



Central District  
Consumer Bankruptcy  
Attorney Association

## **PROGRAM SUMMARY 4-15-23**

By: Gary Wallace-Program Summary Committee Chair

### **CDCBAA Holds Fourth Meeting and MCLE Program of 2023: "STUDENT LOANS"**

On April 15, 2023, the CDCBAA held its fourth members meeting and MCLE program of the year. The meeting and program were conducted as a live webinar via Zoom video. The program topic was: "**STUDENT LOANS.**" Our distinguished panel included Hon. Magdalena Reyes Bordeaux | Bankruptcy Judge, Central District of California, Riverside Division; Hon. Martin Barash | Bankruptcy Judge, Central District of California, San Fernando Valley Division; Augustus T. Curtis, Esq. | Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; Christine Kingston, Esq. | Surf City Lawyers, APC; and Elan S. Levey, Assistant United States Attorney. Former CDCBAA president and current board member Hale Andrew Antico moderated. What follows are some of the highlights of the seminar.

Mr. Curtis led off the panel's discussion by informing attendees of the Department of Justice's recently published guidance for bankruptcy attorneys who represent the United States in litigation concerning student loan hardship discharges ("The Guidance"). The Guidance is quickly becoming a touchstone for judges and counsel in bankruptcy courts throughout the nation where student loan adversary proceedings are pending.

The starting point for application of the Guidance is the "heightened standard" for discharge found in 11 U.S.C. section 523(a)(8), which states that student loans may not be discharged "unless excepting such debt from discharge under this paragraph would impose an *undue hardship* on the debtor and the debtor's dependents[.]" (emphasis added). Mr. Curtis discussed the long-standing Second Circuit's *Brunner* three-part (past, present, future) test for "undue hardship." This test has been adopted in almost every federal circuit, including the Ninth Circuit. He also discussed the slightly different 'totality of the circumstances' multi-part test and noted its elemental and factual similarities to the *Brunner* test. The Guidance roughly tracks both the *Brunner* test and the "totality of the circumstances" test, which no doubt has helped it gain rapid adoption.

The stated objectives of The Guidance are to (1) set clear, transparent, and consistent expectations for debtors; (2) reduce burdens by simplifying the fact-gathering process through a completed Attestation form; and (3) identify proceedings where the government may stipulate to facts demonstrating undue hardship.

The Attestation form has six parts: (1) personal information; (2) current information and expenses; (3) future inability to repay student loans; (4) prior efforts to repay student loans; (5) current assets; and (6) additional circumstances. It must be signed by the debtor under penalty

of perjury. It is designed to make The Guidance easier to apply and may be used at any point in the litigation; but the debtor is encouraged to use it earlier rather than later, as it may avoid the need for costly fact-finding through discovery. It should *not* be docketed. It used internally by the Departments of Justice and Education. It does not, however, preclude or limit the United States' ability to perform independent investigation or to seek further verification from the debtor. A sample attestation was provided with the materials.

In assessing present circumstances, debtors can claim the combined total National Standard expense amounts for categories other than uninsured medical costs, and the Standard uninsured medical costs for each household member. Amounts in excess of these standards can also be claimed, but an adequate supporting explanation and justification must be provided. Other "necessary and reasonable" expenses may also be claimed.

The past circumstances prong is fact-sensitive and multi-factored. The debtor must show good faith efforts to repay the student loan. Such good faith can be shown by (for example): (1) meaningful engagement with servicers or others; (2) past payments; (3) applications for deferment or forbearance; and (4) consideration or enrollment in a IDR. Does the good faith requirement take into account the debtor's mindset at the time the money was borrowed or only after the debt became due? The panel said that case law is divergent on the answer to this question.

The future circumstances prong looks at whether the current inability to repay is likely to persist for a significant portion of the repayment period. The Guidance creates presumptions that the inability to repay will persist if (1) the debtor is 65 or older; (2) the debtor has a disability or injury impacting income potential; (3) the debtor has been unemployed for at least 5 of the last 10 years; (4) the debtor failed to obtain a degree for which the loan was procured; (5) the debtor's loan has been in repayment status for ten years. When considering the debtor's assets, The Guidance states that inclusion of a residence or retirement funds is "an extreme measure that should be exceptionally rare."

The Guidance also encourages partial discharge where the debtor satisfies the undue hardship elements but has ability to make payments on the loan.

The seminar was interactive: attendees were permitted to ask questions. As usual, a lengthy and detailed program outline was provided to all registered participants.

The next CDCBAA members meeting and Zoom MCLE program will be held on June 17, 2023. The topic will be "**UPDATES IN THE AREA OF DEFAULT INTEREST RATES AND HARD MONEY LOANS + ADVERSARY PROCEEDINGS.**" Our speaker will be the Honorable Wayne Johnson| U.S. Bankruptcy Court - Central District of California, Riverside Division; Stella Havkin, Esq.| Havkin and Shrago; Gerrick Warrington, Esq.| Frandzel Robins Bloom & Csato; and Michelle Rodriguez, Esq.|Wright, Finlay & Zack. We hope you will join us.

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