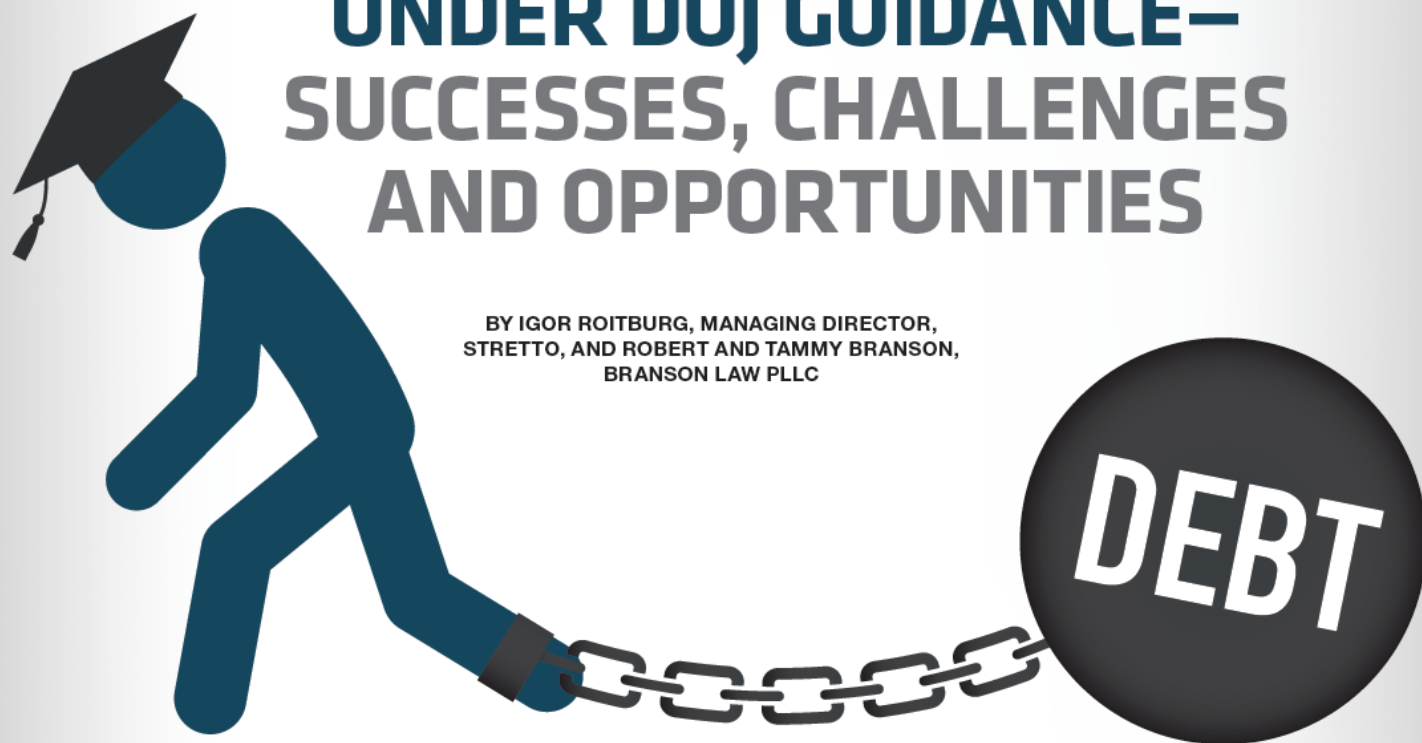


STUDENT LOAN DISCHARGES UNDER DOJ GUIDANCE— SUCSESSES, CHALLENGES AND OPPORTUNITIES

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The Department of Justice (DOJ) and Department of Education (DOE) unveiled new guidance on Nov. 17, 2022, to streamline student loan discharges in bankruptcy (the “Guidance”). As of September 2023, the DOJ reported that 632 cases were filed under the Guidance with 97% of the cases voluntarily using the new process.¹ According to the DOJ, the “vast majority of borrowers seeking discharge have received full or partial discharges.”² While this signals initial success, many feel that this progress has been modest. If the Guidance is going to make an impact on the over \$1.7 trillion in student loan debt, many more cases will need to be filed and achieve discharge. In order to do that, DOJ and DOE must work with bankruptcy courts and leverage existing technology to review and decision cases more quickly and with greater clarity and transparency.

To DOJ’s and DOE’s credit, the Guidance is on point. On paper, it provides clear, objective standards and instructions by which debtors can achieve discharge. It carefully tracks existing law and appears

to have avoided political pushback and challenge. The Guidance even includes an attestation form which ensures the debtor provides the requisite information with relative ease. In theory, the Guidance

should be a huge success. So, why—after over a year of availability—have so few debtors even engaged in this process? After all, there are probably hundreds of thousands of debtors with student loans already in bankruptcy and potentially many more of the 45-plus million borrowers for whom a bankruptcy discharge is the best solution.

CHALLENGES TO BE ADDRESSED

There is obviously no single explanation as to why so few debtors have sought to discharge their student loans, but some themes are beginning to emerge. Some are relatively benign, like attorneys being generally hesitant to file adversary proceedings (an underlying requirement under the Guidance) or figuring out how to offer this new service. These types of issues will resolve themselves with time and experience. However, other issues—mostly dealing with the implementation of the Guidance—are more serious and threaten its very success. Three of bigger concerns

commonly raised by debtor attorneys are (1) the process takes too long; (2) results are inconsistent; and (3) there is very little transparency.

The root cause of these issues is that DOE and DOJ are simply not equipped to process a meaningful number of cases as currently constructed. They have neither the manpower nor the systems to administer a high volume of cases. This is evidenced by the fact that out of the 632 cases filed, only about 120 have even reached resolution. With so few reaching resolution, it will be hard to change the old narrative that student loans are not really dischargeable.

OPPORTUNITIES FOR PROGRESS

The Guidance's slow start does not need to define it, but debtors and more importantly, debtor attorneys will need tangible proof that the Guidance is indeed different before they take it seriously and it can have the impact many hope it does. To do that, however, DOJ and DOE need to work with the bankruptcy courts to provide clear rules and tools to review these cases. Answers need to be delivered quickly and predictably. Communication must be clear and direct. By its own terms, the Guidance is meant to create an objective standard which should be easy to measure. It is unacceptable that some cases are taking months with debtor attorneys not even knowing the status of their cases.

Presently, the attestation form and accompanying documentation are exchanged via email with the United States Assistant Attorney that is assigned to the adversary proceeding. While this might sound like a reasonable way to exchange information, it causes delays and slows down the process. It is also not secure, especially since tax returns often must be submitted.

This new process is déjà vu of the Great Recession when millions of Americans sought to modify their mortgage to an affordable

payment but were faced with challenges of providing information and communicating with mortgage servicers. To solve these issues, many bankruptcy courts, including the Middle District of Florida³, implemented mortgage modification programs with procedures that included timelines, use of an online portal and document preparation. These programs were very successful and resulted in tens of thousands of debtors receiving modifications.

These same lessons and measures from mortgages can and should be applied to student loan adversaries. Court rules with timelines, portals and technology should be used to facilitate the preparation and exchange of documents and communication ensuring clear procedures and results. DOJ and DOE should have transparency into every review so they can monitor implementation of the Guidance and ensure it is being followed equally in all jurisdictions.

Some courts have already taken steps to improve the process. For example, both Northern and Central districts of California have already provided for automatic extensions for DOE to answer the adversary complaint. This is an excellent first step that eliminates unnecessary filings and wasted time. Other courts like those in all the districts of Florida and the Eastern District of Pennsylvania have established student loan management programs that leverage existing technology to facilitate communication between the parties and provide transparency.

We have to remember that for decades bankruptcy attorneys looked the other way when debtors had student loan debt. It will take time to change this mentality. Many felt like they were hitting their head against a brick wall when attempting to discharge student loan debt.

Before the Guidance, adversary proceedings were expensive, burdensome and time-consuming. This was especially

true because the government would require extensive discovery. A basic premise of the Guidance is to "reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process."⁴ But simplifying the process will be meaningless if there is no corresponding process for DOJ and DOE to review and process these requests efficiently and predictably.

As a real-world example of how student loan debt can be successfully discharged in bankruptcy, one distressed student loan borrower recently wiped out her student loan debt which had grown to over \$155,000.00. She earns a little over \$4,000.00 per month. Using the DOJ Guidance, the entire debt was discharged after reviewing the attestation. It took several months to complete the process but it was life-changing for the debtor and well worth the wait. So do not sit back and wait. Ask your court if an online portal might be an effective tool. Use the software and tools that are available to make the process easier. Each of us alone cannot make a meaningful impact when there are millions of Americans that need this relief, but together, we can.

Looking forward, the DOJ and DOE can significantly expand the impact of the Guidance by considering new programs, embracing them, and encouraging even more innovation. n doing so, they can move beyond treating these cases like ordinary adversary proceedings and make a meaningful impact with a greater number of attorneys and DOE representatives. With these actions, the DOJ, DOE and legal community can overcome the challenges presented by too many potential cases and too few hands to lend assistance. ■

FOOTNOTES

1. <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan>.
2. Id.
3. <https://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=91>.
4. DOJ Guidance, page 2.

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