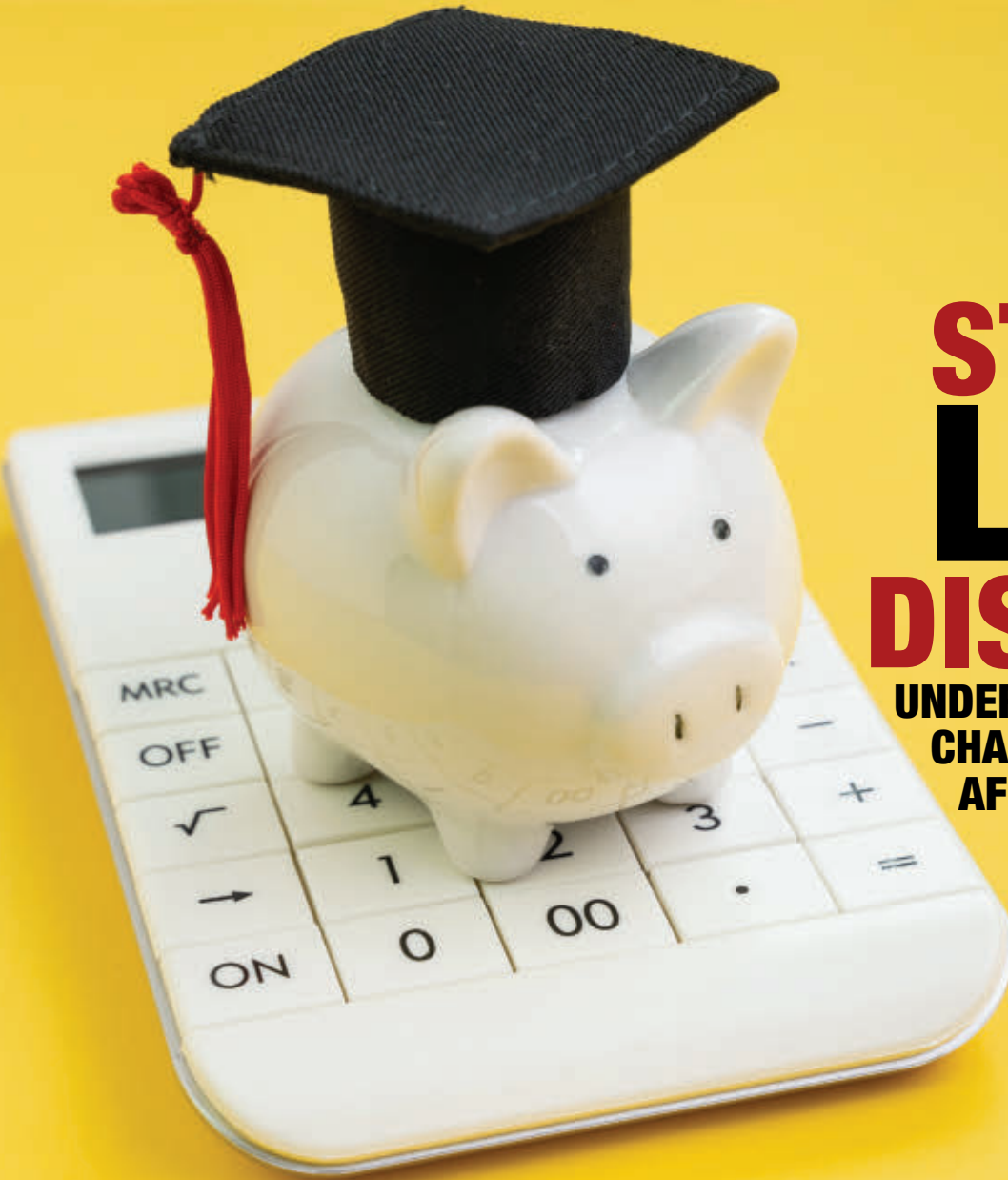


**CONSUMER
BANKRUPTCY**

JOURNAL

Spring 2023



STUDENT LOAN DISCHARGE

**UNDERSTANDING THE LATEST
CHANGES AND HOW THEY
AFFECT YOUR CLIENTS**

**DOJ Clarifies the Path to
Student Loan Discharges
in Bankruptcy**

**How to Serve an
Adversary Proceeding**



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2023 Offers Many Opportunities to Connect

BY JOHN C. COLWELL, ESQ.



Dear NACBA Members, I have concluded my final term as NACBA President. It has been my honor and privilege to have served you all and lead NACBA these past years. I will still be advocating for you on NACBA's Legislative Committee. NACBA has accomplished many wins through the ups and downs, especially following the COVID-19 pandemic, and, importantly, never stopped—and will never stop—working for you. I'd like to take this opportunity to introduce you all to NACBA's new presiding President, Richard "Hal" Nemeth. Hal, as many of you know, is an excellent practicing bankruptcy attorney in Ohio who has served many years as an officer, offering his years of expertise—most recently as Secretary. Even more he is a good friend to not just me, but many of you. I am excited for NACBA to be under Hal's leadership. Gene Melchionne will remain Vice President and Ike Shulman will remain Treasurer. Jenny Doling will assume the role as NACBA Secretary. Jenny has also been a longstanding NACBA officer and grassroots advocate. She has dedicated many hours to NACBA, while growing her bankruptcy practice in California. I invite you all to join me in welcoming Hal and Jenny to these NACBA Executive roles.

With that, I'd like to set the mood for NACBA's upcoming Annual Convention. Picture this: a morning walk around the Potomac River. An evening spent uncovering a new exhibit in one of the many **free** Smithsonian museums. Exploring the newly developed Wharf and getting a taste of local flavors at highly rated restaurants. Make these memories AND earn CLE in Washington, DC with NACBA!

Other convention sessions NACBA is buzzing about are personalized circuit meetings, dissecting what's good and bad in Elizabeth Warren's reintroduction of the Consumer Bankruptcy Reform Act, the nuts and bolts of Subchapter V and so much more! There is no other organization like NACBA that devotes enormous energy to serve the needs of consumer bankruptcy attorneys like you. I extend my many thanks to the planning committee for their hard work in helping to organize #NACBADDC.

As we get started in 2023, I encourage you all to reexplore the **benefits of your NACBA membership**. Check out NACBA's lineup of online educational programs with brand new monthly topics to help you grow your practice and better serve your clients. Be sure to stay up to date with NACBA Connect (aka the NACBA listserv), submit news about yourself to be featured in the *Consumer Bankruptcy Journal's* Sidebar (this issue's Sidebar is featured on page 17), read NACBA's Weekly Caselaw Update newsletter, update your profile on NACBA's national Attorney Finder, and be sure to follow us on Facebook, LinkedIn and Twitter for more consumer bankruptcy news and timely updates on NACBA's ongoing legislative work!

I encourage you to introduce your colleagues who are not yet NACBA members to all that NACBA offers. If not for your dedication as a member, we would not be able to dedicate our time to provide you the latest top-notch consumer bankruptcy resources.

Educate. Advocate. Litigate.

John C. Colwell, Esq.
NACBA President

As we get started
in 2023, I have
completed my
final term as
NACBA President.

NACBA 2023 CONVENTION PREVIEW

BY RACHEL VOGELTANZ, CONVENTION CHAIR

NACBA's 31st Annual Convention will be held April 27-30, 2023, in Washington, DC at the historic Washington Hilton. NACBA's planning committee is putting together a great convention with topics, speakers, and networking opportunities that you will not want to miss. The convention is taking place at the time of year to hopefully get to see the cherry blossoms in full bloom, and the hotel is located less than two miles from the White House and National Mall, with rates starting at \$245 per night for attendees.

At this year's pre-convention session on Thursday April 27, John Rao, Ed Boltz, Stanley Tate, Ike Shulman, and other presenters will take a deep dive into the new student loan discharge guidelines issued in November 2022 by the Department of Education. Other confirmed speakers include the Hon. Rebecca Connelly, Chief Bankruptcy Judge for the Western District of Virginia; Hon. Michelle Harner, Bankruptcy Judge for the District of Maryland; Krista d'Amelio, Director of Government Affairs and Communications for NACBA; Tara Twomey, Executive Director for the National Consumer Bankruptcy Rights Center; Henry Sommer; Brett Weiss; Jill Michaux; Jenny Doling; Ciara Rogers; and Alyssa Whatley.

There will be multi-session presentations on Subchapter V Nuts and Bolts and on Litigation. Other topics will include Basic and Advanced Taxes in Bankruptcy; Legislative Advocacy; Technology; and Diversity in the Legal Profession. You'll receive important legal and legislative updates from our panel, as well as during meetings led by your Circuit leaders on Friday, April 28.

REGISTER TODAY!

Register by March 10, 2023 for early bird pricing. Remember that while other bankruptcy associations "add consumer tracks," NACBA is the only national association that is dedicated to serving the professional needs of consumer bankruptcy attorneys. We look forward to seeing you in DC!

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MORE AND REGISTER.



There is something to learn for everyone, so don't miss out on this opportunity to connect with your peers and interact with industry leaders and influencers. ■

DOJ CLARIFIES the Path to Student Loan Discharges in Bankruptcy

Guidance is still new and untested, but it appears to have provided a beacon of light on the horizon.

BY IGOR ROITBURG, MANAGING DIRECTOR, STRETTO
& ED BOLTZ, ESQ., PARTNER, LAW OFFICES OF JOHN T. ORCUTT

On November 17, 2022, the U.S. Department of Justice (DOJ) and Department of Education (DOE) announced new guidance (Guidance) regarding how and when the federal government will agree to discharge federal student loans in bankruptcy. This Guidance represents one of the most seismic changes in consumer bankruptcy practice since the enactment of BAPCPA in 2005. With student loans representing the second largest source of consumer debt in the U.S.¹, the impact of the Guidance will be far-reaching for millions of distressed debtors who will now have a clearer path and increased likelihood to successfully discharge their federal student loans in bankruptcy.

To be clear, neither the statute (11 U.S.C. § 523 (a)(8)) requiring an “undue hardship” to discharge federal student loans nor the case law interpreting it has changed. The majority standard of review remains *Brunner v New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987) with some courts adopting a totality-of-the-circumstances test. Under *Brunner*, the debtor must demonstrate an inability to maintain a minimum standard of living, the

circumstances must be likely to persist in the future and the debtor must have made good faith efforts to repay the student loans. The totality-of-the-circumstances, on the other hand, requires that courts broadly examine debtor’s ability to repay their loans considering relevant factors such as debtor’s past, present and likely future financial resources, reasonable living expenses for debtor and dependents, and other relevant facts.

To date, attempts by debtors to meet the “undue hardship” test have largely been ineffective and expensive.² As a result, many realistically but also mistakenly assume that student loans simply are not dischargeable in bankruptcy.

The Guidance seeks to change that by providing the objective standards through which the DOE and DOJ will review a debtor’s case—safe harbors of sorts. If the debtor can demonstrate the existence of these facts and circumstances, then the DOJ and DOE will stipulate that the student loans should be discharged. And, while an adversary proceeding will still be a necessary protocol to initiate the review, the clarity provided by the Guidance will allow debtors to more effectively evaluate their likelihood of success before even engaging in the process. Moreover, the DOE will provide its recommendation to the debtor’s counsel and then the DOJ’s decision to stipulate (when appropriate) will allow for abbreviated and less costly proceedings instead of full-blown litigation.

Another important benefit of the Guidance is that DOJ is providing transparency as to how its attorneys will evaluate critical



“ With student loans representing the second largest source of consumer debt in the U.S., the impact of the Guidance will be far-reaching for millions of distressed debtors. ”



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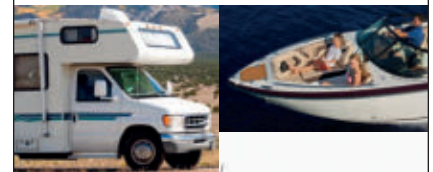
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To provide more information about how consumer bankruptcy attorneys can implement the new DOJ/EOD guidance to benefit both their clients and their own practices, NACBA offers an in-depth webinar, *New DOJ/ED Guidance on Undue Hardship Discharge of Student Loans in Bankruptcy* and will have a full day course with up-to-the-minute information at its Spring Conference in Washington, D.C. on April 27, 2023.



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actual borrower expenditures for expenses covered by IRS Local Standards.³ Perhaps most importantly, the DOJ has made clear that its attorneys, when determining student loan affordability, should look to the benchmark affordability of student loan payments under the Standard Repayment plan formula (normally the most expensive and least affordable plan). This is a major shift since previously, great emphasis was placed on affordability of Income-Driven Repayment plans which are normally the least expensive.

The Guidance is still new and untested so navigating student loan discharges may not be smooth sailing yet, but it appears to have provided a beacon of light on the horizon. ■

FOOTNOTES

1. Hanson, Melanie. "Student Loan Debt Statistics" EducationData.org. July 29, 2022, <https://educationdata.org/student-loan-debt-statistics>
2. Iuliano, Jason, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard (July 24, 2011). 86 American Bankruptcy Law Journal 495 (2012), Available at SSRN: <https://ssrn.com/abstract=1894445> or <http://dx.doi.org/10.2139/ssrn.1894445>
3. DOJ has also made clear that it will allow debtors to explain the need for any expenses that exceed any of the IRS Standards and its attorneys are to consider such explanations and determine if they are reasonable and warranted.

financial information. For example, DOJ has advised that it will allow debtors to take the full amount of any expense covered by IRS National Standards, while it will look to

Discharging STUDENT LOANS Under ED/DOJ Guidance

ADAPTED FROM NATIONAL CONSUMER LAW CENTER'S, "NEW PROCESS TO DISCHARGE STUDENT LOANS IN BANKRUPTCY" BY JOHN RAO

A new Guidance from the Department of Justice (DOJ), issued in coordination with the Department of Education (ED), has the potential to change bankruptcy practice dramatically. Until now, attorneys have not thought of bankruptcy as a way to help clients struggling with student loan debt. If the Guidance is implemented as intended, however, more bankruptcy debtors will be eligible for discharge of their federal student loans. Attorneys will need to become familiar with the terms of the Guidance in order to evaluate their clients' chances of obtaining an undue hardship discharge.

The Guidance recognizes that "some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge."

Another barrier to relief acknowledged by the agencies is the "cost and intrusiveness" of litigating an adversary proceeding. The Guidance is intended to redress these concerns so that discharges are more readily obtained, by 1) to setting "clear,

transparent, and consistent expectations" for discharge, 2) reducing burdens on debtors by simplifying the process, and 3) increasing the number of cases in which a settlement is offered.

The Guidance is accompanied by two attachments: Attachment A—an **Attestation form** that debtors will submit that includes information used to evaluate a settlement, and Attachment B—a **Sample Scenario** that is a sample filled-in Attestation form based on a hypothetical case.

SCOPE AND LIMITS OF THE NEW GUIDANCE

The Guidance process and standards are designed to reach a settlement between ED and the bankruptcy debtor to allow for the student loan's hardship discharge. But if a pre-trial settlement is not reached, the Guidance's standards are not binding on the positions that DOJ or ED may take later in

litigating the case or on the bankruptcy court in deciding the undue hardship discharge proceeding. The Guidance does not create any enforceable rights.

The Guidance applies to Direct Loans and other loans held by ED and not to FFEL loans held by guarantors—where the discharge is often contested by the Educational Credit Management Corporation (ECMC)—or to Perkins Loans still held by the school. ED may soon issue a similar guidance or a dear colleague letter applicable to such FFEL and Perkins loans. The Guidance also does not apply to holders of private student loans.

The Guidance states that it applies only to “bankruptcy proceedings” that were pending on the Guidance’s issue date of November 17, 2022, and to future bankruptcy proceedings. Based on this language, it is likely that DOJ and ED intended the Guidance to apply only to pending and future bankruptcy cases, rather than re-opened cases. Rather than move to reopen closed cases, attorneys should consider alternatives, such as whether in appropriate circumstances a former client may wish to seek bankruptcy relief in a new case and then file an undue hardship adversary proceeding in the new case. ■



Scan QR code for full Guidance.



Scan QR code for Attestation Form.



Scan QR code for Sample Scenario.



THE NEW ATTESTATION FORM AND TEN-STEP PROCESS

GETTING STARTED

STEP ONE: INITIATING AN ADVERSARY PROCEEDING

The first step in the new process to obtain a student loan’s discharge is to initiate an adversary proceeding in the bankruptcy case seeking a declaratory judgment that the student loan debt may be discharged. An adversary proceeding is a lawsuit within the bankruptcy case initiated by the filing of an adversary complaint, and the proceeding is subject to Bankruptcy Rules that are almost identical to the Federal Rules of Civil Procedure. See Fed. R. Bankr. P. 7001-7087. There is no filing fee for the debtor’s adversary complaint.

STEP TWO: FOLLOW-UP TO ADVERSARY PROCEEDING COMPLAINT

After the adversary proceeding is filed, the Assistant United States Attorney (AUSA) representing ED should request that ED provide a litigation report. For each adversary proceeding, ED will provide to the AUSA its litigation report and debtor’s account history, loan details, and, if available, an educational history. The initial litigation report should include data ED has relating to the presumptions as to the debtor’s future financial circumstances and whether the debtor has made good faith efforts in repaying the loans. Debtor attorneys should request this information from the AUSA if it is not routinely provided. The information could be helpful in preparing the Attestation form, if it has not yet been submitted, or could be used to supplement an already submitted Attestation.

STEP THREE: GETTING FAMILIAR WITH THE ATTESTATION FORM AND WHEN TO SUBMIT IT

The Guidance settlement process is triggered by the debtor submitting a completed 15-page Attestation Form to the DOJ attorney handling the case, typically an AUSA. This is used for the DOJ to evaluate whether to offer a settlement.

COMPLETING THE ATTESTATION FORM

STEP FOUR: INDICATING INCOME ON THE ATTESTATION FORM (LINES 11-13)

The expenses and income information on the attestation form will determine debtor presently cannot make payments on the student loans while also maintaining a minimal standard of living, considering the debtor’s current income and expenses. Importantly, unlike the means test in bankruptcy, gross income includes Social Security and unemployment benefit payments.

STEP FIVE: INDICATING EXPENSES ON THE ATTESTATION FORM (LINES 14, 15, AND 17)

On Attestation Form Line 14(a), the debtor checks “yes” or “no” for various expense categories as to whether the debtor’s expenses are below dollar amounts set out on the form for the debtor’s family size. The dollar amounts are based on IRS National Standards for food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous.

If each expense item is below the standard, the AUSA will need no further inquiry and the listed dollar amounts are allowed. If the debtor’s actual expenses for a category exceed the expense standard, the AUSA, in consultation with ED, should consider whether the debtor has a reasonable explanation for the additional expense and may allow it. The debtor reports excess expenses on Line 14(c) and should include an explanation of why the expense is necessary.

STEP SIX: THE DEBTOR’S PRESENT ABILITY TO PAY THE STUDENT LOAN (LINE 16)

The debtor must deduct allowed expenses from gross income and list this monthly remaining or net income. If the debtor’s expenses exceed income (*i.e.*, net income is \$0 or less), the AUSA should conclude that there is a present inability to repay the student loan.

If the amount listed is sufficient to make full student loan payments, no recommendation for settlement will be made. If the debtor can pay some portion of the full payment, the AUSA should consider a partial discharge.

This analysis requires that the correct student loan payment amount be used. The Guidance states that the monthly payment amount is the amount due under a “standard” repayment plan for the loan, which is typically based on a repayment period of ten years. In a major change from prior practice, the Guidance further states that “[e]xcept as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator.” When a student loan has been accelerated, based on payment default or otherwise, the AUSA should consult with ED and use the “standard repayment amount either prior to default or as calculated if the loan were removed from default status.”

STEP SEVEN: MEETING THE FUTURE INABILITY TO REPAY STANDARD (LINES 18 AND 19)

The AUSA will consider whether a debtor’s inability to pay a student loan will persist in the future, and the Guidance sets out presumptions that inability will persist. If the debtor indicates on the Attestation that one or more of the following circumstances apply, there is presumption that the debtor’s inability to repay will persist.

- Debtor is age 65 or older;
- Debtor has a disability or chronic injury impacting their income potential;
- Debtor has been unemployed for at least five of the last ten years;
- Debtor has failed to obtain the degree for which the loan was procured; and
- Loan has been in payment status other than “in-school” for at least ten years.

The debtor should check all applicable boxes. Because completion of this section may require the debtor to disclose highly sensitive personal information, such as medical or employment records, the Attestation should not be attached to adversary complaint that is filed with the court. If for some reason it is filed with the court, the debtor’s attorney may wish to file a motion under Bankruptcy Rule 9037(d) requesting a protective order.

Note that the presumptions in the Guidance are rebuttable and apply only for purposes of settlement.

STEP EIGHT: MEETING THE GOOD FAITH ATTEMPT TO REPAY STANDARD (LINES 20-26)

The AUSA will only offer a settlement if the debtor shows a good faith attempt to repay

the student loans. The Guidance notes that good faith may be shown in numerous ways and that the “good faith inquiry ‘should not be used as a means for courts’ or DOJ attorneys ‘to impose their own values on a debtor’s life choices.’”

The Guidance sets out objective factors that demonstrate good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an income driven repayment plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

A must read for the debtor’s attorney is the lengthy discussion of the weight that should be given to the debtor’s actual payment history and failure to enroll in an income driven repayment (IDRP) plan. Non-enrollment in IDRP by itself does not show a lack of good faith, and in that case the AUSA is expected to consider the debtor’s response in Line 25 and should “accept any reasonable explanation or evidence supporting the debtor’s non-enrollment in an IDRP.” Acceptable explanations or evidence may include:

- that the debtor was denied access to, or diverted or discouraged from using, an IDRP, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDRP;
- that the debtor had a plausible belief that an IDRP would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRP and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDRP.

AUSAs should not oppose discharge where the “debtor’s IDRP non-enrollment was not a willful attempt to avoid repayment.”

STEP NINE: LISTING OF THE DEBTOR’S ASSETS (LINES 27-32)

Debtors are required to describe their assets in Lines 27-31 of the Attestation. Unfortunately, the Guidance does not rely upon the detailed Schedule A/B that the debtor has filed in the

bankruptcy case. The Guidance provides that AUSAs may consider the debtor’s assets, but they should not “give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor’s well-being and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship.” As far as exempt property, such as a home or retirement funds, it states that AUSAs “should be careful in considering such property in the undue hardship analysis.”

STEP TEN: THE AUSA’S RECOMMENDATION AND THE CONCLUSION OF THE PROCESS

The AUSA makes a recommendation on settlement in accordance with the Guidance, based on the debtor’s present and future financial circumstances and the debtor’s good faith in attempting to make payments on the student loan. The AUSA then submits the recommendation, along with ED’s recommendation, under the “standard procedures applicable in that attorney’s component.” This refers apparently to the protocol at the local U.S. Attorney’s office to review and approve settlement offers in civil litigation.

If a recommendation to settle the case is approved, ED and the debtor “stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor’s student loan be discharged.” While the Guidance notes that the stipulation is not binding on the court, bankruptcy courts routinely approve consent judgments entered into by the parties in an adversary proceeding.

The AUSA might offer a partial discharge. While some courts have held that the Bankruptcy Code does not authorize granting a partial discharge, other courts have found that a debtor who has some future earnings potential, but not enough to pay the entire debt, may receive a partial discharge.

While a partial discharge may seem attractive to a debtor who has an excessive amount of student loan debt, debtor attorneys should be cautious in recommending a partial discharge settlement when there are doubts about the debtor’s future earning capacity or a risk of large future expenses. Debtors should also avoid consenting to a conditional judgment that provides that the entire debt will spring back and become nondischargeable if the debtor fails to make agreed-upon scheduled payments on the portion of the debt not discharged.

If a settlement cannot be reached with the DOJ, the debtor can proceed with the adversary proceeding and see if the bankruptcy court will grant the hardship discharge even where the DOJ was unwilling to settle.



How to Serve an ADVERSARY PROCEEDING

An introduction to Fed.R.Bankr.P. 7004

BY JIM HALLER, ESQ.

A common rule many bankruptcy attorneys must master is Fed.R.Bankr.P. 7004: Process: Service of Summons, Complaint. This rule sets out the requirements for service in an adversary proceeding and for contested matters. The rule mandates different types of service depending upon the type of defendant. This article will explain the different requirements.

Every attorney filing an adversary proceeding should first read Rule 7004 and Fed.R.Civ.P. 4. These rules contain specific instructions for service. Courts routinely ask plaintiff's counsel if service requirements are met. These rules are available to review at Rule 4. Summons | Federal Rules of Civil Procedure | LII/Legal Information Institute (cornell.edu)ⁱ and Rule 7004. Process: Service of Summons, Complaint | Federal Rules of Bankruptcy Procedure | LII/Legal Information Institute (cornell.edu).ⁱⁱ In addition, local rules should be reviewed. Many jurisdictions have additional requirements or local forms to follow.ⁱⁱⁱ

Rule 7004(a) adopts many of the requirements for service found in Fed.R.Civ.P. 4. These include Rule 4(a)—Contents and Amendments to Summons, (b)—Issuance of the summons, (c)(1)—Service In General and (d)(5)—Jurisdiction and Venue [Objections] Not Waived. Specific rules depending upon the defendant also apply, see Rule 4(e)–(j). This includes: (e) Service on an Individual in the U.S. (f) Service on Individual in a Foreign Country, (g) Serving a Minor or Incompetent Person, (h) Serving a Corporation, Partnership or Association (i) Serving the United States and Its Agencies, Corporation, Officers, or Employees, and (j) Serving a Foreign, State,

or Local Government. Finally, Rules (l) and (m) apply: (l) Proving Service and (m) Time Limit for Service.

Owing to the Bankruptcy Code's goal of quick and efficient resolution of cases, there are significant differences found in Rule 7004. The first change is found at Rule 7004(a)(2) which allows the clerk to sign and issue a summons by placing an "s/" before the clerk's name. This allows the clerk to issue the summons electronically.

Further, Rule 7004(e) shortens the time to serve a summons from Fed.R.Civ.P. 4 from 30 days to 7 days after the summons is issued.

Rule 7004(b) adds the option to serve certain defendants by first class mail instead of personal service as follows.

PRACTICE TIP

Use all available options to serve a defendant. This will increase the likelihood of success.

There are special rules for service on an insured depository institution. Therefore,

| DEFENDANT | METHOD OF SERVICE BY FIRST CLASS MAIL POSTAGE PREPAID |
|--|--|
| Individual (not an infant or incompetent) Rules 7004(b)(1) and (b)(7) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint to <ul style="list-style-type: none"> ▪ the individual's dwelling house or usual place of abode or ▪ to the place where the individual regularly conducts a business or profession, or ▪ the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state. See Rule 7004(b)(7). |
| Infant or Incompetent Person Rule 7004(b)(2) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint to <ul style="list-style-type: none"> ▪ the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. ▪ The summons and complaint in that case shall be addressed to the person required to be served at <ul style="list-style-type: none"> ▸ that person's dwelling house or usual place of abode or ▸ at the place where the person regularly conducts a business or profession. |
| Domestic/Foreign Corporation, Partnership or Other Unincorporated Association NOT an Insured Depository Institution Rules 7004(b)(3), (b)(7), and (i) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint to <ul style="list-style-type: none"> ▪ the attention of an officer, a managing or general agent, <ul style="list-style-type: none"> ▸ Note: The defendant's officer or agent need not be correctly named in the address—or even be named—if the envelope is addressed to the defendant's proper address and directed to the attention of the officer's or agent's position or title. (See Rule 7004(i)); Or ▪ to any other agent authorized by appointment or by law to receive service of process and, <ul style="list-style-type: none"> ▸ if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant; Or ▪ the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state. See Rule 7004(b)(7). |
| United States Rule 7004(b)(4) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint addressed to <ul style="list-style-type: none"> ▪ the civil process clerk at the office of the United States attorney for the district in which the action is brought and ▪ by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and ▪ in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. |
| Officer or Agency of the United States Rule 7004(b)(5) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint to <ul style="list-style-type: none"> ▪ the United States as prescribed in paragraph (4) of this subdivision and ▪ also to the officer or agency. <ul style="list-style-type: none"> ▸ If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. ▪ If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule. |
| State/Municipal Corporation or other Governmental Organization Rule 7004(b)(6) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint <ul style="list-style-type: none"> ▪ to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or ▪ in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof. |
| Any Defendant Rule 7004(b)(8) | <ul style="list-style-type: none"> • Mail to an agent of such defendant authorized by appointment or by law to receive service of process, <ul style="list-style-type: none"> ▪ at the agent's dwelling house or usual place of abode or ▪ at the place where the agent regularly carries on a business or profession and, ▪ if the authorization so requires, by mailing a copy of the summons and complaint to the defendant as provided in this subdivision. |
| Debtor Rules 7004(b)(9) and (g) | <ul style="list-style-type: none"> • Mail a copy of the summons and complaint to the debtor <ul style="list-style-type: none"> ▪ at the address shown in the petition or ▪ to such other address as the debtor may designate in a filed writing. ▪ If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F.R.Civ.P. (Rule 7004(g)). |
| United States Trustee Rule 7004(a)(10) | <ul style="list-style-type: none"> • Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to <ul style="list-style-type: none"> ▪ an office of the United States trustee or ▪ another place designated by the United States trustee in the district where the case under the Code is pending. |

it is extremely important to determine the status of your defendant. There are several methods to make this determination. Look for identifying marks including N.A., FDIC Insured, Member FDIC or other identifiers. There are online resources available as well. The FDIC has a BankFind Suite for research at BankFind Suite (fdic.gov).^{iv} Further, the Office of the Comptroller of the Currency maintains a Financial Institution List at Financial Institution Lists | OCC.^v

Service on an insured depository institution in either a contested matter or adversary proceeding must be made by certified mail

addressed to an officer of the institution.^{vi} See Rule 7004(h). It is not necessary to list the officer's name. Rule 7004(i) provides that "[t]he defendant's officer or agent need not be correctly named in the address—or even be named—if the envelope is addressed to the defendant's proper address and directed to the attention of the officer's or agent's position or title."



Send two copies to an officer at headquarters one certified and one first-class mail. If the postal service returns the certificate mailing

because the recipient refused delivery, but it does not return the first-class mailing as undeliverable, it will be easier for the court to accept the server's certification that notice was served at a good address.

There are three exceptions to Rule 7004(h)'s certified mail requirement if (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail; (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

PRACTICE TIP

Use a checklist whenever preparing a contested or adversary pleading to ensure that service is correct. An example is below.

- The correct full name for each defendant is identified.
- Each defendant has been checked to determine if it is an insured depository institution.
- The correct method of service for each defendant is identified.

Proper service on a defendant benefit both you and your client. It makes the process efficient and less costly. Further, it will bolster your reputation and confidence with the court. Take the time to make sure service is done correctly. ■

FOOTNOTES

- https://www.law.cornell.edu/rules/frcp/rule_4
- https://www.law.cornell.edu/rules/frbp/rule_7004
- Examples of local forms include Delaware's requirement to use a local form and include a notice of pretrial conference, see Rule 7004-2 Summons and Notice of Pretrial Conference in an Adversary Proceeding. | District of Delaware | United States Bankruptcy Court (uscourts.gov) (<http://www.deb.uscourts.gov/content/rule-7004-2-summons-and-notice-of-pretrial-conference-adversary-proceeding>); procedural instructions and requirement for a Notice of Status Conference for the Central District of California, see COMPLETE LBRS 01-31-22 double-sided.pdf (uscourts.gov) (https://www.cacb.uscourts.gov/sites/cacb/files/documents/local_rules/COMPLETE%20LBRS%2001-31-22%20double-sided.pdf); The Eastern District of Missouri requires the filing of a certificate of service at least 14 days before the hearing date on the summons, see EDMO Local Rules 2022.pdf (uscourts.gov) (<https://www.moeb.uscourts.gov/sites/moeb/files/EDMO%20Local%20Rules%202022.pdf>).
- <https://banks.data.fdic.gov/bankfind-suite/>
- <https://www.occ.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html>
- Rule 7004(h) service requiring service made by mail addressed to an officer of the institution is NOT MET by service upon its registered agent. *Hamlett v. Amsouth Bank (In re Hamlett)*, 322 F.3d 342 (4th Cir. 2003).



JUSTICE DEPARTMENT ANNOUNCES

New Director of the U.S. Trustee Program

BY DEPARTMENT OF JUSTICE-OFFICE OF PUBLIC AFFAIRS

The Justice Department has announced that Attorney General Merrick B. Garland has selected Tara Twomey to serve as Director of the U.S. Trustee Program (USTP) at the Department of Justice.

“The United States Trustee Program plays a critical role in ensuring the fairness of the bankruptcy process—including by providing impartial oversight and protecting consumer debtors from fraud and abuse,” said Attorney General Merrick B. Garland. “I am confident that Ms. Twomey’s leadership will advance USTP’s mission to promote the integrity and efficiency of the bankruptcy system for debtors, creditors, and the public.”

Ms. Twomey has over 20 years of experience working on bankruptcy and consumer credit issues. She currently serves as the Executive Director of the National Consumer Bankruptcy Rights Center, which advances the rights

of consumer bankruptcy debtors. She is Of Counsel at the National Consumer Law Center and serves as a member of the Judicial Conference. Ms. Twomey is a fellow of the American College of Bankruptcy, a conferee of the National Bankruptcy Conference, and a director of the National Association of Consumer Bankruptcy Attorneys.

USTP is the only neutral party in the bankruptcy process and brings a national perspective to every bankruptcy matter. USTP also plays a critical role in protecting consumer debtors against fraud and abuse. USTP consists of the Executive Office for U.S. Trustees, located in Washington, D.C., and 21 regions with 90 field offices throughout the country. The Director of USTP is responsible for leading approximately 1000 employees to implement USTP’s core mission to protect the integrity of the bankruptcy system.

Ms. Twomey will assume her duties on Feb. 27. ■

NACBA Connect: THE PREMIER CONSUMER BK LISTSERV!

NACBA Connect, a.k.a. “NACBA listserv,” is one of the most popular features of NACBA membership.

NACBA Connect is an online community that is home to more than 20 different listservs for consumer bankruptcy attorneys that gives members the ability to pose bankruptcy questions and get real time responses from their colleagues around the country. Each listserv, which also function as a virtual community of people doing the same type of work, is a boon for new practitioners as well as the most sophisticated consumer bankruptcy attorneys. NACBA Connect is where

members enjoy the unparalleled ability to post both the easy and hard questions to some of the best consumer bankruptcy attorneys in the nation.

FEATURED NACBA CONNECT COMMUNITY: STUDENT LOAN DEBT DISCUSSION

With student loan debt growing, and the new DOJ/ED guidance on undue hardship discharge of student loans in bankruptcy released to help distressed borrowers, this is a dedicated space to discuss everything related to the student loan debt issue. Participate in this community (and many MORE) to get your questions answered, stay up to date on the latest student loan debt news and follow NACBA’s advocacy work! ■

ACCESSING NACBA CONNECT

Already a NACBA member? Accessing NACBA Connect is easy! Simply sign into your NACBA member dashboard on NACBA.org, navigate to the “Member Resources” tab, and click “NACBA Connect”. Still have questions? Email Krista, NACBA Director of Government Affairs & Communications for help: krista.damelio@nacba.com.

Not a NACBA member? You’re missing out on this premier member benefit and so much more that help you to better serve your clients in bankruptcy and grow your practice! Email admin@nacba.com for more member information.

Welcome New NACBA Members!



Ashton Anderson
Emmett Bertold
William Bible
Paul Choate
Kelli Cook
Michele Cook
Michael Cox

James Crump
J. Dennery
Kim Diddio
Timothy Donovan
Carolyn Evans
Paula Greenway
Ashley Irwin

William Dave Jackson
Asa King
Shaya Markovic
James McBride
Lisa Milas
Donald Reid
Carolyn Secor

Adam Singer
Robert Suzenski
Valerie Thurston
Jennifer Tuffnell
Vaughn White

SIDEBAR: MEMBER NEWS, AWARDS & UPDATES

KARA K. GENDRON, ESQ. (HARRISBURG, PA)

Kara Gendron has joined the Board of Directors of the American Board of Certification (ABC) for 2023, which certifies attorneys as specialists in business bankruptcy, consumer bankruptcy, and creditors' rights law. Kara also serves as a Chapter 7 and Chapter 12 Trustee, is co-owner of Mott & Gendron Law in Harrisburg, PA, and has been practicing bankruptcy exclusively for over 20 years.

PETER HANSEN, ESQ. (BURLINGTON, IA)

Peter Hansen of Hansen Law Offices in Burlington, Iowa was selected as a 2022 Great Plains Super Lawyer® in the area of Bankruptcy.

JENNY L. DOLING, ESQ. (PALM DESERT, CA)

Jenny Doling is founding attorney of J. Doling Law, PC and a CA Certified Bankruptcy Specialist. They were recently successful in defending against the trustee's objection to debtor's homestead exemption under 11 U.S.C. §522(m) and (p). The trustee has now appealed to the District Court in the CDCA and briefing is underway. Jenny also serves as Secretary on the NACBA Board of Directors and is the Vice President of the San Diego Bankruptcy Forum. Recently, Jenny went back to law school! She is attending the University of San Diego for her LLM in Taxation with a graduation date set for May 2023.

RONALD I. LEVINE, ESQ. (HACKENSACK, NJ)

The New Jersey State Bar Association honored Ron on Jan. 12, 2023, with its "Distinguished Legislative Service Award" for his work in fighting to keep for-profit debt adjusters out of New Jersey, which are currently prohibited. Ron is the lead attorney of the Law Offices of Ronald I. Le Vine. He served the public in many capacities, as an elected official, public defender, a municipal judge (Midland Park Borough 1988-1994), and currently as chairperson of the New Jersey State Bar Association's Special Committee on Consumer Protection Law.

JOSEPH R. MOORE, ESQ. (MONROE, LA)

Joe recently earned board certification in Consumer Bankruptcy. He was invited to and attended the 2022 Fifth Circuit Judicial Conference in Memphis, Tenn. Locally Joe serves on the rules committee for the Louisiana Western District Federal Bankruptcy Court. In the last year, Joe has appeared and litigated cases in every Bankruptcy Court District in Louisiana and in every division of those Districts.

RONALD C. SYKSTUS, ESQ. (HUNTSVILLE, AL)


Over the past several years, Ron has been AV rated by Martindale Hubbell, named as a Mid-South Super Lawyer®, and selected to Best Lawyers in America. He is the Alabama State Co-chair of the National Association of Consumer Advocates. Ron also hosts a podcast titled "Next Lawyer Up," which is available for free at iTunes, Stitcher, and PlayerFM.

NINA M. PARKER, ESQ. (FOXBORO, MA)

Nina is a Fellow of the American College of Bankruptcy where she is a 1st Circuit Council member on the Diversity, Equity and Inclusion Committee; is an at-large member of the Board for the Massachusetts-New England network of IWIRC's and a member of the ABI Northeast Advisory Board. Nina is a board-certified consumer bankruptcy attorney by the American Board of Certification and is rated as an AV Preeminent Attorney by MARTINDALE-HUBBELL®. In 2022, Nina was named as one of the top 10 attorneys in Massachusetts Super Lawyers® and has been one of the top 50 women since 2012. She moderated a panel at the 2022 ABI Northeast Conference entitled "Representing a Debtor or Creditor in a Bankruptcy Proceeding? It's an Ethical Minefield Either Way!" and is currently awaiting a decision on an interesting case involving a chapter 13 debtor and a recovery related to the Roundup herbicide litigation.



JEFFREY J. BURSELL, ESQ. (ST. PAUL, MN)



Jeff has been practicing consumer bankruptcy law since 2001 and at the height of the COVID-19 pandemic built a “new-aged” firm—using technology to build a firm not dependent on a brick-and-mortar location and the associated constraints. He previously worked to change and strengthen the Minnesota homestead exemption (2007), tried (but lost) to get bifurcation allowed in Minnesota (*In re Siegle*), and is working now to modernize the rest of Minnesota’s exemptions. Jeff currently serves on the bankruptcy practice committee for the District of Minnesota.

STEVEN R. FOX, ESQ. (ENCINO, CA)

Since 1994, Steven Fox has owned his own firm. The Fox Law Corporation practices bankruptcy, in particular business reorganization and bankruptcy litigation, in the Los Angeles area and around the United States. Recently on Jan. 9, 2023, after the bankruptcy court struck his client’s claim in a Chapter 11 case for \$29.8 million based on an unjust enrichment theory, Steven R. Fox won a reversal of the lower court’s decision at the Ninth Circuit Court of Appeal.




JOHN D. SARAI, ESQ. (ENCINO, CA)

John recently defeated an adversary complaint filed against his client and debtor by a factoring company that the client had contracted with on behalf of their LLC. The Texas factoring company (and their large law firm attorneys) alleged fraud, misrepresentation, theft, intentional and material omissions and misrepresentations in the bankruptcy schedules, etc., and challenged the discharge in their complaint. John’s firm went through eight months of litigation until they got the creditor to drop their complaint in its entirety and with prejudice. John’s client received a full discharge. See case no. 1:22-ap-01003-MT (C.D. CA).

SCOTT R. SCHNEIDER, ESQ. (HICKSVILLE, NY)

Scott R. Schneider received the Thomas Maligano Pro Bono award from the Nassau County Bar Association in New York on Law day in May 2022. Scott owns The Law Offices of Scott R. Schneider, which is a full-service bankruptcy and real estate law firm. He has been providing premier legal assistance in bankruptcy cases for more than 20 years, representing clients in Chapter 7, 13 and 11.



KURT O’KEEFE, ESQ. (ST. CLAIR SHORES, MI)

Kurt has been certified in consumer bankruptcy law since 2001. His current quixotic campaign is to restore student loan dischargeability in bankruptcy, get the government out of the student loan business and then sell the existing portfolio of student loans. Kurt has received the support of a staffer of the House Majority Leader and interest from Congressional members and will continue to tilt at windmills. Kurt was selected as a panelist on Student Loans in Bankruptcy at the November 2022 Consumer Bar Association seminar. Kurt and other NACBA members are working to get the Michigan exemptions changed.



HAVE AN ANNOUNCEMENT?

Submit your member news, awards and updates to **SIDEBAR**, which runs in every issue of the *Consumer Bankruptcy Journal*! Contact NACBA’s Director of Government Affairs & Communications by email at krista.damelio@nacba.com.



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BY  RICHARD JAMES

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