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PRACTICE POINTERS

**FOR DISCHARGING
STUDENT LOAN DEBT
IN BANKRUPTCY**



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PRACTICE POINTERS

FOR DISCHARGING STUDENT LOAN DEBT IN BANKRUPTCY

BY GEORGE M. VOGL, MANAGING DIRECTOR, STRETTO & MALISSA LAMBERT GILES, ESQ., GILES & LAMBERT, P.C.

Discharging student loan debt in bankruptcy has become a more viable yet often misunderstood alternative for millions of Federal student loan borrowers to get out of debt and gain a fresh start in bankruptcy under the guidance from the U.S. Department of Justice (DOJ) and Department of Education (DOE) announced in November 2022. While debtors are still required to meet an “undue hardship” requirement, they now can evaluate their likelihood of discharging their student loan debt more efficiently and much earlier in the process. Additionally, and perhaps most critically, “undue hardship” has an entirely new definition in this process which will help thousands of debtors actually achieve a student loan discharge without contested litigation.

As consumer debtor attorneys evaluate their clients’ eligibility for discharge of student loan debt, they may find there are certain aspects of the process that are not obvious from the guidance or Bankruptcy Code. The following practice pointers offer a “boots-on-the-ground” perspective with actionable tips that can maximize efficiencies and the potential for a successful outcome.

1 RECOGNIZE THE INHERENT “FLEXIBILITY” OF THE ATTESTATION FORM TO TELL THE CLIENT’S STORY

As part of its guidance, the DOJ requires the completion of an attestation form with the debtor’s input to present the debtor’s financial history, current state of affairs and outlook

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for the future. This attestation form provides attorneys with the opportunity to describe their client’s situation in a compelling light. By elaborating on the client’s background and circumstances, attorneys can really tell the story of the debtor as opposed to just populating data.

Furthermore, the attestation form offers some flexibility for the accuracy of past payments for when clients have no recollection of how many payments they have made over the years.

As attorneys are focused on accuracy in preparing for bankruptcy proceedings, it may seem counter-intuitive to provide a “best-effort recollection”, but in this instance, it will suffice as the DOJ recognizes that payment histories are not always well-maintained by debtors or loan servicers, especially if the debtor has consolidated or moved their loans. Be as accurate as possible, but don’t hesitate to provide an attestation that includes more vague statements of payment and refers the DOE back to its own records. And remember a \$0.00 payment under an income driven repayment plan (IDR) is actually a payment that counts.

2 CHECK WITH DOE’S FEDERAL STUDENT AID WEBSITE AND LOAN SERVICERS FOR PAST PAYMENT INFORMATION

One of the biggest pain points in preparing the attestation form is collecting student loan payment history. As one resource to consider if the client has no recollection of their previous payments, the DOE’s Federal Student Aid website (<https://studentaid.gov/>) houses some payment information for student loan borrowers in addition to the various student loan programs that they make available. Debtors can access this by logging into the website and searching for their payment details. The National Student Loan Data System file which will identify the type of loan, the institution attended and other important information can be obtained from this website. In addition, some loan

servicers will furnish payment records which can be helpful, particularly if the debtor did not move or consolidate their student loans. While none of these sources will be absolutes, they can help to supplement the debtors’ personal records and estimates. These payment records may not show the exact number of payments made, but they will usually show how much has been paid on the loan and the number of forbearances and deferments, all of which is useful information for the attestation.

3 ATTORNEYS SHOULD AUTOMATICALLY REVIEW “BELOW-MEDIAN” DEBTORS FOR A STUDENT LOAN DISCHARGE

Debtors with student loans that fall “below-median” as part of the means-testing process to assess their income against the IRS-based median for a comparable household in the same jurisdiction should have a discussion with their counsel about the likelihood of a student loan discharge. While each case will have different circumstances, and some debtors with better prospects for improved income in the future may not be eligible for discharge, falling “below-median” can be a useful indicator of whether it makes sense to proceed with pursuing a discharge.

4 WORK, COMMUNICATE AND COLLABORATE WITH YOUR LOCAL AUSA, UST, CHAPTER 13 TRUSTEE AND BENCH

All involved parties are figuring out how best to navigate the guidance and the process from the debtor, legal and justice perspectives. While there have been some efforts to implement training and procedures, there is still much to learn on all fronts. For debtor attorneys, it is particularly important to work closely with Assistant United States Attorneys (AUSA) to determine how much detail is needed and questions that will be asked. The Trustee and the bench also play a significant role here and therefore all players in the process need to know

what is happening in the case and how it’s progressing. Work with the AUSA to educate the bench on the process and its goals so that realistic trial schedules are established, and the parties understand the processes that must be completed before an answer should be required in the adversary or trial schedules are automatically set.

5 EDUCATE YOURSELF ON ALL STUDENT LOAN OPTIONS, NOT JUST DISCHARGE, AS THERE MAY BE A MORE EFFECTIVE PATH TO SUCCESS

Distressed student loan borrowers may have other options available to them and should consider all of them. For example, under the Higher Education Act, individuals with permanent disabilities or who attended schools who overpromised or under-delivered may be eligible for an administrative student loan discharge option.

Given the current recount efforts for individual payments made under income-driven repayment (IDR) plans to determine whether servicers failed to keep accurate records of payments, it may also be wise for debtors who enrolled in IDR plans to wait and see if they will be eligible for student loan forgiveness at the conclusion of the recount. If their bankruptcy case should close during the waiting period, they can easily re-open it if they are not eligible for forgiveness and then file the adversary proceeding using the attestation form to seek discharge of their student loan debt. Bankruptcy cases can be reopened for no fee to pursue a student loan discharge.

While the bankruptcy community continues to gain greater understanding of the DOJ/DOE guidance for student loan discharge in bankruptcy, we are seeing more and more successful cases where student loans are being discharged. For an eligible client with the right circumstances, pursuing student loan discharge in bankruptcy can be a worthwhile effort to give them an even greater fresh start. ■