STUDENT LOANS IN BANKRUPTCY AND BEYOND

I. It All Began with Sputnik

On October 4, 1957, the world changed. The former Soviet Union launched Sputnik, causing widespread panic that we Americans were falling behind our Soviet counterparts in technological ability. Within a year, President Eisenhower and Congress responded by creating three programs designed to supercharge the technological capacity of the United States: The Advanced Research Projects Agency (n/k/a DARPA), the National Aeronautics and Space Administration, and the National Defense Student Loan Program. Eight years later, this latter program was transformed by the Higher Education Act of 1965 (the "**HEA**") into the federal student loan program that remains with us today.[1]

In the 1960's, baby-boomers were graduating from high school and making the fundamental choice to either go to work or go to college. At that time, the U.S. economy was still generating plenty of good jobs in manufacturing and skilled trades, so entering the work force immediately after high school was a very viable career path for many Americans. But manual laborers didn't launch Sputnik, and the government decided it was necessary to open the door to more people who could succeed in college, if only they could afford the cost of tuition.

The HEA was based on the fundamental belief that higher education is a safe investment for both society and the debtor. Through the HEA, Congress hoped to cultivate a meritocracy by creating a path for minorities, the poor, and middle-class Americans to

[1] *See*, Student Loan History, https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/federal-student-loan-history/

attend college. Banks were reluctant to make loans to students, who were viewed as poor credit risks. So, the HEA provided funding for the government to guarantee student loans made by banks to any prospective student without regard to credit worthiness, generally shifting the ultimate risk of student-borrower default to us taxpayers. Since 1965, the HEA has been reauthorized ten times, making permanent the government's role in guaranteeing student loans. Along the way, Congress created the Student Loan Marketing Association a/k/a Sallie Mae, a government sponsored enterprise, to service federal education loans.[2]

In practice, the HEA created a system where eligibility for student loans became an entitlement. The HEA doesn't establish any academic criteria for students to qualify for student loans. Nor does the HEA limit student loans to borrowers depending on whether their chosen fields of study are reasonably likely to lead to gainful employment. Prospective students can borrow money to attend any school of their choice, in any field of study, without regard to their prospects for employment. It is a noble idea that anyone who wants to go to college should be able to and choose to study anything that they wish. But Congress never considered that many students might (i) end up in debt without earning a degree, or (ii) earn a degree but in a field where available jobs have insufficient wages to repay their loans, or (iii) even worse, earn a degree that does not qualify the student for any gainful employment whatsoever. In hindsight, these are systemic flaws.

The systemic flaws on the supply side are even worse. Congress never considered that (i) colleges would be incented to admit students with marginal academic credentials, or (ii) substantially increasing demand into a fixed supply of traditional post-secondary

[2]In 2014, Sallie Mae spun off its loan servicing operations and most of its loan portfolio into a separate, publicly traded entity called Navient Corporation. After the FFELP program ended in 2010, Sallie Mae began originating private education loans, and today holds the largest portfolio of private education loans in the country.

school programs would substantially increase the cost of a college education, or (iii) persons with no background in higher education would create for-profit "colleges" to milk the student loan system, or (iv) private lenders would lend money to enable young people to enroll at dubious for-profit colleges ("**For-Profits**") and lobby Congress to make private student loans nondischargeable.

The HEA, created without the slightest semblance of government oversight, created a lucrative opportunity for colleges, traditional and newly minted, to harvest huge sums of tuition dollars by admitting academically suspect students, without suffering any consequences if those students dropped out and defaulted on their student loans. Predictably, the flood of federal student loan dollars led to a surge in the ranks of college-going students but did not increase the supply of available higher education programs. Colleges responded to higher demand by raising prices, leading Congress to increase loan limits. Sallie Mae and private banks made big profits and colleges collected huge amounts of money. However, higher education became a dysfunctional market, with large numbers of academically marginal students enrolled for increasingly expensive college training. Sadly, this did not lead to the meritocracy which Congress envisioned.

The portfolio of federal direct and federally guaranteed student loans stands at **$1.747 Trillion** as of April 10, 2022.[3] Another **$136.3 Billion** in private student loans is also outstanding. In the immortal words of Everett Dirksen, this is real money.

The HEA has undoubtedly enabled millions of Americans to get a college degree, which they otherwise could never afford. However, the endless spigot of federal education

[3] https://educationdata.org/student-loan-debt-statistics

dollars has had another undeniable effect: the cost of college tuition has gone through the roof. In the past three decades, the cost of a college education has risen by an average of about 4% per year ***in inflation adjusted dollars***.[4] However, the jobs available to college graduates today frequently are at salaries insufficient to repay the student loan debt incurred. Today, students can no longer safely assume that incurring a large debt to attend college will be worth it; according to the New York Federal Reserve, nearly 4 in 10 recent college graduates work in jobs that don't require a college degree.[5] Far too often, the cost of college exceeds the economic benefit that students can expect to derive from this investment, and the foundational belief that higher education is a safe investment has been debunked. As a matter of public policy, this calls into question one of the primary justifications for making student loans nondischargeable in bankruptcy.

In addition to removing any incentive for traditional colleges and universities to practice cost management, the virtually uncapped availability of federal student loan dollars spawned a host of For Profits, which have a poor track record of placing students in gainful employment. According to the United States Department of Education ("**ED**"), the default rate on federal student loans among For-Profits now approaches 16%, as compared to a default rate of ~7% for non-profit and private colleges and universities.[6] Exacerbating the problem, until recently, most courts read the 2005 amendments to Section 523(a)(8) to make private student loans incurred to attend For Profits presumptively

[4] *See*, Trends in College Pricing Archive, https://research.collegeboard.org/trends/college-pricing/report-archive

[5] See, Federal Reserve Bank of New York, The Labor Market for Recent College Graduates, https://www.newyorkfed.org/research/college-labor-market/college-labor-market_underemployment_rates.html

[6] *See Education Data Initiative – Student Loan Default Rate* https://educationdata.org/student-loan-default-rate

nondischargeable in bankruptcy. When students of For-Profits take out private student loans in addition to federal student loans, many find that they have mortgaged their futures for an education that leaves them ill equipped to ever pay off the debt.

In this environment, many voices are questioning whether the *Brunner* Test[7], *viz.* the prevailing standard for determining "undue hardship" in bankruptcy, should be modified.

II. *Brunner* and the Undue Hardship Test

"Undue hardship" is undefined in the Code, and "Congress itself had little to say on the subject."[8] The phrase "undue hardship" first appeared in a 1976 amendment to the HEA, providing that student loans are non-dischargeable in bankruptcy unless (i) the debt first became due more than 5 years before the date of the filing of the bankruptcy petition or (ii) failure to discharge the debt would cause undue hardship to the debtor or to dependents of the debtor. This amendment was a response to a perceived increase in the number of bankruptcy petitions filed by recent college graduates who arguably were not in financial distress but filed for bankruptcy anyway solely to discharge their student loans shortly after graduation. From 1968 - 1970, there were 760 bankruptcy cases involving student loans. By 1976, 8,641 bankruptcy cases were filed involving $33.1 Million in unpaid loans, and it was reported that ED had paid over $500 million to banks for nearly

[7] *Brunner v. New York State Higher Educ. Serv. Corp.*, 46 B.R. 752 (S.D. N.Y. 1985).

[8] *Brunner*, 46 B.R. at 753.

350,000 student defaults.[9] When Congress adopted the Bankruptcy Code in 1978, 11 U.S.C. §523(a)(8) carried over the restrictions on the discharge of student loans with §523(a)(8)(B) providing for discharge only if failure to discharge the loans would cause undue hardship to the debtor and the debtor's dependents.

As adopted in 1978, Section 523(a)(8) originally provided that

> A discharge under section 727 ... does not discharge an individual debtor from any debt:
> ...
> (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, ***unless—(A) such loan first became due before five years before the date of the filing of the petition; or***
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; ....

(Emphasis added). In the absence of legislative guidance, the courts began to devise tests to measure undue hardship.

And so, in 1985, Judge Charles Haight of the United States District Court for the Southern District of New York, was confronted with the case of Marie Brunner, who had persuaded the bankruptcy court to discharge her student loan debts. Troubled by that result, Judge Haight articulated a three-part test for debtors seeking to prove undue hardship (apparently without the benefit of any sophisticated argument from Marie Brunner, who was a *pro se* debtor):

> Obtaining a discharge of student loans in bankruptcy ***prior to five years after they first come due*** requires a three-part showing: 1) that the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the loans, 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student

[9] *See*, Annotation by Andrew M. Campbell, Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978 (11 U.S.C.S. § 523(a)(8)(B) Discharge of Student Loans, 144 A.L.R. Fed. 1, 29 (1998)) copy included in Appendix 1.

> loan, and 3) that the debtor has made good faith efforts to repay the loans. [10]

(Emphasis added.)

As Judge Haight explained, the phrase "undue hardship" was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States and was intended to stem a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loans."[11] In explaining his rigorous test, Judge Haight noted the special context of loans guaranteed by the government:

> The effect of these requirements is to make student loans a very difficult burden to shake without actually paying them off. While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program. ***When making such loans, the government (as guarantor) is unable to behave like ordinary commercial lenders, who may, after investigating their debtors' financial status and prospects, choose to deny as well as grant credit and may adjust the interest rate which they charge according to their judgment as to the likelihood of repayment. The government has no such luxury. It offers loans at a fixed rate of interest, and it does so almost without regard for creditworthiness. Indeed, because it bases its loan decisions in part on student need, it arguably offers loans selectively to the worst credit risks.***
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> …. In return for this largesse—and it is undeniable that guaranteed student loans have extended higher education to thousands who would otherwise have been forced to forego college or vocational training—***the government exacts a quid pro quo. Through §523(a)(8), it commits the student to repayment regardless of his or her subsequent economic circumstances. In return for giving aid to individuals who represent poor credit risks, it strips these individuals of the refuge of bankruptcy in all but extreme circumstances***.[12]

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[10]*Brunner*, 46 B.R. at 756.

[11]*Brunner*, 46 B.R. at 754.

[12]*Brunner,* 46 B.R. at 754.

(Emphasis added.)

The first prong of *Brunner* requires the court to consider whether the debtor can, based on current income and expenses, maintain a "minimal" standard of living if forced to repay the loans. As observed by Judge Haight:

> Most courts have accepted that a debtor must at least satisfy the "minimal standard of living" test before a discharge of his or her student loans will be granted. ... That is, before receiving a discharge of student loans the debtor is required to demonstrate that, given his or her current income and expenses, the necessity of making the monthly loan payment will cause his or her standard of living to fall below a "minimal" level. Indeed, if the calculation of future earnings and expenses were an exact science, a similar showing extended into the future might be all that would be necessary to justify discharge. ***After all, it is not unreasonable to hold that committing the debtor to a life of poverty for the term of the loan—generally ten years—imposes "undue" hardship.***[13]

(Emphasis added.)

This same context is evident in the discussion leading to the second *Brunner* prong—that the "present inability to pay" is likely to persist for a significant portion of the repayment period of the student loan:

> It is the nature of §523(a)(8)(B) applications that they are made by individuals who have only recently ended their education. Their earning potential is substantially untested, and because they are inexperienced they are in all likelihood at the nadir of their earning power. ...
>
> It is no doubt for this reason that many courts have required more than a showing on the basis of current finances that loan repayment will be difficult or impossible. Perhaps the best articulation of this doctrine is that … "dischargeability

[13]*Brunner,* 46 B.R. at 754.

> of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment."… Stated otherwise, the debtor has been required to demonstrate not only a current inability to pay but ***additional circumstances which strongly suggest that the current inability to pay will extend for a significant portion of the repayment period of the loan….***[14]

To restate the context in 1985, in considering the question of undue hardship, **the *Brunner* court was focused on language of the statute in 1985, which permitted the discharge of student loans after 5 years without a showing of undue hardship**, **and the standard ten-year repayment term.** Moreover, in 1985, student loans were dischargeable in chapter 13 cases without a showing of undue hardship.

After *Brunner*, Congress substantially amended §523(a)(8) on several occasions, without considering this context. , In 1990, the statute was amended to (i) extend the nondischargeability period from five to seven years, (ii) remove student loans from the super-discharge available under Chapter 13; and (iii) add language "or for an obligation to repay funds received as an educational benefit, scholarship or stipend." Then, in 1998, the statute was amended to eliminate the nondischargeability period all together, rendering all student loans nondischargeable in the absence of undue hardship, without regard to how long the loans have been in repayment. Finally, in 2005, the statute was amended to make some private student loans nondischargeable. There is no indication in *Brunner* that Judge Haight would have considered it "reasonable to commit [Marie Brunner] to a life of poverty" until the day she died. However, when Congress eliminated the seven-year non-

[14]*Brunner*, 46 B.R. at 754-55 (citations omitted).

dischargeability period all together without a fresh look at the meaning of "undue hardship," that is the logical effect.

Nonetheless, Judge Haight's analysis was compelling. After the Second Circuit affirmed *Brunner* in 1987,[15] eight other circuit courts of appeals adopted the *Brunner* test for measuring undue hardship,[16] without stopping to consider that, in 1985, §523(a)(8) declared student loans nondischargeable only for the first five (5) years after they first became due.[17] Further, when Judge Haight articulated the *Brunner* test, this exception to discharge only applied in cases under Chapter 7. Until 1990, debtors successfully completing a Chapter 13 plan could discharge student loans without full repayment, and private student loans were dischargeable, with no questions asked. There is no indication that any of the courts subsequently adopting the draconian *Brunner* test after 1990 considered the context that led Judge Haight to devise it 37 years ago.

Moreover, the *Brunner* test was clearly never intended to be applied to student loans made by private lenders. While the government has no discretion under the federal student loan program to grant or deny access to student loans based on a borrower's financial status and prospects, private lenders retain that discretion. Moreover, while the federal government offers subsidized fixed rate loans with regulated terms, the private student loan

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

[16]*See, In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 300 (3d Cir. 1995); *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Ekensai v. Education Resources Institute (In re Ekenasi)*, 325 F.3d 541 (4th Cir. 2003), *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1241 (11th Cir. 2003); *United States Dept. of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Education Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1311 (10th Cir. 2004); *Oyler v. Educational Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005).

[17]*Brunner*, 46 B.R. at 754.

industry is free to adjust the interest rates it charges depending on the credit risk involved, and to include onerous loan terms.

Finally, after the *Tipton* case in 1991 (further discussed *infra* p. 15), ED has created various administrative remedies for federal student loan debtors, including periods of deferment or forbearance,[18] administrative discharge of student loans if a debtor becomes totally and permanently disabled,[19] various income driven repayment programs,[20] and remedies for borrower's whose school has closed or falsely certified the borrower's eligibility.[21] The private student loan industry offers none of these debtor protections in return for the ability to make loans that cannot be discharged in bankruptcy.

Predictably, after the 2005 amendments to Section 523A)(8) which make private student loans nondischargeable, there is substantial evidence of predatory lending practices.[22]

III. The "Totality of the Circumstances" Test

The *Brunner* test has been adopted by a clear majority of courts but is not applied everywhere. The Eighth Circuit and various courts in the First Circuit instead employ a "totality of the circumstances" test, which requires the debtor to prove by a preponderance

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[18] *See* http://www.direct.ed.gov/postpone.html.

[19] 34 C.F.R. 682.402 (c).

[20] *See, e.g.*, 20 U.S.C. § 1098e, the income-based repayment program.

[21] See pps. __ *infra*.

[22] On September 16, 2014, the Consumer Financial Protection Bureau sued for-profit college chain Corinthian Colleges, Inc. for an alleged predatory lending scheme. The Bureau alleges that Corinthian lured tens of thousands of students to take out private loans to cover expensive tuition costs by advertising questionable job prospects and career services. Corinthian then used improper debt collection tactics to strong-arm students into paying back those loans while still in school. *See* http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-corinthian-colleges-for-predatory-lending-scheme/.

of evidence that: (1) the debtor's past, present, and reasonably reliable future financial resources, (2) the debtor's and debtor's dependents' reasonably necessary living expenses, and (3) other relevant facts or circumstances unique to the case, prevent the debtor from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. *In re Andresen*, 232 B.R. 127, (B.A.P. 8th Cir. 1999).

Congress has so far chosen not to define what constitutes undue hardship. Given the level of public debate on student loans, one might think that the time is ripe for a *certiorari* petition to resolve the split in the circuits to determine whether the *Brunner* test or the Eighth Circuit's "Totality of the Circumstances" test provide the proper standard for determining undue hardship.[23] However, as recently as last June, the Supreme Court denied a writ of cert to resolve this question.[24]

IV. Friends Don't Let Friends Default on Federal Student Loans

Debtors should avoid defaulting on federal student loans at all costs, because the consequences of default are devastating. Upon default, all unpaid interest is capitalized, and collection fees are assessed as a percentage of the outstanding balance – generally ~ 20% of the loan amount.[25] This is specifically provided for under the terms of the Master

[23]*See*, Rochelle's Daily Wire, *Recent Decisions Deepen and Entrench Circuit Split on Discharging Student Loans*, August 9, 2019.

[24] *McCoy v. United States*, No. 20-886, cert. denied, 2021 WL 2519103 (U.S. June 21, 2021), Brief for Petitioner (Available at: https://www.supremecourt.gov/DocketPDF/20/20-886/165012/20201230142505658_McCoy%20Cert%20Petition.pdf).

[25]*See* 34 C.F.R. 410(b)(2).

Promissory Note[26] and applicable federal regulations.[27] Further, if a debtor has defaulted and then chooses to consolidate student loans, all collection charges will also be capitalized. And, if a Debtor then defaults on a consolidation note, collection fees will be assessed again. After interest and collection charges are capitalized, fully repaying a student loan becomes incredibly difficult.

V. Non-Bankruptcy Considerations: the Scope and Limits of Federal Preemption

For federal student loans, ED has created safety nets via administrative remedies and repayment programs (hereafter discussed), which substantially softens the burden on debtors who cannot repay their student loans. However, no such safety nets are available for private student loans.

In considering their options, student loan debtors must also factor in developments in nonbankruptcy law with respect to the collection of student loans. During the last 50 years, various courts have considered the application of state and federal consumer debt collection statutes in student loan enforcement actions. Under the HEA, Congress and ED have developed a detailed statutory and regulatory system to control the collection of federal student loans. The HEA affirmatively abrogates any statute of limitations on the collection of student loans.[28] Congress also expressly empowered ED to prescribe regulations to carry out the HEA,[29] and directed it to establish minimum formal due

[26]"If you default, we may capitalize all outstanding interest. This will increase the principal balance of your loan, and the full amount of the loan, including the new principal balance and collection costs, will become immediately due and payable." From the Master Promissory Note Direct Subsidized Loans and Direct Unsubsidized Loans William D. Ford Federal Direct Loan Program, copy attached.

[27]34 C.F.R. § 30.60 What costs does the Secretary impose on delinquent debtors?

[28]*See* 20 U.S. Code § 1091a - Statute of limitations, and State court judgments.

[29]*See* 20 U.S.C. § 1082(a), and implementing regulations found at 34 C.F.R. § 682.411.

diligence requirements for collection of student loans.[30] Many of these loan collection requirements facially violate otherwise applicable state and federal consumer collection laws. To address this, the HEA and its implementing regulations expressly preempt "any state law, including state statutes, regulations or rules that would conflict with or hinder satisfaction of the requirements or frustrate the purposes of this section."[31] In 1990, ED issued a "Notice of Interpretation" regarding this preemption language: "This preemption [§ 682.411(o)] includes any state law that would hinder or prohibit any activity taken by these third parties to complete these required steps."[32]

As a result, the law on this subject is now well settled. As noted by one court:

> Preemption does deprive some defaulters of the ability to receive damages under state law; however, the Congressional purpose in enacting the HEA was not to make it easier for defaulters to get money from loan collectors, but to protect the millions of students who would suffer a remedial loss if Congress had to shut down the [guaranteed student loan] program. [33]

Significantly however, ED takes the position that preemption does not extend to school-related defenses affecting whether a student loan obligation is enforceable. In the seminal case on this subject, in 1991, Timothy Wayne Tipton and others filed an action in federal court in West Virginia, for declaratory judgment under the HEA and implementing regulations. Plaintiffs were former vocational students at the defunct Northeastern

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[30] 20 U.S.C. § 1078.

[31] 34 C.F.R. § 682.411(o).

[32] 55 Fed. Reg. 40120 (Oct. 1, 1990).

[33] *See, e.g. Brannon v. United Student Aid Funds, Inc.* 94 F.3d 1260, 1263-65 (9th Cir. 1996).

Business College whose educations at that institution were funded in part with federally insured student loans, and Mr. Tipton sought a declaration that they should not have to repay their student loans because the school had closed.[34] Although ED was the lead defendant, it agreed with the *Tipton* plaintiffs on one critical issue:

> [A]lthough Congress has given the Department of Education the authority to issue regulations which preempt state law, "generally, . . . such preemption on the area of borrower defenses is not necessary to accomplish the objectives of the Guaranteed Student Loan Program."[35]

Ultimately, Judge Copenhaver agreed with *Tipton* and ED on this significant point.[36] As a result, it is now well settled that school-related defenses to the enforceability of student loans are not preempted by the HEA.

VI. Administrative Discharge Remedies under the HEA

Following *Tipton*, ED promulgated regulations which provide a path to administrative discharge of student loans for school-related defenses, if a debtor can establish (i) closure of the school at which the debtor was enrolled, (ii) false certification by the school of a student's eligibility to borrow, or (iii) there is an unpaid tuition refund (e.g. if the debtor enrolls in school but does not attend the program).[37] During the Trump

[34] *Tipton v. Secretary of Educ. of the U.S.*, 768 F. Supp. 540, 542 (S.D. W.Va. 1991).

[35] *Tipton*, 768 F. Supp. at 553.

[36] "The court concludes that the plaintiffs have stated valid, non-preempted theories upon which the defendants may be held subject to the students' school related defenses under certain portions of state statutory law . . . Given the Secretary's policy articulations, . . . the court finds that plaintiffs have stated a valid claim against the Secretary for discharge of their loan obligations . . . . Furthermore, inasmuch as HEAF is, as a practical matter, the entity which holds the majority of the notes in question and is required to pursue collection activity against the loans with due diligence, the court finds that HEAF should likewise be held subject to the Secretary's apparent policy of non-collection on GSLP loans deemed unenforceable against the original lenders …." *Tipton,* 768 F. Supp. at 570-71.

[37] 34 C.F.R. § 682.402 (d) and (e).

Administration, there was a movement to rewrite and/or reinterpret these regulations, making it more difficult to obtain administrative discharge in these instances. Copies of various news reports chronicling this effort by ED and the pushback against it are included in Appendix 4. So far, the Biden Administration has signaled an intent to not reinterpret these applicable regulations.

ED has also provided by regulation for administrative discharges of student loans in a variety of other circumstances, including disability discharge when a debtor becomes totally and permanently disabled.[38] Initially, the criteria for a discharge based on total and permanent disability ("**TPD**") was different than the standard for a determination of entitlement to social security disability benefits. However, effective July 1, 2013, an individual can qualify for a TPD discharge simply by showing that he or she is receiving Social Security Disability Insurance ("**SSDI"**) or Supplemental Security Income benefits.[39]

In addition, in 2007, Congress created the Public Service Loan Forgiveness ("**PSLF**") Program, to provide incentives to debtors to enter professions such as teaching and public interest law, where the salaries offered often aren't high enough to enable repayment of the loans incurred to obtain a degree. Congress tasked ED with the job of developing regulations to interpret the PSLF Program, to provide an administrative discharge for certain debtors who work in a qualifying public sector job. The PSLF Program forgives the remaining balance on a debtor's student loans after 120 monthly payments under a qualifying repayment plan.

[38] 34 C.F.R. § 682.402 (c).

[39] 34 C.F.R. § 685.213.

Once again, during the Trump Administration, there was an effort at ED to rewrite and/or reinterpret these regulations. However, at the time that ED began its push to rewrite/reinterpret the PSLF regulations, there were thousands of debtors who had been working in public sector jobs for years, in reliance upon the promise of a PSLF administrative discharge. For example, the American Bar Association (ABA) had been identified as a qualifying public sector employer after the PSLF Program was established in 2007. After ED began its initiative to reinterpret the PSLF regulations, employees of the ABA were notified that their jobs did not constitute qualified public sector work. In response, the ABA sued ED in the District of Columbia on behalf of four of its employees, alleging that ED did not adhere to the notice standards mandated under the Administrative Procedures Act, and that the changes in interpretation were arbitrary and capricious.

On February 22, 2019, the District Court for the District of Columbia agreed in substantial part, granting the summary judgment motions of three of the four plaintiffs. *See Public Service Attorneys Win Important Victory in Dept. of Ed Loan-forgiveness Lawsuit*, ABA Journal, February 24, 2019 (copy attached, see Appendix 4).

Under the current administration, it appears that the effort to reinterpret the PSLF regulations has been discontinued.[40]

VII. Income Driven Repayment Plans

In recognition that many debtors simply are not earning enough money to pay off their student loans, Congress and ED have created various income driven repayment plans

[40] *See, AFT settles student debt lawsuit, wins big gains for borrowers, https://www.aft.org/news/aft-settles-student-debt-lawsuit-wins-big-gains-borrowers*

for student loan debtors.[41] These income driven programs include the Income Based Repayment Plan ("**IBR"**), the Income Contingent Repayment Plan ("**ICR**"), the Pay As You Earn Repayment Plan ("**PAYE**") and the Revised Pay As You Earn Repayment Plan ("**REPAYE**"). The repayment period and terms under each of these plans is summarized as follows:

Income-Driven Repayment Plan	**Repayment Period**
REPAYE Plan	20 years if all loans you're repaying under the plan were received for undergraduate study 25 years if any loans you're repaying under the plan were received for graduate or professional study
PAYE Plan	20 years
IBR Plan	20 years if you're a new borrower on or after July 1, 2014 25 years if you're not a new borrower on or after July 1, 2014
ICR Plan	25 years

REPAYE Plan

Generally, 10 percent of your discretionary income.

PAYE Plan

Generally, 10 percent of your discretionary income, but never more than the 10-year Standard Repayment Plan amount

IBR Plan

[41]Information regarding these programs can be found at the Department of Education's website: *If your federal student loan payments are high compared to your income, you may want to repay your loans under an income-driven repayment plan* https://studentaid.gov/manage-loans/repayment/plans/income-driven

Generally, 10 percent of your discretionary income if you're a new borrower on or after July 1, 2014*, but never more than the 10-year Standard Repayment Plan amount

Generally, 15 percent of your discretionary income if you're not a new borrower on or after July 1, 2014, but never more than the 10-year Standard Repayment Plan amount

ICR Plan

The lesser of the following:

- 20 percent of your discretionary income or
- what you would pay on a repayment plan with a fixed payment over the course of 12 years, adjusted according to your income

Under all four plans, any remaining loan balance is forgiven if the federal student loans aren't fully repaid at the end of the repayment period. For any income-driven repayment plan, periods of economic hardship deferment, periods of repayment under certain other repayment plans, and periods when the debtor's required payment is zero will count toward the total repayment period. Whether the debtor will have a balance left to be forgiven at the end of the debtor's repayment period depends on several factors, such as how the debtor's income rises or falls, and how large the debtor's income is relative to the debtor's debt. If a debtor's income increases substantially, the debtor may fully repay the loan before the end of the repayment period. The debtor's loan servicer is tasked with tracking the qualifying monthly payments and years of repayment, then notifying debtors when they are getting close to the point of qualifying for forgiveness of any remaining loan balance.

If someone is making payments under an income-driven repayment plan and also working toward loan forgiveness under the PSLF Program, the debtor may qualify for forgiveness of any remaining loan balance after making 10 years of qualifying payments, instead of 20 or 25 years. Qualifying payments for the PSLF Program include payments made under any of the income-driven repayment plans.

Debtor eligibility for each of the Income Driven Repayment Plans is summarized below:

REPAYE Plan -- Any debtor with eligible federal student loans can make payments under this plan.

PAYE and IBR Plans -- Each of these plans has an eligibility requirement to qualify for the plan. To qualify, the payment under the PAYE or IBR plan (based on your income and family size) must be less than what the debtor would pay under the Standard Repayment Plan with a 10-year repayment period.

- If the payment amount under the PAYE or IBR plan (based on income and family size) is more than the payment under the 10-year Standard Repayment Plan, a debtor wouldn't benefit from having the monthly payment amount based on income, and so would not qualify.
- Generally, a debtor will meet this requirement if their federal student loan debt is higher than their annual discretionary income or represents a significant portion of annual income.

Only new debtors qualify for the PAYE Plan.

ICR Plan -- Any debtor with eligible federal student loans can make payments under this plan.

The ICR Plan is the only available income-driven repayment option for parent ("**PLUS**") student loan debtors. Although PLUS loans made to parents can't be repaid under any of the income-driven repayment plans (including the ICR Plan), parent debtors may consolidate their Direct PLUS Loans or Federal PLUS Loans into a Direct Consolidation Loan and then repay the new consolidation loan under the ICR Plan (though not under any other income-driven plan).

Debtors can estimate their payment amount using an online tool, the Repayment Simulator.[42] The Repayment Simulator provides a comparison of estimated monthly payment amounts for all federal student loan repayment plans, including income-driven plans. This comparison is important because the income-driven plans may not provide the lowest payment amount based on the individual's circumstances. In other words, the payment may be lower under one of the fully amortizing plans, including the Standard Plan (ten years), Graduated Plan and Extended Plan.

The IBR bases the monthly payment on the debtor's income and family size. To qualify for the IBR, the debtor must first demonstrate partial financial hardship ("**PFH**"). A debtor can demonstrate PFH if the annual amount due on all eligible student loans under a 10-year repayment schedule is more than 15% of the debtor's adjusted gross income ("**AGI**") minus 150% of the federal poverty guideline for the applicable family size. Most debtors whose total loan balance exceeds their annual earnings will satisfy the PFH requirement.

The IBR payment is calculated using the debtor's AGI and family size. If the debtor earns less than 150% of the poverty level for their family size, the IBR payment will be $0. Generally, the required annual loan payment under the IBR is capped at 15% of earnings above 150% of the applicable poverty level. Because the monthly IBR payment is

[42] https://studentaid.gov/loan-simulator/

calculated as a percentage of the debtor's income, if the debtor's income drops, the monthly payment is reduced accordingly. As a point of reference, 150% of the poverty level for a family of one in 20 (i.e. a single debtor with no dependents) is $20,925.00.[43]

The IBR payment is recalculated annually. Debtors who elect the IBR must sign a consent form authorizing the disclosure of their tax information and must recertify their family size on an annual basis. A debtor may contact their lender at any time if they experience a change in financial circumstances that could affect their required IBR payment. Additional information about the various income driven repayment plans is available on ED's website.[44]

VIII. Implications of Income Based Repayment Plans for Undue Hardship Cases

In the context of undue hardship adversary proceedings, the availability of income driven repayment programs results in the settlement of many cases, as many courts hold that the availability of an income driven repayment plan prevents a debtor from proving either the first or third prong of the *Brunner* test.[45] However, from a public policy standpoint, the availability of income driven repayment plans completely severs the link between the value of student's education and how much they should be able to borrow.

[43]The 2022 Poverty Income Guidelines, published by the Dept. of Health and Human Services, are found at https://aspe.hhs.gov/poverty-guidelines.

[44]https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven/questions

[45]I.E. that the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself of herself and his or her dependents if forced to repay the loan. *Brunner*, 46 B.R. at 756. *See, e.g., Straub v. Sallie Mae Educ. Credit Mgmt. Corp. (In re Straub),* 435 B.R. 312 (Bankr. D.S.C. 2010), or that the debtor has not made a good faith effort to repay the loan. *See, e.g., Educational Credit Mgmt. Corp. v. Mosko (In re Mosko),* 515 F.3d 319, 326 (4th Cir. 2008). *But see Krieger v. Educational Credit Mgmt. Corp.,* 713 F.3d 882 (7th Cir. 2013).

Enrollment in income driven repayment plans is a major reason why the federal government's costs for the student loan program are increasing exponentially.

IX. Federal Student Loans Compared to Private Student Loans

Holders of private student loans don't offer income-driven repayment plans. Additionally, private lenders don't offer the many flexible repayment options available for federal student loans. Moreover, there are no administrative remedies for resolving school-related defenses to repayment of private student loans. While federal student loan debtors with defenses based on closure of a school or false certification of their ability to benefit can receive an administrative discharge of their student loans without recourse to the courts, private student loan debtors must sue or be sued to assert these defenses. Similarly, federal student loan debtors have recourse to the administrative remedy of a TPD discharge if they are receiving SSDI benefits, and various income driven programs are available if their job prospects don't enable them to repay their loans. Administrative discharge based on disability is not available to debtors with private student loans.

These differences between options available to debtors with federal student loans as opposed to private student loans exemplifies the problem with applying the *Brunner* test to private student loans made by for-profit lenders. The federal student loan program is so fundamentally different from loans made by for-profit lenders that one can cogently argue that the *Brunner* undue hardship test simply should not apply to student loans made by for-profit lenders, from a public policy standpoint.

Notwithstanding this, in 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("**BAPCPA**") broadened the categories of educational loans which are presumptively nondischargeable, to include "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual." This had the effect of making many private student loans nondischargeable, provided the loan constitutes 'a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986.'

To be "qualified" the loan must be used ***solely*** to pay for qualified higher education expenses. 26 USC §221(d)(1). Thus, mixed use loans are not qualified. Further, the loan must be incurred to pay for the education of the taxpayer, the taxpayer's spouse, or the taxpayer's dependents. The student must be enrolled on at least a half-time basis and cannot have been simultaneously enrolled in elementary or secondary school. And the student must be seeking a degree, certificate, or other recognized educational credential at an institution of higher education that is eligible for Title IV federal student aid or at a hospital or healthcare facility that provides postgraduate internship and residency training programs. This last qualification means that ***most private student loans incurred to attend For Profits ARE NOT qualified education loans.***

However, Navient Solutions, fka Sallie Mae, has been treating many or all private student loans incurred by debtors who attended For Profits to be nondischargeable, and has continued to pursue collection of such loans notwithstanding the entry of a bankruptcy discharge. This went relatively unchallenged for ~ ten years after BAPCPA. Then, in 2016, Evan Brian Crocker reopened his 2015 bankruptcy case and filed an adversary proceeding in the Bankruptcy Court for the Southern District of Texas (the same court that had granted him a discharge), seeking a declaratory judgment that his private student loans had been discharged; and entry of judgment holding Navient in contempt for violating the discharge injunction.

Later, Mr. Crocker and Michael Shahbazi (who had received a chapter 7 discharge from the Bankruptcy Court for the Eastern District of Virginia), filed an amended complaint in Texas, seeking to certify a nationwide class of those who (1) obtained prepetition private education loans from Navient or related companies to cover expenses at an institution not accredited under Title IV of the HEA; (2) later filed for bankruptcy and were issued discharge orders; (3) have never reaffirmed their prepetition private education loan debt; and (4) were being induced by Navient to pay their allegedly discharged private education loans. Damages were also sought in the amended complaint.

Navient moved for summary judgment on these claims, arguing that (i) a bankruptcy court has no jurisdiction to interpret and enforce discharge orders entered by courts in other judicial districts and (ii) the plaintiffs' education loans were nondischargeable. The bankruptcy court denied Navient's motion in March 2018, rejecting the general rule giving an issuing court sole authority to enforce its own injunctions and determining that the private loans at issue were not excepted from discharge under Section 523(a)(8). In the same order, the bankruptcy court authorized an interlocutory appeal, then certified the order for direct appeal to the Fifth Circuit.

On appeal, the Fifth Circuit concluded that a bankruptcy court does not have authority to enforce the discharge injunctions entered in other districts, so Mr. Shahbazi was out of luck. Turning to the second question on appeal, because the For Profits were not eligible for Title IV federal student aid, Navient conceded that the private loans at issue were not "qualified educational loans" and thus not covered by 523(a)(8)(B). However, Navient argued that these private loans were covered by 523(a)(8)(A)(ii) as "an obligation to repay funds received as an educational benefit, scholarship, or stipend."

After thoroughly parsing this clause, the Fifth Circuit concluded that private loans cannot be characterized as a scholarship or a stipend, and thus the only remaining question was whether the private loans at issue were "an obligation to repay funds received as an educational benefit." In interpreting that provision, the Court relied on *noscitur a sociis* (the rule of construction that an unclear or ambiguous word should be construed by considering the words with which it is associated in context). The Court noted the absence of the word "loan" and the inclusion of the concepts of "stipends and scholarships," to narrow the meaning of receiving an educational benefit to include only such funding as "tuition advances by an employer that must be repaid if the employee leaves her employment within a certain period of time." *Id*. At 218.

The Court also focused on the Congressional use of the word "as" to precede "educational benefit." To the *Crocker* court, this meant that what was received was the educational benefit, akin to scholarships and stipends, not that what was received could be used to pay for educational benefits. Based on this analysis, the private student loans at issue were thus dischargeable. *Crocker*, 941 F. 3rd at 218. The court also noted Congressional ratification in 2005 of prior interpretations of the same language, and the command that discharge exceptions are interpreted narrowly in favor of debtors. The Court thus concluded that "educational benefit" is limited to conditional payments with similarities to scholarships and stipends, finding that:

> the only possibly applicable part of the relevant statute is Subsection 523(a)(8)(A)(ii). In interpreting that provision, we rely on the *noscitur a sociis* doctrine, the need to avoid surplusage, Congressional ratification in 2005 of prior interpretations, and the command that discharge exceptions are interpreted narrowly in favor of debtors. We conclude that "educational benefit" is limited to conditional payments with similarities to scholarships and stipends. The loans at issue here, though obtained in order to pay expenses of education, do not qualify as "an obligation to repay funds received as an educational benefit, scholarship, or

> stipend" because their repayment was unconditional. They therefore are dischargeable.

941 F. 3rd at 223-24. The *Crocker* court also observed that if Navient were right and private loans are included in the word "benefit," Section 523(a)(8)(A)(ii) would cover all student loans, rendering 523(a)(8)(A)(i) superfluous. *Id*. At 220. Thus, the Fifth Circuit affirmed the Bankruptcy Court finding that the loans at issue were dischargeable.[46]

The *Crocker* court's reasoning proved persuasive. The Tenth Circuit in 2020 and the Second Circuit in 2021 both followed Crocker in finding that private student loans incurred to attend for profit colleges are not covered by Section 523(a)(8). Specifically, Laura McDaniel in the Tenth Circuit and Hilal Homaidan in the Second Circuit (in the Southern District of New York) reopened their bankruptcy cases and brought similar actions against Navient. In each of those actions, the bankruptcy courts agreed with Crocker, that private student loans which are not "qualified educational loans" are dischargeable. Navient appealed both of those adverse decisions, and both the Tenth Circuit[47] and the Second Circuit[48] likewise agreed with the result in Crocker. As a result, it is now relatively well settled that private student loans which are not "qualified educational loans," including those incurred to attend For Profits, are dischargeable in bankruptcy.

However, the fact remains that BAPCPA rendered private student loans that are "qualified education loans" nondischargeable under 523(a)(8). For this and other reasons

[46] *Crocker v. Navient Solutions LLC*, 941 F.3d 206 (5th Cir. 2019).
[47] *McDaniel v. Navient Solutions, LLC*, 973 F.3d 1083 (10th Cir. 2020).
[48] *Homaidan v. Sallie Mae, Inc.* 3 F.4th 595 (2d Cir. 2021).

in the current environment, many voices are questioning whether the undue hardship standard should be modified.

X. Is it Time to Revisit the *Brunner* Test for Undue Hardship?

ED takes the position that the availability of income driven repayment programs in combination with various administrative remedies means that no student loan debtor can establish the second and/or third prongs of *Brunner*, viz. that additional circumstances strongly suggest that a current inability to pay will extend for a significant portion of the repayment period of the loan, and that the debtor has made a good faith effort to repay the loans. However, ***all income driven repayment programs presume that a debtor's expenses are prototypical.*** If there is evidence that a debtor has extraordinary nondiscretionary expenses—e.g., a medical condition that requires recurring uninsured expenses—or that a debtor is of an age that renders a protracted repayment plan untenable (or both),[49] then the available administrative remedies may be inadequate. A debtor with substantial income but extraordinary nondiscretionary expenses may make a good test case, to bring the undue hardship question before the Supreme Court, on the basis that the income driven plans available require a payment beyond what the debtor can pay.

XI. Issues with Securitized Student Loan Debt Held by the National Collegiate Student Loan Trusts: *Consumer Financial Protection Bureau v. NCSLT*

There is litigation pending in the federal and state courts in Delaware, which has profound implications for debtors with private student loans held by the National Collegiate Student Loan Trusts (the "**NCSLT Trusts**"). In *Consumer Financial Protection Bureau v. The National Collegiate Master Student Loan Trust, et. al.*, Case No. 17-1323 in

[49] *See, e.g., Roth v. Educational Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908 (B.A.P. 9th Cir. 2013).

the United States District Court for the District of Delaware, the Consumer Financial Protection Bureau ("CFPB") filed suit against the 15 Delaware statutory trusts (the "**NCSLT Trusts**") to obtain injunctive relief, damages and other monetary relief, alleging violation of the Consumer Financial Protection Act of 2010. In this action, counsel for the NCSLT Trusts initially agreed to enter a Consent Judgment, substantially admitting to the underlying allegations in the Complaint, including the following stipulation of fact:

> Since at least November 1, 2012, in order to collect on defaulted private student loans, Defendants' Servicers filed Collections Lawsuits on behalf of Defendants in state courts across the country. In support of these lawsuits, Subservicers on behalf of Defendants executed and filed affidavits that falsely claimed personal knowledge of the account records and the consumer's debt, and in many cases, personal knowledge of the chain of assignments establishing ownership of the loans. In addition, Defendants' Servicers on behalf of Defendants filed more than 2,000 debt collections lawsuits without the documentation necessary to prove Trust ownership of the loans or on debt that was time-barred. Finally, notaries for Defendants' Servicers notarized over 25,000 affidavits even though they did not witness the affiants' signatures.

As a result of this stipulation, the proposed Consent Judgment proposed extraordinarily broad remedial action, including the following:

> Defendants and their officers, agents, servants, employees, and attorneys who have actual notice of this Order, including but not limited to all of Defendants' Servicers, whether acting directly or indirectly, may not initiate a Collections Lawsuit to collect Debt unless they possess:
>
> a. the documentation necessary to prove that a Trust owns the loan, including but not limited to, documentation reflecting the complete chain of assignment from the Debt's originator to the specific Trust claiming ownership; and

b. a document signed by the Consumer, such as a promissory note, evidencing the agreement to pay the loan forming the basis of the Debt.

Defendants and their officers, agents, servants, employees, and attorneys who have actual notice of this Order, including but not limited to all of Defendants' Servicers, whether acting directly or indirectly, may not initiate a Collections Lawsuit to collect on a loan for which the applicable statute of limitations has expired.

Defendants and their officers, agents, servants, employees, and attorneys who have actual notice of this Order, including but not limited to all of Defendants' Servicers, whether acting directly or indirectly, may not collect any Debt through Collections Lawsuits that Defendants or their agents have any reason to believe may be unenforceable.

Defendants, their officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, including but not limited to all of Defendants' Servicers, whether acting directly or indirectly, are permanently restrained and prohibited, in connection with the collection of a Debt, from submitting any Affidavit:

a. containing an inaccurate statement;

b. in which the Affiant represents, expressly or by implication, that the Affiant is familiar with or has personal knowledge of the Consumer's education loan records or the maintenance of those records when that is not the case;

c. in which the Affiant represents, expressly or by implication, that the Affiant has personal knowledge of the Consumer's Debt when that is not the case;

d. in which the Affiant represents, expressly or by implication, that the Affiant has personal knowledge of the loan's chain of assignment or ownership when that is not the case;

e. in which the Affiant represents, expressly or by implication, that the Affiant has personal knowledge of the documents relating to the loan's chain of assignment or ownership when that is not the case;

f. representing, expressly or by implication, that the Affidavit has been properly notarized if the Affidavit was not executed in the presence of a notary or if the notarization was otherwise not compliant with applicable notary laws; or

g. in which the Affiant represents, expressly or by implication, that any documents or records concerning the Debt that forms the basis of the Collections Lawsuit have been reviewed by the Affiant when that is not the case.

Defendants are permanently restrained and prohibited from reselling Debt that is time-barred or for which Defendants lack the necessary documentation required by Paragraph 9(c) without obtaining the written agreement of the purchaser to comply with this Order.

Defendants, their officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, including but not limited to all of Defendants' Servicers, whether acting directly or indirectly, are permanently restrained and prohibited from, in connection with the collection of a Debt, providing any testimony in a Collections Lawsuit that contains any misrepresentations, including false statements that the witness:

a. is familiar with or has personal knowledge of the Consumer's education loan records or the maintenance of those records;

b. has personal knowledge of the Consumer's Debt;

c. has personal knowledge of the loan's chain of assignment or ownership; or

d. has personal knowledge of the documents relating to the loan's chain of assignment or ownership.

If Defendants determine that any of their agents, including but not limited to all of Defendants' Servicers, are on behalf of Defendants engaging in any conduct prohibited by this

Order, Defendants promptly will take the necessary steps to ensure that their agents cease any and all practices that violate this Order.

Within thirty (30) days of making any determination described in Paragraph 12, Defendants must submit to the Enforcement Director a report detailing (1) the practices that violate the Order, (2) the specific agents engaged in the practices in question, and (3) a plan to ensure that the practices cease and to remediate any harm resulting from the practices.

With regard to pending Collections Lawsuits in which Defendants, through actions taken by Defendants' Servicers acting on behalf of Defendants, have filed an Affidavit that contains any misrepresentations—including but not limited to false statements that the Affiant (1) is familiar with or has personal knowledge of the Consumer's education loan records or the maintenance of those records, (2) has personal knowledge of the Consumer's indebtedness, (3) has personal knowledge of the loan's chain of assignment or ownership, (4) has personal knowledge about the maintenance of documents relating to the loan's chain of assignment or ownership, or (5) has attached as an exhibit a true and correct copy of a document—Defendants must either withdraw the pending Collections Lawsuit or ensure that the Affidavit is withdrawn. Defendants must instruct their attorneys, Defendants' Servicers, and their agents to either withdraw the pending Collections Lawsuit or notify the court of the following in writing while simultaneously providing the court with a copy of the Order entered into between the Bureau and Defendants: "Plaintiff withdraws the affidavit of [insert name of affiant] pursuant to an Order entered into by the Consumer Financial Protection Bureau and the National Collegiate Student Loan Trusts."

With regard to concluded Collections Lawsuits in which Defendants, through actions of Defendants' Servicers acting on behalf of Defendants, filed with a court or in arbitration an Affidavit that contained any misrepresentations—including but not limited to false statements that the Affiant (1) is familiar with or has personal knowledge of the Consumer's education loan records or the maintenance of those records, (2) has personal knowledge of the Consumer's indebtedness, (3) has personal knowledge of the loan's chain of assignment or ownership, (4) has personal knowledge about the maintenance of documents relating to the loan's chain of assignment or ownership, or (5) has attached as an exhibit a true and correct copy of a document—Defendants must instruct their attorneys, the Defendants' Servicers, and their agents to cease post judgment enforcement activities and will seek, and will instruct their agents to seek, to remove, withdraw, or terminate any active wage garnishment, bank levies, and similar means of enforcing those judgments or settlements as well as cease accepting settlement payments related to any such concluded Collections Lawsuits.

With regard to servicing of Debt owned by Defendants, Defendants shall within ten (10) days of the Effective Date (1) direct the Primary Servicer to cease transferring any Debt to the Special Servicer and any Subservicer and instead retain possession of the Debt pending approval and implementation of the Compliance Plan provided for in Section III; (2) direct the Special Servicer and any Subservicer to suspend further collection efforts on all Debt owned by Defendants pending approval and implementation of the Compliance Plan provided for in Section III; (3) direct the Special Servicer and any Special Servicer agent to discontinue making outbound call attempts, sending collection letters, providing negative reports to any of consumer reporting agencies the credit bureaus, or other efforts as may be instructed by Defendants and are necessary to effectuate compliance with this Order; (4) direct the Primary Servicer to instruct the Special Servicer and all Subservicers to return to the Primary Servicer all student loans in their portfolio owned by Defendants that are completed and the subject of each monthly Compliance Audit Report described in Paragraph 20; and (5) direct Defendants' Servicers to take any other appropriate actions necessary to effectuate compliance with this Order as instructed by the Defendants.

Defendants shall direct (1) the Primary Servicer and Special Servicer to remit all payments from Consumers to an escrow account as designated by Defendants pursuant to Paragraph 18; (2) the Subservicer to remit funds to the Special Servicer and the Special Servicer to remit those payments to the escrow account as designated by Defendants pursuant to Paragraph 18; and (3) the Primary Servicer and Special Servicer to provide an itemized report to the Defendants identifying the payments remitted at the loan level in a format approved by the Defendants.

Nothing in this Order shall prohibit Defendants or their Servicers from accepting payments from Consumers made in the regular course on Debt that is not subject to a Collections Lawsuit. All such payments shall be held in escrow until the requirements of Paragraphs 9(c)(1) and (2) are satisfied and Defendants have determined that sufficient loan documentation exists to either retain the payment or refund the amount paid as to be provided for in the Compliance Plan of Section III. Defendants may use funds from the escrow to carry out Trust operations, including payments to noteholders sufficient to avoid events of default under the Indenture

Trust, auditors, consultants, accountants, legal counsel, and other necessary professionals.

Within thirty (30) days of the Effective Date, Defendants must secure and retain one or more qualified, independent consultants or auditors with specialized experience in the servicing of student loans, and acceptable to the Enforcement Director, to conduct an independent audit of all of the servicing and collecting conducted by Defendants' Servicers on student loans owned by Defendants from inception of each of the Trusts to the present, using procedures and standards generally acceptable to the student loan–servicing industry. The purposes of the Compliance Audit must be to determine, at a minimum:

a. For each and every student loan, whether Defendants, or their agents (including Defendants' Servicers), have or ever had in their possession sufficient loan documentation, including signed promissory notes and documentation reflecting the complete chain of assignment since the loan's origination, to support the claim that a Debt is currently owed to a Trust, including but not limited to, assignments from the Debt's originator to the Trust claiming ownership and any subsequent assignments by the Trust to a student loan guarantor (such as The Education Resources Institute or its successors);

b. Whether certain loans owned by Defendants are no longer legally enforceable because the applicable statute of limitations has expired;

c. Whether Collections Lawsuits have been filed on any loans for which sufficient documentation, including signed promissory notes and documentation reflecting the complete chain of assignment from the Debt's originator to the Collections Lawsuit's named plaintiff, is not in the possession of the Collections Lawsuit's named plaintiff, or a Defendants' Servicer acting on behalf of the named plaintiff, to prove the existence of the Debt owed to the Trust in question, or where the applicable statute of limitations has expired;

d. Whether judgments were obtained in Collections Lawsuits described in Paragraph 19(c), the identity of Consumers from whom the Defendants obtained payments in response to those Collections Lawsuits, and the specific amounts collected from these Consumers;

e. Whether any student loans were disbursed to the Consumers after the loans allegedly were transferred to the Defendants;

f. Whether any of Defendants' agents, including but not limited to any of Defendants' Servicers, have failed to comply with any Federal consumer financial law or any of the Servicers' Servicing Guidelines; and

g. Whether any of Defendants' agents, including but not limited to any of Defendants' Servicers, are or have engaged in any practices on behalf of Defendants after the Effective Date that violate this Order.

Within thirty (30) days of receiving the final Compliance Audit Report Defendants must submit to the Enforcement Director for review and non-objection an amendment to the Compliance Plan ("Amended Compliance Plan") described in Section III to:

a. ensure the withdrawal and dismissal without prejudice of any pending Collections Lawsuits identified in Paragraph 19(c);

b. ensure that Defendants and their agents, including but not limited to any of Defendants' Servicers, will not take any steps to initiate collections or furnish negative reports to consumer reporting agencies, on loans identified in Paragraph 19(a), or accept payments on any defaulted Debts, unless and until Defendants first verify the existence of the documentation referenced in that subparagraph in order to prove the existence of the Debt and the identity of the current owner;

c. ensure that Defendants and their agents, including but not limited to any of Defendants' Servicers, will not take any steps to collect Debts by any means on any loans identified in Paragraph 19(b) without Clearly and Prominently disclosing to the Consumer as follows:

i) For those time-barred debts that generally cannot be included in a consumer report under the provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681c(a), but can be collected through other means pursuant to applicable state law, Defendants will instruct their agents to include the following statement: "The law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau."

ii) For those time-barred debts that can be collected through other means pursuant to applicable state law, and may be included in a consumer report under the provisions of FCRA, 15 U.S.C. § 1681c(a), Defendants will instruct their agents to include the following statement: "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it."

After the proposed consent judgment was negotiated, the court received eight motions to intervene on behalf of Ambac Assurance Corporation, Transworld Systems Inc., certain Objecting Noteholders, GSS Data Services, Inc., the Pennsylvania Higher Education Assistance Agency d/b/a American Education Services, Wilmington Trust Company, U.S. Bank National Association in its capacity as Successor Special Servicer and U.S. Bank in its capacity as Indenture Trustee. The court granted each of the motions to intervene.

As presently postured, the court has denied the intervenor defendants motions to dismiss contending that they are not “covered persons” subject to the CFPB’s authority but has certified that question and a constitutional issue for interlocutory appeal. As a result, that action is stayed. However, the problem identified in that lawsuit, viz. the inability of the NCSLT Trusts being able to properly document chain of title to the promissory notes underpinning their right to enforce the student loans contributed to the underlying trusts, is hiding in plain sight.

This same problem is also the subject of private litigation in various courts. For example, in *Eul v. Transworld Systems et. al.*, the United States District Court for the Northern District of Illinois denied the defendant's motion to dismiss (Transworld Systems is one of the sub-servicers identified in the CFPB litigation in Delaware described above). Subsequently, the court approved a settlement of the class action on the terms described in the amended final approval order. Copies of pleadings in *Eul* and pleadings in other cases involving the unenforceability of student loans held by the NCSLT Trusts are included in Appendix 7.

Thus, any person with private student loans held by one of the NCSLT Trusts should consult with a lawyer and find out whether the NCSLT Trust can prove that the debt is owed.