

Department of Justice Student Loan Bankruptcy Litigation Guidance

36th Annual Seminar of the Alabama State Bar Bankruptcy & Commercial Law Section

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Overview of the Guidance

- ▶ **The Undue Hardship Standard:** The “heightened standard for discharge of student loans.”

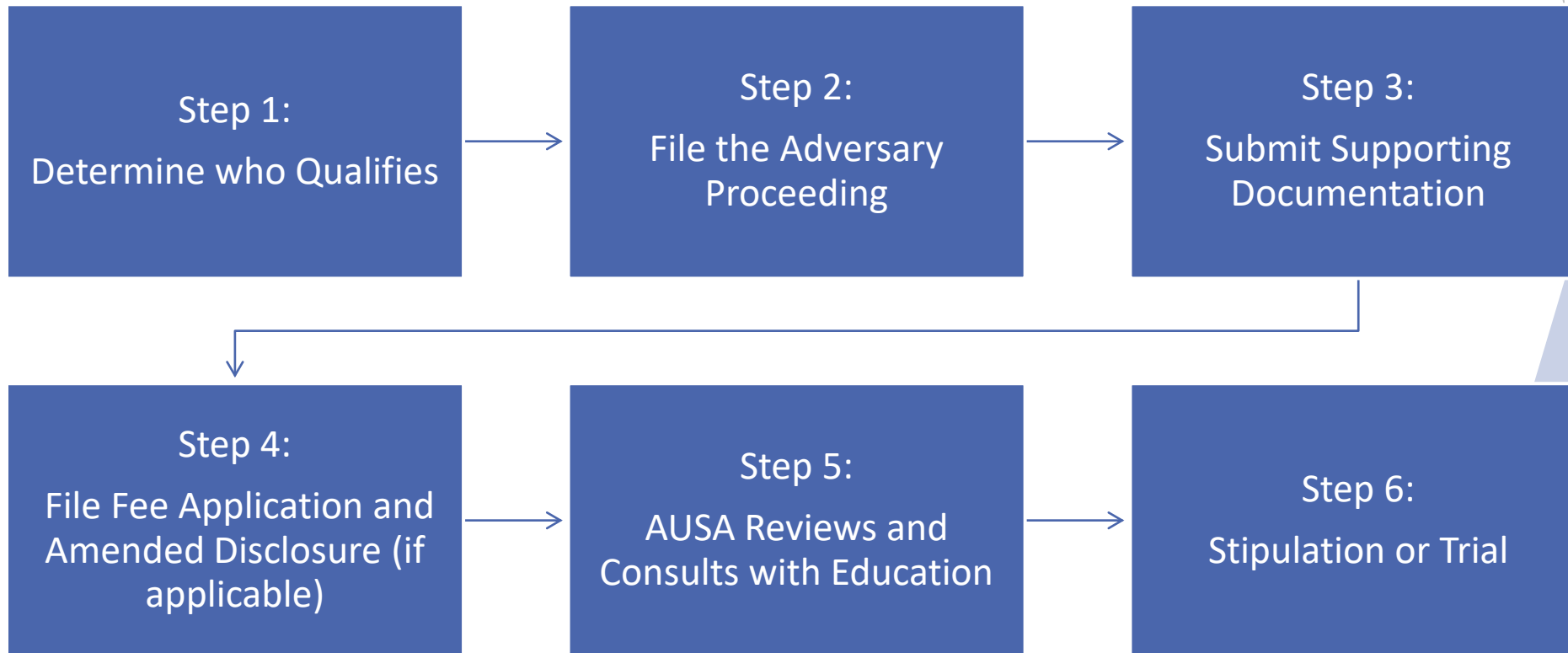
11 U.S.C. § 523(a)(8)

- ▶ 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[.]”
- ▶ *Brunner Test* (*Brunner v. New York State Higher Educ. Services Corp.*, 831 F.3d 395 (2d Cir. 1987))
 - ▶ Adopted by the Eleventh Circuit. See *In re Acosta-Conniff*, 686 F. App’x 647, 648 (11th Cir. 2017); *In re Cox*, 338 F.3d 1238, 1240 (11th Cir. 2003).
 - ▶ Three-part test: Past, Present, Future

Objectives of the Guidance

1. Set clear, transparent, and consistent expectations for debtors;
2. Reduce burdens by simplifying the fact-gathering process through a form Attestation; and
3. Identify proceedings where the government may stipulate to facts demonstrating undue hardship.

The Lifecycle of a Student Loan AP under the Guidance



Step 1:
Determine who
Qualifies

Reopening a Closed Case

- ▶ Guidance applies to future [post November 17, 2022] bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance.
- ▶ Jurisdictional issue vs. administrative act
- ▶ Reopening a bankruptcy case for the sole purpose of filing a new adversary proceeding

Step 1: Determine who Qualifies

- ▶ Review information
 - ▶ Tax returns
 - ▶ Schedules I/J and Means Test
 - ▶ Credit report and/or loan history from servicer to determine types of education loan and amounts
 - ▶ Private loan holders are not bound by the guidance but can satisfy their regulatory requirements by following the guidance
 - ▶ DCL: Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings ([Link](#))
 - ▶ FFELP loans, Perkins loans, and Parent PLUS loans
 - ▶ Administrative discharge outside of bankruptcy (e.g., TPD, IDR, closed school, etc.) ([Link](#))

Step 2:
File the Adversary
Proceeding

- ▶ Considerations:
 - ▶ Ripeness
 - ▶ Paying attorney fees through the Chapter 13 plan
 - ▶ Election year
 - ▶ If there are private loans, should it be two separate APs or a consolidated AP?

Step 3: Submit Supporting Documentation

- ▶ Contact the AUSA once the case has been filed
 - ▶ Provide the AP case number and the completed attestation
- ▶ Updated attestation, effective August of 2023
 - ▶ NDAL ([Link](#))
 - ▶ MDAL ([Link](#))
 - ▶ SDAL ([Link](#))
- ▶ Attestation should not be filed with the AP. This is for internal consideration of DOJ and Education.
- ▶ New IRS Standard Deductions ([Link](#))
 - ▶ Rebuttable
 - ▶ Unmet future expenses
- ▶ Although one of the purposes of the Guidance is to reduce the burdens of litigation, which includes discovery, the AUSA may need additional documentation.
 - ▶ For example, if, at the time the AP is filed and the attestation is completed, the debtor is unemployed.
- ▶ New attestation expected in May of 2024 (with new IRS Standard Deductions)

Step 4: File Fee Application and Amended Disclosure (if applicable)

- ▶ On March 12, 2024, the Bankruptcy Court for the Middle District of Alabama issued Administrative Order 2024-01, which provides a *presumptive* fee in student loan APs. ([Link](#))
 - ▶ \$500.00 *presumptive* pre-litigation fee to determine whether a Student Loan Undue Hardship Proceeding is advisable
 - ▶ \$2,000.00 *presumptive* consensual litigation fee for representation in Student Loan Undue Hardship Proceeding through the entry of a stipulation and consent judgment
 - ▶ Need to file amended disclosure of compensation in accordance with 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016(b)
 - ▶ If paying the additional fee through the Chapter 13 plan, the attorney may also need to amend or modify the plan to adjust for the needed increase in plan payments.

Step 5: AUSA Reviews and Consults with Education

- ▶ AUSA reviews attestation, bankruptcy schedules, loan history, and any additional documentation requested by the AUSA from the debtor, and then makes a recommendation to Education.
- ▶ Filing an answer in the AP vs. moving for an extension of time and staying deadlines
- ▶ Average length of time of stay or continuances is around 90 days.
 - ▶ Example: Bankruptcy Court for the NDCA has issued guidance, staying deadlines for 120 days during attestation process. ([Link](#))

Step 6: Stipulation or Trial

If the parties agree to a discharge of some or all of the loans...

- ▶ Joint stipulation making findings of fact and consent order discharging and dismissing
- ▶ Loans *discharged* vs. loans are *dischargeable*
- ▶ Is the judge required to make any further inquiries once the parties have agreed?
- ▶ Dismissals under Fed. R. Bankr. P. 7041(a)(1)(A)(ii)
 - ▶ *City of Jacksonville v. Jacksonville Hospitality Holdings, L.P.*, 82 F.4th 1031 (11th Cir. 2023): Voluntary dismissals under Fed. R. Civ. P. 41(a)(1)(A)(ii) requires all parties who have appeared in a case to sign a joint stipulation of dismissal, even if they are not the party being dismissed or have already been dismissed from the case.
- ▶ Tax consequences for the debtor

Step 6: Stipulation or Trial

Partial discharges

- ▶ Where the debtor satisfies the undue hardship elements when the full debt amount is considered but has demonstrated some ability to make partial payments on the loan.
 - ▶ Arises when the debtor has significant assets or disposable income to pay part of the loan(s)
- ▶ Not a method for “settling” the case
- ▶ Not allowed in some jurisdictions

Step 6: Stipulation or Trial

If the parties do not agree...

- ▶ Guidance no longer applies
- ▶ Debtor may either move forward with discovery and trial or dismiss the AP

One last thing...

- ▶ New regulation allowing borrowers making Chapter 13 plan payments to count those payments toward IDR forgiveness
 - ▶ 34 C.F.R. § 685.209(k)(4)(iv)(K)
 - ▶ Regulation effective July 1, 2024
 - ▶ Published at 88 Fed. Reg. 43820, 43903 (July 10, 2023)
 - ▶ Discussion at 88 Fed. Reg. 43820, 43854 (July 10, 2023)
 - ▶ This Regulation, located in 34 C.F.R. Part 685, is only for Direct Loans, not for other types of loans.