



# Bankruptcy and Other Issues with Student Debt

MAY 3, 2018

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# Most Important Thing

- ▶ Automatic Stay – Everything Must Stop!!!
  - ▶ - Must Halt Collection Efforts or Face Possible Sanctions
- ▶ Notice of Filing – in any form -
  - OK to verify that actually filed

## Most Important Thing – cont'd

- ▶ Willful Violation –
  - ▶ - if notice sent, focus is on whether collection activity was intentional, not whether willfully violate stay

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## Most Important Thing – cont'd

School's Obligation – automatic stay means lifting academic hold to release transcript, diploma and allow re-register

## Most Important Thing – cont'd

- ▶ Bankruptcy Practitioners – who look for violations to file sanction motions

# Timing of Filing & Dischargeability

- ▶ Pre-Petition Debts
- ▶ Post-Petition Debts

# Types of Debt

- ▶ Tuition and Fees – will be dischargeable if pre-petition
- ▶ Financial Aid Overpayment/Title IV Money, State Aid – TAP Overpayments – Not dischargeable
- ▶ Student Loans - - Not dischargeable . . . we take the position that this includes school institutional loans as well as federal loans

# Undue Hardship

- ▶ Exception to Non-Dischargeability
  - ▶ ***11 USC § 523(a) (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor***



# Undue Hardship Test

- ▶ **THE BRUNNER TEST** - Brunner v. HESC, 831 F.2d 395 – (2<sup>nd</sup> Cir 1987)
- ▶ a) debtor cannot maintain on current income and expenses a “minimal standard of living” for debtor and dependents if forced to repay debt
- ▶ b) additional circumstances exist indicating that this state of affairs is likely to persist for significant portion of repayment period
- ▶ c) debtor made good faith effort to repay the loans

# Undue Hardship Test – cont'd

- ▶ Discussion of In Re: Murphy Case - - 535 BR 97  
(Bankr. Ct. WD Pa 2015) - - Application of *Brunner* Test
  - 1) Good Faith Efforts to Repay
    - focus on factors beyond own control, rather than willful or negligent conduct

# Undue Hardship Test – cont'd

- ▶ Must consider whether debtor incurred substantial expenses beyond those required to pay for basic necessities; and
- ▶ Debtor made efforts to restructure the loan before filing his BR petition
- ▶ Also look at ratio of educational loans to total unsecured debt and the timing of when loans became due and the filing
- ▶ Look at all these factors in deciding whether debtor made GF effort

# Undue Hardship – cont'd

- ▶ ***Additional Circumstances Prong***
- ▶ Must show additional circumstances “indicating that his current state of financial affairs is likely to continue for significant portion of the repayment period”

# Undue Hardship – cont'd

## ▶ ***Minimal Standard of Living***

- ▶ If forced to repay loans, will not be able to maintain minimal standard of living
- ▶ Concept is flexible and dependent upon facts of particular case
- ▶ Evaluate income and expenses but both are not regarded as unalterable
- ▶ Can consider whether it be unconscionable for debtor to pursue additional income or reduce expenses
- ▶ Showing that finances are “tight” is insufficient

# Undue Hardship – cont'd

- ▶ **Educational Credit Mgmt Co v. Murray – US Dist Ct. Kansas 2017 (on appeal from Bankr. Ct. Kansas)**
- ▶ Using Brunner Test – found all 3 criteria met
- ▶ Husband and Wife been making payments in income based repayment plan but could not get out from 9% interest being charged
- ▶ Looked at jobs and both had music degrees (not lend itself to high income)
- ▶ Found undue hardship to repay interest, but still had to repay principal

# Undue Hardship – cont'd

- ▶ **TOTALITY OF CIRCUMSTANCES TEST – 8<sup>th</sup> Circuit Uses – felt Brunner test was too restrictive and this allows for more discretion**
  - 1) **Looks at Debtor's Past, Present and Reasonably Reliable Future Financial Resources**
  - 2) **Calculate Debtor and any Dependents Reasonable Necessary Living Expenses**
  - 3) **Any Other Relevant Facts and Circumstances Surrounding Each BR Case**

# Asserting School's Rights as Creditor

- ▶ Types of Bankruptcy Filings

- ▶ Chapter 7

- ▶ Chapter 13

- ▶ Chapter 11



# Asserting School's Rights – cont'd

- ▶ Steps to Take To Try and Collect Debt
- ▶ 1. Proof of Claim - if there are assets or a chapter 13 reorganization plan
- ▶ 2. Proof of Claim Form – Materials

# Asserting School's Rights – cont'd

## ▶ Parts of Proof of Claim

- ▶ a) Identify the Claim – giving name of creditor, identify where notices and payments should be sent, etc.
- ▶ b) Information about Claim as of Date Filed – Amount, Basis, Is it Secured (by Real Property . . . . generally no), Entitled to Priority (again, generally no)
- ▶ c) Verification – Sign as to truth and correctness
- ▶ d) attaching redacted copies of proof of debt/that debt exists

# Asserting School's Rights – cont'd

## ▶ Recovery ?

- ▶ What if anything we recover is generally a function of the type of bankruptcy filed
- ▶ Chapter 7 (generally no) v. Chapter 13

# Asserting School's Rights – cont'd

- ▶ **Post Discharge** - If debt is non-dischargeable, we start collection efforts up again
- ▶ **School Obligation** - If debt is non-dischargeable, services can *again* be withheld - - Otherwise, students must be allowed to register as if it never happened, transcripts must be provided.
- ▶ **Non-discrimination Law** - Government agencies cannot discriminate against someone based solely on a past bankruptcy § 525(c)

# Frequency of Debtor's Filing

- ▶ Frequency Depends on Type of Filing and if Discharge Received
  - **Chapter 7 Discharge – must wait eight years from date of filing before can file new Chapter 7**
  - ▶ **Chapter 13 then Chapter 13—two years.**
  - ▶ **Chapter 13 then Chapter 7—six years**
  - ▶ **Chapter 7 then Chapter 13—four years**
  - ▶ **Must Wait 180 Days if BR petition was dismissed with no discharge granted**

# Parents Filing Bankruptcy

- ▶ Child's debt so in theory should not impact
- ▶ Parent as Guarantor for Minor Child – typically only see that with special programs like high school student who takes a college class

# Parents Filing Bankruptcy

- ▶ **Bankruptcy Trustee “Clawback” Suits – Trying to Recoup Bankrupt Parents Voluntary Payment of Children’s Tuition**
- ▶ 11 USC §548(a)(1) – Fraudulent look back period – 2 years from date of filing – transfer done to hinder, delay creditor or not receive reasonably equivalent value and rendered insolvent
- ▶ NY Debtor Creditor Law – under Fraudulent Conveyances – can go back 6 years from the date of the transfer if is fraudulent if is actual or constructive
- ▶ Constructive Fraud can be proven in NY if there is not fair value or consideration for the transfer and the result was insolvency for the debtor

# Parents Filing Bankruptcy cont'd

- ▶ **The 2-year fraud period is not to be confused with the 90-day look back period for avoidance of “preferential transfers” at the time of a bankruptcy filing:**
  - ▶ **Preferential transfer focuses on whether a creditor received a payment that puts themselves in a better position than other creditors**
  - ▶ **Fraudulent transfer looks at whether an insolvent debtor made a transfer without getting a reasonably equivalent value in return**



# Parents Filing Bankruptcy

## Unsettled Law:

- 1) In re Lindsay — 2010 Bankr. LEXIS 1554 (Bankr. SDNY Poughkeepsie 2010)
- 2) In re Leonard – 454 BR 444 (ED Mich 2011)
- 3) In re Cohen – 2012 Bankr. LEXIS 5097 (Bankr. WD Pa 2012)
- 4) In re Palladino – 556 BR 10; 2016 Bankr LEXIS 2938 (August 10, 2016) (Bankr. D. Mass)
- 5) Matter of Dunston (debtor), Roach (Trustee) v. Skidmore College – 566 BR 624 (Bankr. S.D. Ga. Feb. 7, 2017)
- 6) Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (In re Knight) – 2017 Bankr. LEXIS 3324 (Bankr. D. Conn, September 29, 2017)
- 7) In re Adamo/Pergament v. Hofstra, Fairfield, Brooklyn Law – 2018 Bankr. LEXIS 941 (Bankr. EDNY March 28, 2018)

# Looking Forward

- ▶ Hard to say a trend . . . .
- ▶ If arguing there is an economic benefit for the tuition payments, I tend to agree with Judge Hoffman in the *Palladino* case but might be more result oriented - - see and understand points being raised by Judge Tancredi in *Boscarino/CCSU* case (both Judge Hoffman and Tancredi are Obama appointees, so not Blue State/Red State thing) . . . Certainly federal legislation would end the debate exempting tuition payments.
- ▶ Perhaps Judge Craig in *Adamo* case gives all schools away out (does this mean that Trustees will then sue students to recoup?)
- ▶ In NY, have some points to raise, if Parents Do Not Have An Obligation, then why:
  - Fam Court Act for Child Support – can include education for college since child support is to 21 if there is an ability to pay;
  - FAFSA looks at parents' income in determining what aid a student gets;
  - Affordable Care Act insures child under parents' policy to 26 years old;

# Other Issues

## Litigation Holds and Discovery

- What does that mean for Student Accounts?
- Point of Contact for School and All Departments  
(Registrar, Financial Aid, Housing, Faculty)
- Litigation Process – Defendant is entitled to try and defend claim and make use of discovery devices including document demands and depositions
- You may have to go to Court to assist in prosecuting claim

# Other Issues

## Timeliness of Referrals – SOLs

- a) Most debts - - Tuition and Fees – 6 years – Contract Claim
- b) Institutional Loans – 6 years – Contract Claim
- c) Perkins Loans and other federal loans – No SOL – see 20 USC § 1091a
- d) Financial Aid Overpayment – we argue has no SOL – see *State v. Fuller case citing 20 USC § 1091a*
- e) Parking Tickets – 3 years – CPLR § 214(2) – an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215
- f) Library Fines or Lost Books – 3 or 6 years – CPLR § 214(3) tort of conversion, taking of chattel (3 years) or implied contract for borrowing (6 years)(not real well settled at this point);
- g) Dorm Damage – 3 years – CPLR § 214(4) – action to recover damages for an injury to property