

Helping your clients take their lives back from their student loans sometimes involve bankruptcy related solutions. While filing bankruptcy has typically NOT been helpful for those with overwhelming federal student loan debt, there is good reason for re-evaluation of that view now. Not only do we have the Student Loan Management Program here in the Middle District of Florida, reducing student loan debt in bankruptcy has become much easier in 2024 due to two new programs rolled out by the Department of Education (“ED”).

First, a new process allowing for Income Driven Repayment (“IDR”) credit for debtors in bankruptcy will begin July 1, 2024. Rather than penalizing a debtor by simply placing the debtor into an administrative forbearance, (with capitalized interest and negative amortization) the new Bankruptcy IDR will give a debtor a month of credit toward loan forgiveness for each month the debtor makes a required plan payment under a confirmed Chapter 13 plan. 34 C.F.R. § 685.209(k)(4)(iv)(K).

Bankruptcy is becoming a very good solution for those with high student loan debt with two new programs – BK IDR and the Attestation Process.

A debtor will receive IDR credit for a plan payment even if no IDR payment is made. Neither ED nor the debtor is required to file a proof of claim for the federal student loan(s), nor is there any requirement that ED receive any distributions under the debtor’s plan. Even if the Chapter 13 Plan is not completed, a debtor shall receive IDR credit for the successful plan payments that were made during the pendency of the bankruptcy case. A special plan provision is not required, but is recommended. Separate classification of the student loans is not required to stay on an IDR plan which eliminates a reason for the United States Trustee or ED to object to the plan.

It is also advisable for the debtor to enroll in an IDR plan before filing a Chapter 13 case, or immediately after the case is closed to avoid errors in the final count toward forgiveness.

This program is particularly valuable for those borrowers with high income who also have large mortgage debt or

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Joseph Caballero
Managing Partner
joecab@erocadv.com



Edmund O’Carroll
Managing Partner
edo@erocadv.com



Steve Stagg
Managing Partner
sstagg@erocadv.com

Former C.E.O. Gulfshore Bank
Certified Public Accountant
Independent Board Member, Carter
MultiFamily Funds

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medical expenses which can be used to reduce disposable income in a bankruptcy to reduce or even eliminate a student loan payment. These types of expenses cannot be used to reduce an IDR payment outside of bankruptcy. It appears that ED will use the Chapter 13 Standing Trustee's Uniform Report and Account form that is filed by the trustee within 150 days of the final distribution to creditors in the case. Item #6 of that Report lists: "Number of months from filing or conversion to last payment." If a debtor completes 24 plan payments in a 60 month plan, the trustee would report 24 in response to Item #6 and ED would give the debtor 24 months of IDR forgiveness credit. In the event that this number is wrong, debtor's counsel may file a motion to confirm the number of plan payments and seek an order compelling the servicer and ED to give IDR credit per 34 C.F.R. § 685.209(k)(4)(iv)(K).

Second, many full or partial discharges of federal student loans are being awarded due to a new attestation process that went into effect in November, 2022 (the "Guidance"). The rollout of this program was initially slow, but it is quickly picking up speed. The process allows for the Department of Justice ("DOJ") to work with ED to review and approve circumstances allowing for discharge in a process that is more transparent and consistent, with less burdens placed upon debtors by simplification of the fact gathering process. Instead of traditional discovery such as requests to produce, interrogatories and depositions, the intent is to have the debtor fill out a questionnaire and attest to the hardship and other impositions that repayment of the student loans would create. In this manner, the goal is to be much less expensive and far quicker than a traditional adversary proceeding. Using the Guidance, certain presumptions for discharge now exist that did not exist previously. Assessment of the debtors' future circumstances and whether ED considers the debtors to have made good faith efforts to repay their student loans still occurs. Once ED reaches a recommendation in accordance with the Guidance, the Court would still need to approve of the outcome. In most circumstances, the Court would likely approve of the parties' decision to discharge any student loan debt.

Traditionally, it was nearly impossible to discharge federal student loan debt in bankruptcy under the *Brunner* standard. Under Section 523(a)(8) of the Bankruptcy

Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan "would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010). This inquiry is undertaken through a formal adversary proceeding in the bankruptcy court.

The most common framework for assessing undue hardship is the *Brunner* test, emanating from *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor's financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396. This *Brunner* standard exists in the majority of states including the State of Florida. Other courts have applied a "totality of circumstances" test. The Totality Test looks to: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and their dependents' reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. The new Guidance applies in both *Brunner* and Totality Test jurisdictions.

While the *Brunner* and Totality Tests still apply, the Guidance allows for an easier review by ED with the added benefit of certain presumptions of discharge. The Guidance creates presumptions that the inability to repay will persist if:

- The debtor is 65 or older;
- The debtor has a disability or injury impacting income potential;
- The debtor has been unemployed for five of the last 10 years;
- The debtor failed to obtain degree for which the loan was procured;
- The debtor's loan has been in repayment status for 10 years.

Traditionally, these factors were not given a presumption

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of discharge as they are now. Of course, the presumptions are rebuttable if there is concrete evidence that the debtor would have the future ability to pay.

Pre-bankruptcy Planning: It's important pre-bankruptcy to ensure that the debtor's situation will be viewed in the best possible light once the bankruptcy is filed. That means possible consolidation to a Direct Loan to take advantage of the Guidance and if needed, the lowest possible IDR repayment plan for the duration of the bankruptcy. The Guidance is available under both Chapter 7 or Chapter 13.

Any good litigator understands that controlling the facts can be helpful in future litigation. Therefore, encouraging the debtor to undertake an IDR, communicate with their servicer, consolidation, applying for non-bankruptcy programs etc. may all be viewed as evidence of good faith which is a major focus of the Guidance.

Evidence of good faith can include things such as:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDR plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with ED or their loan servicer regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

The key is to look for opportunities to help the debtor fit the criteria above to allow for discharge of his or her student loan debt.

The bottom line is that bankruptcy is becoming a rather good solution for those with student loan debt now that the landscape has changed and new programs come online which allow for far more discharge of student loan debt.

The information provided in this Sidebar does not, and is not intended to, constitute legal advice. For a 1-on-1 consultation, please email info@christiearkovich.com or call (813) 258-2808.



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