Central States
Bankruptcy Workshop

Consumer Track

Student Loans

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CONCURRENT SESSION

2022

Successful Settlement through Strategic Cooperation:
Navigating the Realistic Challenges Faced by Debtors and their Counsel
in Student Loan Adversary Proceedings

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I. What you NEED to know before the consult:

A. Are you in a District subject to *Brunner* or the *Totality of the Circumstances* test?

1. The 6th Circuit strictly follows *Brunner*; courts within the 7th Circuit typically follow *Brunner but* have also ruled on the Totality of the Circumstances.

a. *Brunner v. New York State Higher Educ. Serv. Corp*., 831 F.2d 395 (2d Cir. 1987).

i. Three-Part Brunner Test:
(1) that the debtor[s] cannot maintain, based on current income and expenses a "minimal" standard of living for [themselves] and [their] 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[s] ha[ve] made good faith efforts to repay the loans. *Loyle v. United States Dep't of Educ.* (*In re Loyle*), Nos. 19-10065, 20-5073, 2022 Bankr. LEXIS 463, at *17 (Bankr. D. Kan. Feb. 24, 2022).

b. Totality-of-the-circumstances approach to the "undue hardship" inquiry *Long v. Educ.Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003)(See also *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 1981);

i. In the context of 11 U.S.C.S. § 523(a)(8), instead of a bright-line rule, determinations of good faith ought to be made on a case-by-case basis. *Promisco v. United States Dep't of Educ. (In re Promisco),* 625 B.R. 715, 720 (Bankr. N.D. Ill. 2021);

ii. Three-Part Totality of the Circumstances Test:
(1) the debtor's past, present, and reasonably reliable future financial resources;
(2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and
(3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).

II. Are you Subject to the BAP?

A. Are you in a district that relies upon decisions by a Bankruptcy Appellate Panel? Are you in a district where a bankruptcy court determination may be appealed to a BAP for review? Consider the likelihood of reversal of your well-intentioned bankruptcy judge's discharge of student loan debt by a federal district court, or a court of appeals.

1. Know the case law in your district, your circuit, and your BAP, if applicable.

a. Appellate courts in the 6th Circuit will not grant a partial discharge unless the minimum standard under *Brunner* is established with respect to the portion of the debt being discharged. This is an exceedingly difficult standard to meet.

i. Circuit Courts Reverse Grant of Partial Discharge:
6th Circuit Court of Appeals Determined the Bankruptcy court erred in concluding that Chapter 7 debtor qualified for partial discharge of student loan debt for undue hardship under 11 U.S.C.S. § 523(a)(8); debtor failed to show that ailments precluded return to work and were likely to persist for significant portion of repayment period and failed to show good faith effort to repay loans. "Tirch has failed to demonstrate that her circumstances meet the *Brunner* standard to qualify for an "undue hardship" partial discharge of her student loans, we REVERSE the decision of the BAP

affirming the judgment of the bankruptcy court." *In re Tirch*, 409 F.3d 677, 683 (6th Cir. 2005);

b. District Courts may make harsher rulings than Circuit Courts:

i. 7th Circuit Court of Appeals reversed a district judge who considered good faith to be a bright line factor:
A district judge who concluded that good faith entailed commitment to future efforts to repay. Yet, if this was so, no educational loan ever could have been discharged. The bankruptcy judge found that the debtor had acted in good faith. The court found that the statutory inquiry was "undue hardship," a case-specific, fact-dominated standard, which implied deferential appellate review. The ultimate finding of undue hardship was neither clearly erroneous nor an abuse of discretion because (1) the bankruptcy judge's finding that the debtor's straightened circumstances were likely to persist indefinitely was not clearly erroneous because the debtor lived in a rural area with few jobs and she lacked the resources to travel in search of employment elsewhere; and (2) the bankruptcy judge found that the debtor's situation was hopeless. The judgment of the district judge was reversed. The case was remanded with instructions to reinstate the discharge issued by the bankruptcy judge. *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 883 (7th Cir. 2013).

III. What you NEED to find out during the consult:

A. Do the facts of your client's story tell the tale of undue hardship?

1. Can they maintain a minimal standard of living if forced to repay?

a. Are they dining out at restaurants or coffee shops? Do they have cable and movie channels? Are they actively minimizing their discretionary living expenses and maximizing their potential income?

i. "In fact, many courts have held that cell phones, cable, internet and recreational expenses are not part of a minimal standard of living. *In re Heart*, 438 B.R. 406, 410 (E.D. Mich. 2010); *Miller*, 377 F.3d at 623–24.

b. Are they making repayments *right now*? Without other circumstances which demonstrate their future ability or lack thereof to continue making payments, this may be a negative determining factor.

i. A thorough review of the client's bank account statements is necessary and will very likely become evidence in any case.

2. What other circumstances exist, and will they be permanent?

a. Age and or illness alone are not sufficient to prove undue hardship:
i. Many courts that have addressed age within an undue hardship context have denied discharge on facts that solely rely upon old age or illness; See, *Jones v. Bank One Texas* (*In re Jones*) , 376 B.R. 130, 139 (W.D. Tex. 2007)("debtor cannot now use her age as grounds to avoid repaying her student loans as she chose to go to school later in life, which resulted in the student loan debts persisting into her later age.");

ii. *Fabrizio v. United States Dep't of Educ.* (*In re Fabrizio*), 369 B.R. 238, 249 (Bankr. W.D. Pa. 2007)("Nor can the debtor rely on his age of 51 years as a discharge basis. The simple fact that the debtor will have to pay his educational loans later for into life is merely a consequence of his decision to incur debt educational purposes during his thirties.");

iii. *Chapelle v. Educational Credit Mgmt. Corp*. (*In re Chapelle*), 328 17 B.R. 565, 572 (Bankr. C.D. Cal. 2005) (". . . age does not constitute an additional circumstance,' especially when [the debtor] is healthy and does not suffer from any age-related illnesses that affect her ability to work.");

iv. *Educational Credit Mgmt. Corp. v. DeGroot* (*In re DeGroot*), 339 B.R. 201, 212 (D. Or. 2006) ("where debtors choose to incur educational debt later in life, the fact that they will reach retirement age during the loan repayment period is not enough alone to justify discharge");

v. *Educational Credit Mgmt. Corp. v. Waterhouse (In re Waterhouse*), 333 B.R. 103, 112 (W.D.N.C. 2005) (rather than presenting evidence of "additional circumstances," the debtor relied on his 51-year-old age to try to satisfy Brunner's second prong; the court found that the advanced age argument does

not satisfy the second prong of Brunner.); *In re Robinson*, 390 B.R. 727 (Bankr. W.D. Okla. 2008); *DeRose v. EFG Tech*., *et al* (*In re DeRose*), 316 B.R. 606, 609 (Bankr. W.D.N.Y. 2004).

b. Many courts have identified what is *not* an undue hardship:

   i. See, *In re Ross*, 262 B.R. 460 (W.D. Wash. 2000) (back problems, depression, knee surgery, and gall bladder surgery did not constitute an undue hardship);

   ii. *In re Sands*, 166 B.R. 299 (Bankr. W.D. Mich. 1994) (diabetes and hypertension were not an undue hardship); *In re Love*, 33 B.R. 753 (Bankr. E.D. Va. 1983) (arthritis and head injury causing extreme sensitivity to stress were not an undue hardship);

   iii. *In re Archie*, 7 B.R. 715 (E.D. Va. 1980) (obesity not an undue hardship).

c. Consider whether the client is eligible for or has started drawing on social security / pension / retirement as of the time that the prospective case may be filed. Ensure that the client's circumstances are certain not to improve for any reason whatsoever.

3. Has the prospective client made a good faith effort to repay?

   a. Has the client paid *anything?*

      i. Many courts have held that student loan debtors who make little or no effort to repay student loans cannot demonstrate a good effort to repay their debt. *Fraley v. United States Dep't of Educ.* (*In re Fraley*), 247 B.R. 417, 421 (Bankr. N.D. Ohio 2000) (court refused to discharge loan of debtor who made no payment, holding that the court "simply cannot conclude that the debtor has made a good faith effort to repay his student loans");

      ii. *Goulet v. Educational Credit Mgmt. Corp*. (*In re Goulet*), 284 F.3d 773, 776 (7th Cir. 2002) (rejecting claim for undue hardship discharge in part because debtor "never made a single payment on his student loans");

iii. *Parks v. Graduate Loan Center* (*In re Parks*), 293 B.R. 900, 904 (Bankr. N.D. Ohio 2003) ("the sole $168.23 payment to PHEAA hardly constitutes a good faith effort to repay under the third *Brunner* prong").

b. Deferment and forbearance are insufficient alone to satisfy the third prong of *Brunner*.

i. *See Spence v. Educational Credit Mgmt. Corp*., 541 F.3d 538, 545 (4th Cir. 2008) ("Obtaining the deferment of student loans is not sufficient to demonstrate a good faith effort to repay them when the deferment is followed by not one payment or any effort to work out a reasonable payment schedule");

ii. *Educational Credit Mgmt. Corp. v. Mosko* (*In re Mosko*), 515 F.3d 319, 327 (4th Cir. 2008) ("without reasonable effort to make subsequent payments, requesting deferments and forbearances alone does not establish good faith").

iii. Good faith payment(s) on a student loan must be *voluntary*; wage garnishments do not meet the third requirement under *Brunner;* failure to make a single voluntary payment on her student loan obligation, outside of the nine required to obtain a further deferment, does not demonstrate the level of good faith required to obtain a discharge of her student loan debt.

iv. The *Tirch* court stated "it is difficult, although not necessarily an insurmountable burden for a debtor who is offered, but then declines the government's income contingent repayment program, to come to this Court and seek an equitable adjustment of their student loan debt." *Conner v. United States Dep't of Educ*. (*In re Conner*), 526 B.R. 218, 229 (Bankr. E.D. Mich. 2015).

B. If your prospective client's story is compelling and seemingly meets the three prongs of Brunner, do they have supporting documentation? Will they be willing and able to provide it? Will their medical specialists be willing and able to testify if called to do so? Will they be able to openly discuss tragic life events which may have caused the persistent state in which they find themselves in?

IV. How Do You Get Paid For This?

A. One of the most challenging aspects of handling a student loan adversary proceeding involves the cost to the debtor. The practical aspect of filing and prosecuting a student loan discharge complaint is equally as taxing on the attorney, who must structure a viable fee agreement.

1. It shouldn't be this complicated, but it is: Issues affecting the collection of fees.

a. Considerations for taking a pre-petition retainer for an adversary:

i. "…a pre-petition agreement to pay an attorney gives rise to a dischargeable debt. A post-petition agreement does not." 404 F.3d at 396-97. *In re Slabbinck*, 482 B.R. 576, 597 (Bankr. E.D. Mich. 2012).

ii. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to representation. *Dignity Health v. Seare (In re Seare),* 493 B.R. 158, 186 (Bankr. D. Nev. 2013).

iii. "…a chapter 7 debtor's counsel cannot be paid from estate property absent authorization under § 330(a)(1) and any prepetition attorney's fee due is dischargeable." *Lamie v. United States Tr.*, 540 U.S. 526, 537, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004).

iv. "…an attorney may limit the scope of his or her representation in certain circumstances, but only if the limitation is reasonable, does not interfere with the attorney's other ethical obligations (including the duty of competence under MRPC 1.1) and only after the attorney consults with the client about the limitations and obtains the client's informed consent to such limitations." *In re Mawson*, No. BT 18-05012, 2021 Bankr. LEXIS 2467, at *16 (Bankr. W.D. Mich. Sep. 7, 2021).

v. If a debtor's attorney violates the restrictions on debt relief agencies, whether intentionally or negligently, the attorney may be required to disgorge fees and reimburse the debtor-client for actual damages and attorney fees. 11 U.S.C. §526(c)(1), (2)(A).

Civil penalties and injunctive relief are also available. 11 U.S.C. §526(c)(5). *In re Finn,* Nos. 19-71144, 19-71778, 2020 Bankr. LEXIS 2311, at *18 (Bankr. C.D. Ill. Aug. 28, 2020).

vi. Attorneys are not incentivized to represent Chapter 7 Debtors in adversary Proceedings that are contemplated prior to the filing of the case; most Chapter 7 debtors cannot afford to pay a substantial retainer fee; fees incurred above and beyond a pre-petition chapter 7 retainer fee are dischargeable; student loan adversary proceedings are incredibly fact-intensive, and the outcome cannot be reasonably guaranteed; certain jurisdictions prohibit an attorney from unbundling pre-petition from post-petition services, particularly if an action such as a question of dischargeable of a debt could (or should) have been reasonably anticipated by counsel for the debtor.

B. How should Debtor Attorneys Structure the Fees at the Consult?

1. Prospective clients must be fully informed of the risks involved in filing a student loan dischargeability adversary proceeding.

2. If the attorney is satisfied with the story of undue hardship and the amount of documentation the client can put forth to tell its story, there are two routes that the attorney can take in preparing the engagement:

a. Pre-petition engagement for a flat fee to cover the chapter 7 and the adversary proceeding (if the goal is to file and settle with student loan creditor);

b. Pre-petition engagement for the Chapter 7 which excludes representation in adversary proceedings in districts where reasonable unbundling of services is accepted, together with a separate post-petition engagement for representation in the adversary proceeding; the post-petition engagement can be an hourly agreement, although this commits the attorney to financing the lawsuit based on the potential future payments agreed to by debtor from his post-petition wages.

i. NOTE: Attorneys CAN take a retainer for a post-petition engagement to handle an adversary proceeding IF the retainer so long as it is NOT property of the estate. Therefore, attorneys are LIMITED to exempt assets (e.g. a savings account scheduled on A/B with $5,000 on deposit which is

properly exempt, and not part of the estate) or post-petition assets (such as wages).

c. Ensure appropriate consistency between the engagement(s) and the 2016(b) statement.

d. Consult the district's local bankruptcy rules for whether there is any requirement or restriction against fees for limited scope representation.

e. Do not exclude representation of a debtor in an adversary from the engagement or from the 2016(b) in chapter 13 cases; approval of attorney fees must be sought pursuant to §329 and §330 by filing a fee application. Build the expected fees and costs into the estimated administrative expense claim for purposes of preparing the plan calc. Specifically separate time entries billed for purposes of prosecuting or defending the adversary proceeding(s) as its own project billing category (or, according to the district's local rules for seeking approval for compensation).

V. Practical Advice

A. When preparing the schedules, make sure that the debtors' schedule I and J can be traced specifically to documentation yielding averages. You will be called to provide this documentation, and it must not show any ability to make a student loan payment.

B. Schedule the student loan in question on Schedule F, marked 'disputed' as to whether it is dischargeable.

C. Manage Expectations.

1. Prospective clients should be made very well aware of the fact that these cases rarely result in complete and total discharge of student loans. Any cases that do go the distance will have gone through a lengthy, fact-intensive, grueling period of discovery which results in trial. Taking a case like this to trial is expensive, and not guaranteed to produce the desired results. Additionally, the debtor will be responsible for the fees and costs associated with trial, which is a major factor preventing more of these cases from being filed.

2. It is possible to manage expectations from the outset: student lenders are eager to resolve adversary proceedings by reaching settlements

with debtors. Therefore, it can be possible to change a debtor's student loan status quo by filing an adversary proceeding without having to spend $20,000 in litigation. Debtors who can demonstrate a valid undue hardship, who can back up their claim of hardship with documentation, who arguably meet the three prongs of *Brunner* and are willing to negotiate with their student loan company to pay *something* — can achieve success by filing an adversary proceeding. These cases are typically resolved with the debtor's agreement to pay a portion of the debt over a reasonable period of time, and the creditor's agreement to discharge the balance of the unpaid portion upon meeting the repayment terms.

3. Unless *Brunner* is overturned, and until federal relief from student loans exists, the filing of an adversary proceeding in a consumer bankruptcy by a debtor who meets the hardship requirements should be the model for seeking dischargeability of student loans. This method is time and resource-saving. It is cost effective, and it has proven to work for numerous debtors. The idea of filing an adversary to discharge student loans for the purpose of reaching a favorable settlement is relatively unknown, because settlements are not reported. In most cases, the terms of the settlements are not even filed. Adversary proceedings which end in stipulated settlements in adversary proceedings do not garner attention, and so this method for resolving student loan debt is relatively unheard of.

D. A Word of Caution

1. It is not advisable to attempt to seek stipulated settlement on a student loan in an adversary if the debtor cannot come close to meeting the *Brunner* standard. Debtor's attorneys should still be prepared to engage in discovery with counsel for the loan company. While student loan companies and their counsel are aware of the rigidity of *Brunner*'s undue hardship requirements, and the fact that a lot of debtors likely qualify for some form of relief through settlement, the simple filing of an adversary proceeding is not a one-way ticket to stipulated settlement. The fact-intensive inquiry will still be conducted by creditor's counsel in order to determine what (if any) relief the lender can offer by way of a manageable settlement with partial payment and partial discharge. If a debtor has made no voluntary repayment, if their circumstances are likely to change, if they can earn more or spend less, chances are the student lender will proceed with the suit in the face of a frivolous complaint.

STUDENT LOANS, REPAYMENT, AND BANKRUPTCY

By: Karen M. Bauer Legal Aid Society of Milwaukee

I. Is the government just going to forgive everyone's loans?
   a. No. You know it can't be that easy!
   b. But…. as of this writing, it looks like the Biden Department of Education will be pushing to forgive $10,000 per borrower, possibly subject to an income cap of $125,000 per debtor.

II. What about my loans? I used to work for the government/legal aid/once helped an old lady cross the street.
   a. You may have heard about Public Service Loan Forgiveness (PSLF). This is the program that many considered a failure because the student loan servicers who were supposed to administer it did a horrible job of communicating with student loan debtors. The current DOE is trying to right those wrongs, and things are getting better now.
   b. Requirements:
      i. Work at a non-profit or government organization, full-time
      ii. While making 120 payments under an income-driven plan,
      iii. On Direct Loans (Stafford loans generally)
      iv. Prove all of the above!
   c. Lots of people erred somewhere in the process, so the government has now waived many of the requirements above, like:
      i. Allowing almost any type of repayment plan to count.
      ii. Counting payments made on loan types that didn't before as long as you consolidate into the Direct Loans program before October 31, 2022.
      iii. Counting some periods of deferment and forbearance.
      iv. See: https://studentaid.gov/announcements-events/pslf-limited-waiver
      v. You need to send in a PSLF/Employment Certification form for every public service employer you have had to get them to count these payments and you need to do it before time runs out on October 31, 2022. https://studentaid.gov/pslf/

III. First line of defense: when your client cannot afford an adversary proceeding, or simply won't qualify for an undue hardship discharge in bankruptcy court for other reasons.
   a. First, figure out what type of loan they have.
      i. Federal loans: go to www.studentaid.gov
         1. Sit with your debtor as they sign into the government student loan data website.
         2. Usually only student is borrower
         3. Stafford or FFEL are common federal loan types
      ii. Private loans: check credit report – these aren't on the government website.
         1. Frequently cosigned

2. High interest rates
3. TILA (Truth in Lending Act) disclosures must be made

b. Repayment plans for federal loans
   i. Standard
      1. 10 years.
   ii. Graduated
      1. Payments increase over time (as your income theoretically increases)
   iii. Extended
      1. Up to 25 years to repay at least $30,000 in loans.
   iv. Income-Driven: payments are a % of your discretionary income for your family size. Payment can be as low as $0 if income is very low.
      1. ICR: Income Contingent Repayment - 34 CFR § 685.209
      2. PAYE: Pay As You Earn - 34 CFR § 685.209
         a. For those who took out loans more recently
      3. RE-PAYE: Revised Pay As You Earn – 34 CFR § 685.209(c)(2)
         a. Anyone can use this.
         b. 10% of discretionary income.
         c. Usually cheapest plan out of the income-driven ones.
      4. IBR: Income Based Repayment - 34 CFR § 682.215
         a. Payment is difference between your adjusted gross income and 150 percent of the annual poverty line for a family of your size and in your state
            i. Will be 10-15% of discretionary income, depending on when loans were disbursed.
         b. Note that the Secretary of the Dept. of Ed pays the remaining interest that isn't covered by the IBR payment for the first 3 years.
         c. Must have a partial financial hardship to qualify for IBR. If your loans are more than your yearly income, you will qualify!
         d. For married couples who both owe loans, can file taxes "Married Filing Separately" and NOT include spouse income in calculation of IBR amount.
            i. For many couples, this saves a substantial amount.
            ii. Use an IBR calculator either on Finaid.org or on the Dept. of Education website to verify the savings.
            iii. Biggest savings is from the DOE definition of "family size." EXAMPLE: Couple with 1 child. One partner's family size is 3 to calculate IBR amount and so is other spouse's.

c. Repayment plans for private loans are based on the contract and whims of the lender. Very few options.
   i. You need to read those contracts. They dictate everything about the options for your client.

d. Statutory discharges for Federal Loans
   i. Closed School
      1. Dept. of Education must discharge a loan if borrower wasn't able to complete the program due to the school's closure. See 20 U.S.C. §1087(c)(1)

a. Not uncommon. Between 2008-13, DOE reported that 128 schools closed.

2. Need to find out date the school closed.
   a. Can obtain discharge if
      i. School closed before student completed program
      ii. Student withdrew from school not more than 120 days before it closed[1]
   b. If the borrower receives this they are no longer obligated to repay the loan. Must apply using Department of Education form from their website.
   c. https://studentaid.gov/announcements-events/closed-school

ii. False Certification: when ability to borrow was falsely certified by the school. Four reasons to justify this discharge:
   1. School falsifies ability to benefit
      a. Examples include malfeasance during Ability to Benefit testing, such as allowing multiple attempts, or supplying answers to test-takers.
   2. School certifies eligibility of student who cannot meet minimum employment requirements for the job they are being trained for.
      a. Example: visually impaired truck-driving school students, or felons attempting to get a nursing degree.
   3. School forges student loan note or check endorsements
   4. The borrower is an identity theft victim

iii. Unpaid Refund: Provides for discharge if the school failed to make a refund that was owed to the student. [2]

iv. Total and Permanent Disability Discharge[3]
   1. Allows for discharge for borrowers who are unable to engage in any substantial gainful activity,
   2. by reason of any medically determinable physical or mental impairment
      a. that can be expected to result in death, or
      b. can be expected to last for a continuous period of 60 months, or
      c. or has lasted for 60 months. [4]
   3. Most people who receive SSDi or SSI for disability will qualify. To find out the details of how to help someone with this, go to https://disabilitydischarge.com/tpd-101

IV. Obtaining a discharge in bankruptcy court

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[1] This 120 period is in the regulations only. 34 C.F.R. §§682.402(d)(1)(i) (FFEL), 685.214(c)(1)(i)(B) (Direct Loans), 674.33(g)(4)(i)(B) (Perkins Loans).

[2] See 20 U.S.C. §1087(c);34 C.F.R. §§682.402(a) (FFEL), 685.216 (Direct Loans)

[3] The government has established a very useful website for applications for these discharges and for information about the process. www.disabilitydischarge.com. Note that those who receive SSDi or SSI benefits can simply submit the form along with proof from the Social Security Administration that their next scheduled review will be in 5-7 years from the date of the most recent disability determination. You can send your client to the SSA to request a BPQY form that has this information.

[4] 34 C.F.R. §685.102(b)

a. For a better review of this information, see my co-presenter's outlines. I am only covering some general client screening information based on my own experience in the 7th Circuit.
b. General rule: Student loans are nondischargeable in bankruptcy unless repayment of the loan would cause an "undue hardship" for the debtor or their dependents *See* 11 USC §523(a)(8).
c. *But see*, Iuliano, Jason, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard (July 24, 2011). 86 American Bankruptcy Law Journal 495 (2012).
    i. Available at SSRN: https://ssrn.com/abstract=1894445 or http://dx.doi.org/10.2139/ssrn.1894445.
    ii. This study found that a large percentage of those who filed to have their loans discharged received at least some relief from the bankruptcy court.
    iii. Shockingly, this same study also found that only .1% of debtors attempt to discharge their student loans at all.
d. So who would be a good candidate to try for an undue hardship discharge?
    i. Someone with a low income (so that they are already at a minimal standard of living)
    ii. Client must be able to tolerate the creditor going through their budget with a fine-toothed comb
    iii. A debtor with a disability or personal tragedy
    iv. Someone with lack of a job skills, or who never graduated
e. Who would be a not-so-good candidate for an undue hardship discharge?
    i. Attorneys (or those with law degrees or other advanced education)[5]
f. These cases rely on good evidence of the debtor's inability to improve their state of affairs.
    i. If the debtor went to a for-profit school that closed or defrauded students, that evidence is important as well.
    ii. Because each of these is so fact-specific, consult an experienced practitioner before you file the adversary proceeding.
g. Adversary proceeding required to obtain discharge of student loan & it can be brought at any time. [6]
    i. "Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt"[7]

[5] See *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 759 (7th Cir. 2015) In this case, the court specifically made note of Tetzlaff having both an MBA and a law degree as reasons why this debtor could not meet the "additional circumstances" prong of the Brunner test.
[6] Fed R. Bankr. P. 4007(b)
[7] *Tennessee Student Loan Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 1912. (2004)

Defense of Student Loan Adversaries

Service:

Was your client properly served?

- Important if there is a pending motion for default or a default judgment.

Parties:

Is your client properly named?

If not:

- Contact plaintiff's attorney and request a stipulation to substitute/delete parties
- Do a motion to intervene (Bankr. R 7024)
- Do a motion to substitute parties (Bankr. R 7025)
- Do a motion to drop a party (Bankr. R 7021)

Complaint:

What is the complaint alleging?

- Undue hardship only; and/or
- Student loan is dischargeable under any of the three prongs of §523(a)(8).

Answers:

Be thorough: Do not inadvertently admit a key defense.

What is the circuit's test for undue hardship?

- 1st, 8th, and 10th circuits: Totality of the circumstances
  - See *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775 (8th Cir. 2009)
- All other circuits: The *Brunner* test
  - See *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)

Counterclaims: Do not clutter your answer with stock counterclaims.

- Do use a counterclaim if warranted: The loan is nondischargeable under §523 (a)(8) because...

Discovery:

This will shape your defense and settlement options.

Requests for admissions:

- Ask for admissions of loan documents and balances.
- Ask for admissions re-key elements of the *Brunner* or totality of the circumstances tests.

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Interrogatories:

- Members of household
  - Other income from household members
- Employment and salary or income history
- Unemployment history of plaintiff and/or household members and reasons why
- Identify all financial accounts, where they're held, and account numbers
- Identify all bills: Utilities, car payments, mortgage, and all recurring payments
- If bankruptcy is not a recent one, request:
  - Updated I & J; and
  - List of personal and real property that plaintiff has an interest in.
- Recent transfers of property
- Gifts/financial support from non-household members
- Pending or anticipated lawsuits
- Medical condition(s)
- Medical insurance information
- Education, degrees, and schools attended
- Description of elements of undue hardship now and as expected in the future
  - Craft according to the appropriate circuit test
- Repayment, deferment, and forbearance history as to each loan
- Other student loans held and balances
- Willingness to negotiate a settlement

Request for production:

Essentially looking for documents to support answers to interrogatories and that detail income and expenses.

- Income for past five years
  - Tax returns
  - W-2s
  - Paystubs
  - Business books and records
  - Social security earnings: https://secure.ssa.gov/RIL/SiView.do
  - Retirement, pension, and profit sharing plans
- Expenses
  - Monthly bank/financial account statements
  - Monthly bills/recurring payments
  - Vehicle notes/payments
  - Mortgage/rent payments
- Medical
  - Medical records
  - Insurance payments/out-of-pocket medical payments

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- Employment/job search
  - Resumes
  - Documents/applications showing job searches
  - Rejection letters
- Education
  - Degrees
  - School transcripts

- Loans
  - Record of payments
- Marriage
  - Divorce decrees, support orders, and separation agreements

Assess:

Review discovery responses:

- Consider doing a spreadsheet to detail monthly expenditures. Look for:
  - Patterns of expenses
  - Unnecessary expenses
  - Extravagant expenses
  - Frequent restaurant visits
  - Verify claimed expenses (mortgage, car payments, utilities)
- Income
  - Are there unexplained deposits or income?
  - Is income more or less than claimed?
- Review medical records/doctors statements
  - Attempt to verify claimed medical conditions
  - Assess severity (or not) of medical conditions
- Assess education and likelihood of different or better employment

Assess your case:

- Is this a true undue hardship case? (Note: This is rare)
- Is this a candidate for a work out?
- Is this a debtor who could pay, but chooses not to?

Deposition:

- Get the plaintiff's story
- Follow up on questions that arose from discovery responses
- Go through employment and educational histories
- Get job search history/expected future employment opportunities
- Drill into claimed undue hardship and get facts

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Motions for Summary Judgment:

These are fact-based cases that do not lend themselves to disposition on motions for summary judgment.

Trial or Settlement?

Trial:

- There will be a winner and a loser at trial (this is all or nothing for both parties)
- Assess the case and your client's risk
- Consult with your client
- Discuss possible settlement and parameters

Settlement:

- Usually, the plaintiff will initiate settlement negotiations
    - If not, reach out, but let plaintiff make first offer
- Forms of settlement:
    - Judgment orders
        - Judgment amount is nondischargeable
            - May make entire loan nondischargeable if there is a payment plan default
            - Monthly payments for a specified period of time
            - Enforcement of judgment stayed as long as payments are made
            - Order closes out adversary proceeding as to your client
    - Settlement agreements
        - May be confidential
        - May have to reduce to judgment to enforce in state court
        - Adversary dismissed by agreement

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Faculty

Michelle H. Bass is a partner at Wolfson Bolton PLLC in Troy, Mich., where she manages its consumer bankruptcy practice group. She represents both debtors and creditors in consumer bankruptcy proceedings and primarily represents debtors in chapter 7 liquidations and chapter 13 reorganizations, which span from high-net-worth and high-income-earning individuals to individuals seeking to prevent foreclosure or repossession of secured collateral. She also represents both debtors and creditors in divorce-related bankruptcy proceedings, and is a frequent speaker on the intersection of bankruptcy and family law disputes. Ms. Bass has represented individuals reorganizing under chapter 11, including subchapter V, as well as small businesses going through chapter 7 liquidation, and has stopped foreclosures, the stripping of secured liens and the cramming down of loans on collateral for individuals seeking to reorganize under chapters 13 and 11. She also has successfully defended appeals in the Federal Eastern District for the State of Michigan and the Sixth Circuit Court of Appeals. Ms. Bass is a member of ABI, for which she co-chairs its Consumer Bankruptcy Committee. She also is a member of the Detroit Consumer Bankruptcy Association and the Oakland County Bar Association, for which she chairs its Debtor/Creditor Committee. Ms. Bass is Board Certified in Consumer Bankruptcy Law, has been named by *Michigan Lawyer's Weekly* as one of 2019's 30 Women in Law, and has been consistently recognized by *Super Lawyers* as a Rising Star in consumer bankruptcy since 2014. She received her B.A. from the University of Michigan and her J.D. from the University of Detroit Mercy School of Law.

Karen M. Bauer is a managing attorney at the Legal Aid Society of Milwaukee, Inc. in Milwaukee, where her practice centers on student loan law, bankruptcy, debt defense and consumer protection litigation. She also manages Legal Aid's groundbreaking Right to Counsel project, Eviction Free MKE. Ms. Bauer is past chair of the Public Interest Law Section of the State Bar of Wisconsin and a former member of the State Bar of Wisconsin's Board of Governors. She is a Fellow of both the Wisconsin Law Foundation and the American Bar Foundation, and has the distinction of being the oldest person to ever win the State Bar of Wisconsin's Outstanding Young Lawyer award. Ms. Bauer authored two articles in *Wisconsin Lawyer* on educational debt and has taught many CLE courses on student loan issues. She is a member of the Association for Women Lawyers, National Association of Consumer Advocates and the State Bar of Wisconsin. Ms. Bauer received her J.D. from the University of Wisconsin Law School, where she was a managing editor of the *Wisconsin Law Review*.

Monette W. Cope is an attorney with Weltman, Weinberg & Reis Co., LPA in Chicago, where she practices exclusively in bankruptcy. She represents banks, financial service organizations and student lenders in Illinois, Wisconsin and bankruptcy courts nationwide in matters involving chapter 7, 11, 12 and 13. Ms. Cope has more than 30 years of experience and began her career in bankruptcy as a staff attorney for a chapter 13 trustee. She is AV-rated by Martindale-Hubbell and a member of ABI and the Chicago Bar Association, and she is a former president of the Credit Education Coalition, former secretary of the Creditor's Attorney Association and a current board member of Chicago Financial Women. Ms. Cope is admitted to practice in Illinois, Maine and Ohio, and before the U.S. District Courts for the Central, Northern and Southern Districts of Illinois, the Western District of Michigan, the Eastern District of Missouri, the Southern District of Ohio, and the Eastern and West-

ern Districts of Wisconsin. She received her B.A. *cum laude* in English in 1979 from The Ohio State University and her J.D. in 1988 from The Ohio State University Moritz College of Law.

Hon. Mary Ann Whipple is Chief U.S. Bankruptcy Judge for the Northern District of Ohio in Toledo, appointed as bankruptcy judge in 2001 and serving her second term. She also served a term on the Sixth Circuit Bankruptcy Appellate Panel. Before her appointment as a bankruptcy judge, she practiced law for 20 years as a commercial, bankruptcy and employment litigator with Fuller & Henry Ltd. in Toledo. Judge Whipple is admitted to practice in Ohio and Michigan and before the U.S. Supreme Court, U.S. Court of Appeals for the Sixth Circuit and the U.S. District Courts for the Northern District of Ohio and the Eastern District of Michigan. In addition, she taught creditor/debtor law as a part-time faculty member at the University of Toledo College of Law for 20 years. Judge Whipple received the 2008 Toledo Bar Association Community Service Award and the Toledo Women's Bar Association's Arabella Babb Mansfield Award in 2016, and is also a master and past president of The Morrison R. Waite Chapter of the American Inns of Court Foundation. She received her A.B. in Russian studies from the University of Michigan in 1977 and her J.D. from Stanford Law School in 1981.