree that a debtor may use §1322(b)(5) to maintain long-term student loan payments only as long as the plan complies with the unfair discrimination prohibition set forth in §1322(b)(5). Id. citing *In re Brown*, 500 B.R.

255, 265 (Bankr. S.D. Ga. 2013) (separate classification must undergo unfair discrimination analysis). Id.

The United States Bankruptcy Code does not define the terms "unfair discrimination." Many different tests have been developed for assisting courts when determining whether or not a proposed plan discriminates unfairly amongst classes of creditors. The courts who follow the majority approach; however, do not agree on an appropriate test for analyzing the issue of unfair discrimination.

The Chapter 13 Trustee in *Quinn* urged the Court to follow the guidelines set forth in the case of *Bentley v. Boyajian* (*In re Bentley*), 266 B.R. 229 (B.A.P. 1st Cir. 2001). In *Bentley,* courts are directed to look to "the principles and structure of Chapter 13 itself" for "the baseline against which to evaluate discriminatory provisions for fairness." Id. citing *Bentley* at 240. The *Bentley* court identifies four (4) baselines for consideration when reviewing a Chapter 13 plan that proposes more favorable treatment to a student loan creditor than to other general unsecured creditors. First, there is the general expectation that absent an express grant of priority, unsecured creditors will share equally in any dividend. As a result, "fairness in Chapter 13 requires equality of distribution among nonpriority unsecured creditors, and the burden of justification is on those who propose plans to the contrary. Id. Second, the Code does not grant student loans priority status. Id. Thus, there is nothing in the Code that warrants or justifies treating the student loans more favorably than the others. Id. citing *Bentley* at 241. Third, mandatory versus optional contribution expresses the Chapter 13 requirement that a debtor devote all of his or her projected disposable income to a plan if the plan does not pay the full amount of allowed unsecured claims. Id. The expectation is that unsecured creditors share pro rata from distributions funded with the debtor's mandatory contributions. Id. at 4-5. Fourth, a

fresh start for honest debtors is one of the Code's fundamental purposes. Id. at 5 citing *Bentley* at 242. This is tempered against the notion that "chapter 13 does not contemplate that a debtor will necessarily emerge from Chapter 13 entirely free of student loan obligations." Id. The *Bentley* Court determined that the plan which proposed paying the student loan creditor in full while paying unsecured creditors a 3.6% dividend, constituted unfair discrimination. Id. citing *Bentley* at 243.

Although the *Quinn* Court has cited to the Bentley decision favorably past, the Court moves away from the *Bentley* guidelines and instead looks at other new approaches undertaken by Courts in recent years. One of those new approaches is the totality of the circumstance test. The *Quinn* Court explains "although courts employ a variety of different tests and approaches in considering what constitutes unfair discrimination, nearly all tests involve considering the totality of the circumstances in each cases. Id. citing *In re Kindle*, 580 B.R. 443, 451 (Bankr. D.S.C. 2017). Applying the totality of the circumstance approach, the *Kindle* court found that the debtor continuing to make her student loan payments while paying the remaining unsecured creditors 33% dividend was not unfairly discriminatory. Id. at 5 - 6 citing *Kindle* at 452.

The *Quinn* Court determined that the totality of the circumstance inquiry is appropriate when making the determination of whether the favorable treatment of a student loan debt in a Chapter 13 plan is unfairly discriminatory. Id. at 6. In addition, the Court determined that the streamlined test developed in *In re Belton*, No. 16-03040-JW, 2016 Bankr. LEXIS 4179, at 19-24 (Bankr. D.S.C. October 13, 2016) was helpful in its analysis. The streamlined tests asks: 1) Is there a good faith, rational basis for the separate classification; 2) Is the separate classification necessary to the debtor's rehabilitation under Chapter 13; and 3) Is there a meaningful payment to the discriminated class. *Quinn* at 5.

The Court explained that the student loan claim is $192,936.15. Under the Debtors' proposed plan, the student loan creditor would receive a minimum of $850.00, but as much as $1,112.40 per month. Despite this significant payment the Debtor would continue be in a state of default on her student loan payment because her contractual obligation is $1,894.00 per month. This is contrary to one of the reasons that supports the favorable treatment of student loan debt, and that is to not force a debtor into a default during the term of the plan. Id. at 6. Many courts that have confirmed a plan giving student loan debt favorable treatment consider this an important factor. Id. The theory here is that this would conflict with the debtor's fresh start. Moreover, the unsecured creditors would receive nothing, which is similar to what they would receive in a Chapter 7 bankruptcy. Id. "Moreover, the Court questions the efficacy of a Chapter 13 plan where the Debtors will be in default on their student loan debt during the term of the plan and, yet, the remaining unsecured creditors will receive nothing." Id. The Court explained that "applying the streamlined test set forth by the court in *Belton* further supports its conclusion because under Debtors' proposed plan, there is no "meaningful payment to the discriminated class." See *Belton*, 2016 LEXIS 4179 at 20. The Court sustained the Trustee's objections and held that while student loan debt may be given favorable treatment in a Chapter 13 plan, considering the totality of the circumstances here, the Court finds that the plan proposed by the Debtors in unfairly discriminatory under §1322(b)(1).

Subsequent to the ruling in this case, the parties went before the Court on June 12, 2018 for clarification on the issue of improper treatment of the student loan debt within the Chapter 13 plan. The Chapter 13 plan had treated the student loan debt in Class 4.1. The Trustee took issue with that treatment because the plan was not curing and maintaining the debt under 11 U.S.C. §1322(b)(5). The Court overruled the Trustee's objection as to improper treatment, confirmed

the plan and determined that a meaningful distribution to unsecured creditors was 10% based upon the facts and circumstances of this case.

SEPARATE CLASSIFICATION OF STUDENT LOAN DEBT

1. *In re Belton,* 2016 WL 7011570, 2016 Bankr. LEXIS 4179. The debtor's plan proposed to pay long term student loan debt under 11 U.S.C. §1322(b)(5) and cure a default under 11 U.S.C. §1322(b)(3) satisfied the unfair discrimination standard under 11 USC §1322(b)(1) while providing an 11.3% distribution to general unsecured creditors. The Court identified a streamlined test consisting of balancing factors which will assist the court in its determination as to whether or not the separate classification amounts to unfair discrimination 1) Is there a good faith, rational basis for the separate classification; 2) Is the separate classification necessary to the debtor's rehabilitation under Chapter 13; and 3) Is there a meaning payment to the discriminated class. The plan's separate classification of the debtor's student loans is permissible and does not unfairly discriminate.

2. *In re Russell*, 503 B.R. 788 (S.D. Oh. 2013). Debtor's plan proposed to pay student loans co-signed by her mother 17.9% and 65.4% of their claims while the other general unsecured creditors would receive a dividend of 1.6%. The Court determined that this proposed treatment did not violate the Code's prohibition against unfair discrimination under 11 U.S.C. 1322(b)(1).

3. *In re Mason*, 456 B.R. 245 (Bankr. N.D. W.Va. 2011). The Court articulated that a basis exists to treat student loans more favorably than other unsecured creditors. The Court explained that one of the primary aims of the Bankruptcy Code is to afford a debtor with a fresh start; Congress has chosen to favor student loan debts over other unsecured debts by excepting them from discharge in all but the most dire of circumstances; the purpose of the exception to discharge is not to punish the debtor but to protect the rights of the creditor as to repayment; strong public policy exists that favors the federal student loan program, the solvency of which is critical to our nations' welfare and prosperity; nothing in the Code, Rule or policies underlying the nature of otherwise dischargeable, general unsecured debt would cause the Court to allow similar discriminatory treatment in favor of the unsecured creditors that are being discriminated against. Id. at 252. However, a debtor must be able to articulate a reason why the discriminatory treatment is being proposed; here, the Court adjourned the confirmation hearing to provide the debtor an opportunity explain the reason for the separate classification.

4. *In re Kindle*, 580 B.R. 443, (Bankr. D. S.C. 2017). Applying the totality of the circumstance approach, the Court held that the plan's treatment to allow the debtor to continue to make her student loan payments while paying the remaining unsecured creditors 33% dividend did not unfairly discriminate.

5. *In re Kalfayan*, 415 B.R. 907 (Bankr. S.D. Fla. 2009). The Debtor's plan proposed to separately classify her long term student loan debt for more favorable treatment. The Court determined that this did not result in unfair discrimination against other general unsecured creditors where the Debtor's failure to remain current on her student loan payments could result in suspension or revocation or her optometry license.

6. *In re Labib-Kiyarash*, 271 B.R. 189 (9th Cir. BAP 2001). The BAP vacated and remanded a bankruptcy court ruling holding that the plan unfairly discriminated against general unsecured creditors without applying the test found in *In re Wolff*, 22 B.R. 510 (9th Cir. BAP 1982). *Wolff* sets forth a 4 part test for determining whether discrimination among classes of claims violates §1322(b)(1). The factors of the test: 1) whether the discrimination has a reasonable basis; 2) whether the debtor can carry out a plan without the discrimination; 3) is proposed in good faith; and 4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination.

7. *In re Pracht*, 464 B.R. 486 (M.D. Ga. 2012). The Debtor's plan proposed to separately classify nondischargeable student loan debt and proposed to pay more on that debt as compared to other general unsecured creditors. The Court determined that the favorable treatment to the student loan creditors did not violate 11 U.S.C. §1322(b)(1) as this treatment would allow the Debtor to participate in the public service loan forgiveness program; would assist with the Debtor's fresh start and was consistent with the legislative objective of the repayment of student loan debt.

8. *In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001). In *Bentley,* courts are directed to look to "the principles and structure of Chapter 13 itself" for "the baseline against which to evaluate discriminatory provisions for fairness." Id. at 240. The baseline test considers the following factors: 1) equality of distribution; 2) nonpriority of student loans; 3) mandatory versus optional contributions; and 4) the debtors fresh start.

9. *In re Engen*, 561 B.R. 523 (Bankr. D. Kan. 2016). The proposed plan provides that separately classified student loans will be paid in full prior to other general unsecured creditors. The Court utilizes but does not limit its analysis to the Bentley baseline test. The Court determined that the separate classification did not unfairly discriminate and was in compliance with §1322(b)(1).

10. *In re Webb*, 370 B.R. 418 (Bankr. N.D. Ga. 2007). The Debtor's plan proposed to cure and maintain the ongoing student loan payments while paying a 1% dividend to the other general unsecured creditors. The Court determined that the plan did not unfairly discriminate against the other general unsecured creditors. The Court utilized a 4 part test found in the case of In re Leser, 939 F. 2d 669 (8th Cir. 1991). The test has four factors: 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. Id. at 423.