

Consumer Corner

BY CARISSA STERLING¹

DOJ Provides Guidance on Evaluating Federal Student Loan Discharge Requests in Bankruptcy

The Department of Justice (DOJ), in coordination with the Department of Education (DOE), has released new guidance on the process through which DOJ attorneys should evaluate debtors seeking to discharge student loans through bankruptcy. While the undue hardship legal standard still applies, DOJ attorneys, where appropriate, should stipulate to facts indicating undue hardship and more predictably and uniformly recommend discharge.

On Nov. 17, 2022, the Office of Public Affairs for the DOJ announced that it and the DOE would be coordinating to create new guidance to aid the process through which DOJ attorneys would evaluate debtors seeking to discharge federal student loans.² Subsequently, the associate attorneys general issued guidance to all DOJ attorneys that provided the guidelines by which to evaluate requests to discharge student loans.

The guidance aids DOJ attorneys in determining when recommending discharge is appropriate. It is intended to promote three goals: (1) "To set clear, transparent, and consistent expectations of discharge" that debtors with and without legal representation can understand; (2) to simplify the "fact-gathering process" and thereby "reduce debtors' burdens in pursuing an adversary proceeding"; and (3) where supported by facts, increase the number of cases where the government stipulates to the facts indicative of undue hardship and recommends a discharge.³

In the press release, U.S. Secretary of Education James Kvaal acknowledged that "Congress may have set a higher bar for granting student loan discharges during bankruptcy, but in practice that bar has become very difficult for deserving borrowers to clear."⁴ Under § 523(a)(8) of the Bankruptcy Code, a debtor cannot discharge student loans "unless excepting such debt from discharge under this

paragraph would impose an undue hardship on the debtor and the debtor's dependents."⁵

As outlined in the DOJ's guidance, the two common tests for determining whether a debtor has demonstrated an undue hardship are the *Brunner* and totality-of-the-circumstances tests.⁶ In using the *Brunner* analysis, a court will look for a showing "(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."⁷ In evaluating a request for discharge using the totality-of-the-circumstances test, a court will consider "(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."⁸ The guidance will apply in both types of jurisdictions.⁹

DOJ and DOE Coordination

In addition to outlining the purpose and applicability of the new guidelines, the guidance also explains how the DOJ and DOE will coordinate efforts. At the outset of an adversary proceeding, the DOE will provide the DOJ attorney with the debtor's account, loan and educational history.¹⁰

The DOJ attorney will then contact the debtor or debtor's counsel to provide the debtor with the opportunity to complete the attestation, which seeks information to aid the DOJ attorney's evaluation of the debtor's financial circumstances.¹¹ The debtor will receive the information provided by the DOE when included with the attestation.¹² A debtor submitting an attestation is doing so under oath and



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² "Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers," U.S. Dep't of Justice (Nov. 17, 2022), available at [justice.gov/opa/pr/justice-department-and-department-of-education-announce-fairer-and-more-accessible-bankruptcy](https://www.justice.gov/opa/pr/justice-department-and-department-of-education-announce-fairer-and-more-accessible-bankruptcy) (last visited on Feb. 23, 2023).

³ Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation, U.S. Dep't of Justice, Office of the Assoc. Att'y Gen. (Nov. 17, 2022) at 2.

⁴ U.S. Dep't of Justice, *supra* n.2.

⁵ 11 U.S.C. § 523(a)(8).

⁶ U.S. Dep't of Justice, *supra* n.3 at 3.

⁷ *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁸ *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).

⁹ U.S. Dep't of Justice, *supra* n.3 at 3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 16.

¹² *Id.*

under the penalty of perjury.¹³ When submitting the attestation, a debtor is also required to provide the documents that support his/her income.¹⁴

After receiving the attestation from the debtor, the DOJ attorney will share it with the DOE.¹⁵ The DOE will provide an initial litigation report, which will include any data relating to the debtor's future ability to pay and its determination as to the debtor's good-faith attempts to repay or lack thereof.¹⁶ The respective employees of each department will confer and determine how to proceed. After determining whether to stipulate to the facts and recommend a discharge, the DOJ attorney will submit its recommendation and the DOE's recommendation for approval per that attorney's office procedures.¹⁷

The Undue-Hardship Analysis

The DOJ attorney's recommendation on how to proceed will either be to stipulate and recommend a discharge because the debtor would suffer an undue hardship, or determine that the debtor will not suffer an undue hardship and therefore a discharge is unnecessary. Under the guidance, DOJ attorneys are advised to stipulate to the "facts demonstrating that [the] debt would impose an undue hardship"¹⁸ and recommend a discharge if the following are satisfied: "(1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan."¹⁹

Present Ability to Pay

In determining a debtor's present ability to pay, the DOJ attorneys are directed to follow a two-step process: (1) determine the debtor's allowable expenses using Internal Revenue Service (IRS) Standards; and (2) determine whether the debtor has income to make student loan payments by comparing income and allowable expenses.²⁰ The DOJ attorney will consider the information provided in the attestation when evaluating this factor. The IRS Standards provide a guide by which a debtor's expenses are to be evaluated relative to the "minimal" standard of living that must be attainable while repaying student loans.²¹ The DOJ attorney will use the IRS National Standards in determining the allowable expenses for the following: "food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous."²² The IRS Local Standards are used to determine the allowable expenses for "housing, utilities, and transportation."²³ The IRS Standards also provide for "other necessary expenses," including alimony and child support payments and child care costs.²⁴

If a debtor's expenses are within the amounts allowed by the IRS National or Local Standards, then no further inquiry is required.²⁵ However, if a debtor's expenses exceed any

of the categories, it is up to the DOJ attorney to accept the expense if the debtor has a reasonable explanation.²⁶ If the explanation or amount in excess of the IRS Standards is not reasonable, the DOJ attorney will limit the debtor's expenses to the amount provided by the relevant standard.²⁷

Upon a determination of the debtor's allowable expenses, the DOJ attorney will compare those expenses with the debtor's household gross income, which, in addition to income from employment, includes unemployment benefits, Social Security benefits and other sources of income for all members of the household.²⁸ If the allowable expenses exceed the household income, then the debtor may be eligible for discharge because the debtor would be unable to maintain a minimal standard of living if required to repay the loans.²⁹ However, if the debtor's expenses do not exceed the household income, the DOJ attorney must determine whether the debtor can make payment in full or partial payments.³⁰ If the debtor can make only partial payments, the DOJ attorney is directed to consider a partial discharge that reflects the debtor's ability to make some of the monthly payment.³¹

In addition to outlining the purpose and applicability of the new guidelines, the guidance also explains how the DOJ and DOE will coordinate efforts.

Future Ability to Pay

In determining a debtor's future ability to pay, the DOJ attorney, using information provided in the attestation, will determine whether any of the rebuttable presumptions apply. There are certain circumstances that create a rebuttable presumption that the debtor will continue to be unable to pay, including "(1) the debtor is 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential; (3) the debtor has been unemployed for at least five of the last [10] years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years."³²

Information rebutting one of the above presumptions must be more than conjecture; the "rebuttal must be based on concrete factual circumstances."³³ A DOJ attorney needs evidence that the debtor's future financial circumstances would allow the debtor to repay the loan.³⁴ A determination that a presumption does not apply or that a presumption has been rebutted does not end the analysis of the debtor's future circumstances. In submitting the attestation, the debtor is not only limited to facts supporting one of the aforementioned

13 *Id.* at 16.

14 *Id.*

15 *Id.* at 2.

16 *Id.*

17 *Id.*

18 *Id.* at 1.

19 *Id.*

20 *Id.* at 5.

21 *Id.*

22 *Id.* at 6.

23 *Id.*

24 *Id.* at 7.

25 *Id.* at 6.

26 *Id.*

27 *Id.* at 6-7.

28 *Id.* at 8.

29 *Id.*

30 *Id.*

31 *Id.* at 8-9.

32 *Id.* at 9.

33 *Id.*

34 *Id.*

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rebuttable presumptions;³⁵ the attestation should also include any facts that affect the debtor's future ability to repay the loans. The DOJ attorney will then consider that information in determining whether that information indicates that the debtor's inability to pay is likely to persist.³⁶

Good-Faith Efforts

In addition to noting that evidence of a debtor's good-faith efforts to repay student loans can be shown in various ways, the guidance specifically notes that evaluation of good-faith efforts "'should not be used as a means for courts' or Department attorneys 'to impose their own values on a debtor's life choices.'"³⁷ The guidance outlines the following as evidence of good-faith efforts: "making a payment; applying for a deferment or forbearance; applying for an income-driven repayment plan (IDRP); applying for a federal consolidation loan; responding to outreach from a servicer or collector; engaging meaningfully with Education 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."³⁸ On the other hand, evidence that a debtor intentionally created hardship to discharge student loans, abused the loan system or "demonstrated a lack of interest in repaying the debt" indicates that a loan should not be discharged.³⁹

A DOJ attorney will also consider a debtor's attempts to find employment, maximize income and minimize expenses.⁴⁰ The guidance emphasizes the need for DOJ attorneys to consider a debtor's payment history and IDRP enrollment. In considering both factors, the guidance notes that the repay-

ment process has had problems involving the miscalculation of payments, wrongful denial of participation in IDRPs, lack of accessibility and other problems with IDRP servicing.⁴¹ Thus, while a debtor's participation in an IDRP is an indication of good faith, a failure to participate in it is not evidence of bad faith. A debtor's reasonable explanation for not participating in an IDRP should be taken into consideration.⁴²

Other Considerations

The guidance also outlines how DOJ attorneys should take into consideration a debtor's assets. It provides that while a debtor's assets must also be considered in analyzing undue hardship, DOJ attorneys are directed not to "give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship."⁴³

Conclusion

While this new process outlines clear and uniform standards for DOJ attorneys to evaluate debtor requests to discharge student loans in bankruptcy, it is important to remember that the bankruptcy judge will ultimately decide whether to grant a discharge. This guidance simply helps DOJ attorneys determine when to challenge or support a request for discharge. Ultimately, this guidance removes one obstacle for a debtor seeking to discharge student loans in bankruptcy: unclear and non-uniform standards for stipulating undue hardship and in recommending discharge. However, the standard for a discharge of student loans remains the same and will continue to be a formidable obstacle to debtors. **abi**

35 *Id.* at 10.

36 *Id.*

37 *Id.* at 10 (citing *In re Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004)).

38 *Id.* at 11.

39 *Id.* at 10.

40 *Id.* at 11 (citing *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008); *In re O'Hearn*, 339 F.3d 559, 564 (7th Cir. 2003)).

41 *Id.* at 12-13.

42 *Id.* at 13.

43 *Id.* at 14.

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