BEYOND BRUNNER

Richard J. Parker

Parker, Butte & Lane, P.C.

At the end of this outline is a Student Loan Primer, along with an article previously published on-line at the Academy website and elsewhere. The purpose of this section is to give you the basic tools to recognize what kind of problem is being presented and how to deal with it – either on your own or by association with, or referral, to a student loan lawyer or bankruptcy lawyer.

Federal vs. Private?

The first step is to "triage" the loan. This is critical as there are different rights and remedies depending on whether the loans are private, federally insured or both. To determine this, your client will need to access the federal website – nslds.ed.gov – though there is information in the "Primer" that will give you good clues as to the nature of the loan.

Is it really a student loan?

To answer this you need to carefully review the statute and the recent case law, in particular, In re Christoff, a March 2015 opinion from the Ninth Circuit Bankruptcy Appellate Panel (510 BR 884) . Is it a "qualified education loan." In this area, the private, for-profit schools can be particularly vulnerable. This includes Beauty Schools, Truck Driving Schools, Helicopter Flying Instruction, Culinary Schools, many "on-line" schools and so on.

Was the loan amount greatly in excess of the "cost of attendance" (including reasonable living expenses)? Is the debt in question actually a loan or just a tuition deferral?

One of the other issues that arises is the student him or herself. Was the student qualified and able to benefit from the education? If the student is a convicted felon, should he or she have been admitted to a course that trains corrections officers? If the student is illiterate, should he or she have been admitted to any type of post secondary education?

Delinquency and Default

If the loan is a private one and is in default, the servicer may allow it to be cured, or it may have declared the loan due in full. Even if it is declared to be due in full, payment arrangements can be made. If the loan is federal and is in default, the default can be cured by "re-habilitation" or by consolidation (essentially a re-finance). If the federal loan is merely delinquent (no more than 6 missed payments), payments can be caught up.

Forbearance and Deferral

While a temporary suspension of payments is usually available for federal loans and many private loans, it should really just be used as "treading water" to avoid default or delinquency. Deferral or forbearance is not a cure or long term solution.

Repayment

Of course this is always an option, though not always possible. Federal loans are not discounted for settlement and many private servicers or collection agents will make deals especially if a lump sum can be offered. Many private lenders will offer interest rate reductions or "interest only" payments for a time. If you do decide to contact either a servicer or a collector, be aware that most of them will require a notarized consent form signed by the client.

Loan forgiveness

Loans can be forgiven for many reasons, including disability of the debtor or issues with the school accreditation. While there are some banks which offer disability discharges, it is the exception for private loans.

Escape hatches and litigation counter claims

While in many respects private student loans may resemble credit card or person loan obligations and are subject to all contract defenses and counterclaims, they are really more like securitized mortgages. They are transferred, packaged and sliced and diced. As a result they have many of the flaws of transferred mortgages. Who owns the right to collect and can they prove it? Can you get a true payment history and a true interest calculation? This is an area that can be subject to claims to TILA, FDCPA and other statutory defenses in additional to the traditional common law defenses such as the statute of limitations.

Timing issues

If you should be consulted by a person who has already filed bankruptcy, they are not foreclosed from pursuing a hardship discharge. A chapter 7 case can be re-opened at any time to litigate a hardship discharge. In addition, a chapter 13 can be filed at any time after a chapter 7 case for the purpose of pursuing a hardship discharge.

Resources

Other than the materials here, the primary resource is the NCLC Student Loan Law volume. It has great detail on the history of student loans and how to deal with them. In addition, if you can navigate them successfully, a great deal of information is available on federal websites. One of the most recent additions to this resource is the Consumer Financial Protection Bureau. And of course, there are a handful of attorneys in the metro area that are knowledgeable about student loan problems.

STUDENT LOAN PRIMER

As with all resources, each attorney should verify that the information is still current and reliable as the student loan area is changing rapidly. While the 3 prong test of the Brunner case is still the law in most Circuits, it is weakening. This is particularly true in the 9th Circuit.

Student loan litigation is beyond the scope of representation for most lawyers, but it is helpful to give the clients some idea of what the law is rather than just says student loans are not dischargeable and you cannot help. The client can then decide if they wish to be referred to an attorney who can deal with the more complex student loan issues.

First, the Brunner test is as follows: 1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and any dependents if forced to repay the loans; 2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and 3) that the debtor has made good faith efforts in the past to repay the loans. Essentially the hardship case must be made for past, present and future – not an easy task.

However, in addition to knowing the history of the debtor with regard to meeting the Brunner test, it is important to know what kind of loans are being dealt with by the client. Federally insured loans and private loans are totally different. About all that they have in common is that at this time they are both non-dischargeable in a basic bankruptcy. Even that rule has some exceptions as certain private loans ARE discharged in bankruptcy without an adversary proceeding. BUT, there are other potential remedies, depending on the kind of loan. To determine the kind of loan, the client needs to go to the government website to get the federal loan account information. That web site is "nslds.ed.gov". First, the client has to log in and establish a password from the site and then return to get their loan info. If a loan is not there, it is 99% likely that the loan is private. There is no central clearing house for private loans, though a credit report can be of some help.

Even if the case for hardship discharge cannot be made at the time of the filing of the bankruptcy, remember that you can file for a hardship discharge near the end of a chapter 13 (which gives the debtor some breathing room) or a discharged and closed chapter 7 case can be re-opened for the purpose of filing an Adversary Proceeding for hardship discharge. If a hardship discharge is not feasible, there are still options for special treatment in chapter 13.

Essentially, private student loans are glorified credit cards that are usually non-dischargeable, but still subject to all traditional defenses – Statute of Limitations, TILA, FDCPA, etc. In addition, many have been "securitized" in the same way as mortgages are and are subject to attack on that basis, as well as on standing. Complications arise when one agency, such as Navient, services both private and federal loans and they misstate remedies available (a potential violation of some debt collection practices laws). The major differences in the loans are the following:

	PRIVATE	FEDERAL
Parties	Co-signers may exist	No. "Parent Plus" Loans ("spousal consolidation") ("endorsers")
Interest	High / often variable	Generally lower and fixed
Statute of limitations	Yes, contractual	None
Formal work-outs	No, not usually	Yes, IBR, ICR, ISR, etc.
Wage Garnishment	Must get judgment	Can take 15% by letter w/o court
Social Security offset	No	Yes – 15%
IRS refund intercept	No	Yes
Discharge on Death	No, not usually	Yes
Disability Discharge	Not usually (some banks do)	Yes
Cure Default	Not usually	Yes
Credit Re-hab	Not usually	Yes
Consolidation	Not usually	Yes

RESOURCES

Thestudentloanlaywer.com

Studentaid.gov

nslds.ed.gov

Prepared by Richard J. Parker - rjp@pbl.net

STUDENT LOAN VICTIMS – "LET THEM EAT CAKE"

by Richard J. Parker, Parker, Butte & Lane, PC

Several recent articles in the *American Bankruptcy Law Journal* and the American Bankruptcy Institute's *Bankruptcy Brief,* as well as a seminar at the recent Annual Debtor-Creditor Section CLE and Annual Meeting, dispassionately describe the statutory and case law on student loans in the United States. This article is not such an endeavor. Rather, it examines how we got here and considers some of the political and economic issues related to what has rightly been called the student loan crisis.

Numerous sources report that total student loan debt is now in excess of one trillion dollars. See., e.g., http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/. About 10% of this amount is private student loans, with the rest being federally insured student loans of various kinds. *Id.* The differences between the two types of loans are significant, both in and out of the bankruptcy courts. This article will briefly describe how student loans work and their history, then analyze the impact student loan debt has on individuals and on society. Finally it will discuss the inadequate remedies available to deal with the problem.

Student Loan History

In the beginning there were student loans and they were good. The initial student loan program was inspired by the very successful GI bill, which guaranteed up to 48 months of higher education to qualified veterans. The Federal Family Education Loan Program (FFEL) began in 1965. It allowed middle-class and working-class families to borrow money without regard to their creditworthiness and repay the loans, usually over a 10-year period after graduation, at a low fixed interest rate. Due to the reluctance of banks to take any risks, such loans were later guaranteed by the federal government. When the banks were still reluctant to take on risk, Congress created Sallie Mae as a secondary market for guaranteed loans. During the 1990s, purely private loans became more common and students were directed to these loans even when they would have qualified for more favorable federal programs. The full history is available in many sources, including the excellent *Student Loan Law,* National Consumer Law Center (4th ed. & Supp. 2012).

In the early years of student loans (before 1976), they were treated like any other debt and were dischargeable in bankruptcy. Following some questionable stories told to Congress about rich doctors and lawyers ripping off the government for a free education, federally insured student loans were made dischargeable only after five years. The period was extended to seven years in 1990. Finally in 1998 Congress made federal loans nondischargeable in the

absence of a showing of "undue hardship" (undefined in the Bankruptcy Code). With BAPCPA in 2005, the noose was fully tightened – private student loans as well were made nondischargeable. The legislative history of this provision is sparse: at one point during the tortured eight-year process that led to BAPCPA's ultimate enactment on May 5, 1999, Senator Lindsey Graham offered an amendment to extend nondischargeabilty to private student loans. A total of three minutes of floor time was devoted to the issue, according to Maureen Thompson, NACBA (Nat'l Assoc. of Consumer Bankruptcy Attorneys) lobbyist. Through all the later debates on BAPCPA, the major concerns were with the means test and changes to chapter 13; this student loan provision was never really addressed again. Even before BAPCPA, though, options were being closed off. In 1991, the statute of limitations was eliminated for collections on federally insured student loans. This provision was later ruled to have retroactive effect, reviving student loan debt that had been previously time barred. *United States v. Phillips,* 20 F3d 1005 (9th Cir 1994). This extraordinary change put most student loan debtors in the same category as murderers and traitors who can be pursued until death.

The Law Today

During the time that student loans were dischargeable only after five years, the *Brunner* case was decided. *Brunner v New York State Higher Educ. Services, Inc.,* 831 F2d 395 (2d Cir 1987). The *Brunner* test for a hardship discharge (required at the time for discharge without the waiting period) requires proof that: 1) the debtor cannot maintain, based on current income, a minimal standard of living for the debtor and dependents if forced to repay the student loan by its terms; 2) circumstances indicate that this state of affairs is likely to persist for a significant portion of the repayment period; and 3) the debtor has made a good faith effort to repay the loans. This standard was eventually adopted by virtually all of the Circuits. In a recent Ninth Circuit BAP case authored by Judge Renn, *In re Roth,* 490 BR 908 (9th Cir BAP 2013), Judge Pappas wrote a concurring opinion in which he explicitly questioned the continuing validity of the *Brunner* doctrine, referring to it as "truly a relic of times long gone." *Id.* at 920. (An interesting side note is that in *Roth,* as in *Brunner,* the debtor was a *pro se* appellant.)

While federally insured student loans have numerous repayment programs available for students facing economic hardship (Income Based Repayment, Income Contingent Repayment, etc), no such programs exist for private student loans. The federal repayment programs, along with options such as disability discharge, make bankruptcy unnecessary for most people who owe under the federal programs. This is not true for those subject to private student loans, which are vigorously pursued by numerous collection agencies, confident that no matter what else happens, their targets are unlikely to attempt to obtain a hardship discharge. The failure to even consider bankruptcy in these cases is a function of debtor and attorney ignorance, as well as the expense of pursuing student loan hardship discharge. A recent article by an academic

found that the odds were reasonably good for those willing or able to pursue a hardship discharge. Iuliano, "An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard," *Am Bankr L J* (Volume 86, Issue #3, 2012). In 2007, the year studied, 51 of the approximately 200 people filing for hardship discharges received a full discharge and 30 received a partial discharge, while 25 more received an administrative remedy such as one of the repayment programs mentioned above.

In contrast to these favorable results, some real life examples show how ruthlessly some agencies and collectors believe *Brunner* should be applied. The creditor in *In re Renville,* 2006 LEXIS 3211 (D Mont), suggested to the court that in order to have the funds to pay a student loan, the debtor should make a 1600-mile round trip each month so he could buy his prescriptions at lower cost on an Indian reservation. The court discharged the student loans.

The North Dakota court in *In re Lindquist,* 2007 LEXIS 4484 (Bankr D ND), was urged to require the debtor (who had been employed at several low wage jobs) to open her own beauty salon so she could make the income adequate to pay her loans. This was despite the fact that she suffered from depression, anxiety, scoliosis, obesity and back pain, and had advised the court that she could only do haircuts; she was not good at other salon skills, having once glued herself to a patron while attempting a manicure. The court declined to follow the advice of the collector.

Finally, a debtor with numerous medical issues sought a discharge and the creditor suggested that she eat "dry breakfast cereal several days a week" to save money. The debtor's food costs were high because she needed a diabetic, low sodium and dairy-free diet. The creditor also believed that the debtor could find other gainful employment, contending that the results of her "Functional Capacity Examination" (showing severe limitations) were skewed – the debtor had been in a diabetic coma and suffered from recurring pneumonia before the test. She could do only sedentary work but had no secretarial skills. Discharge granted. *In re Hurley,* 258 BR 15 (Bankr D Mont 2001).

But sometimes the court is equally ruthless. In an Ohio case highlighted in the *New York Times*, the bankruptcy judge opined that the debtor's blindness did not necessarily create a hopeless employment situation, despite the fact that the debtor lived in a rural area and had certain transportation issues. While not requiring the debtor to move to an urban area with more opportunities for employment for the blind, the judge declined to grant a discharge; he set a future date to allow the debtor "additional time to adjust to his situation." *See* Lieber, "Degrees of Debt," *NY Times* Sept 1, 2012,
http://query.nytimes.com/gst/fullpage.html?res=9A0DE5DE153CF932A3575AC0A9649D8B63

Another judge in Illinois addressed a case of a visually impaired man on Social Security Disability. The judge was not prepared to declare his situation hopeless and gave him a two year "window of opportunity" to recover from his financial situation, stating that he believed that the debtor had the potential to obtain "meaningful employment." *Id.*

The Economic Impact

People fighting the burden of $50,000 or $100,000 or more in student loan debt are unable to buy houses, start families, or make many of the normal consumer purchases that drive our economy. A *New York Times* article addressed the problem of people being left out of the mainstream economy and deferring starting families due to their crushing student loan debt. Lewin, "Burden of College Loans on Graduates Grows, *NY Times,* April 11, 2011, http://www.nytimes.com/2011/04/12/education/12college.html?_r=0. In a similar vein, the ABI *Bankruptcy Brief* of August 15, 2013, included an article titled "Analysis: Student-Loan Load Kills Startup Dreams," documenting how the debt load discourages many graduates from becoming entrepreneurs.

At the same time, some private student loan agencies are among the most profitable businesses around, and have highly compensated employees. At one agency, seven employees earned more than $400,000 per year through commissions ranging up to 31%, not to mention the CEO who earned $1.1 million in 2010. http://www.huffingtonpost.com/2012/05/17/student-loan-debt-collector-salaries_n_1525297.html. A scathing commentary by Matt Taibbi that recently appeared in *Rolling Stone* assigned some blame to schools that have little incentive to cut costs when the cash flow from student loans is virtually unlimited, but there is plenty of blame to go around. Taibbi, "Ripping Off Young America: The College-Loan Scandal," *Rolling Stone* Aug. 15, 2013, http://www.rollingstone.com/politics/news/ripping-off-young-america-the-college-loan-scandal-20130815.

The Political Situation

As even the most casual observers of national politics can tell, it is unlikely that Congress in the foreseeable future will have the votes, the will, or the interest to address the growing student debt problem. While some bills have been proposed to change the law, they have gained no traction. Of more impact are the efforts of Senator Elizabeth Warren to shine a light on the issues, including highlighting the fact that the government makes a profit on many student loans. She has also questioned why Sallie Mae was allowed to borrow money from the Federal Home Loan Banks ($8.5 billion dollar line of credit at .23%) to help to fuel its 2012 profit of $2.5 billion largely from interest income from its private student loan portfolio (June 24th, 2013 letter from Senator Warren to the Director of the Federal Housing Finance Agency). It is

ironic that the FHLB was chartered to help people buy homes, but now aids a sector of the economy whose practices prevent people from buying homes.

What Can Be Done

First, everyone concerned – students, former students, their families and their lawyers – must push for changes at the federal level, recognizing that it may be two years or longer before anything happens. The Consumer Finance Protection Bureau, http://www.consumerfinance.gov/, is becoming more active in the area of student loan collection abuse, and its involvement should provide some relief from the most egregious collection abuses.

Second, those concerned should take action on the state level, supporting such measures as the Oregon proposal to "pay it forward" and have repayment based on future income. Locally, attorneys need to make sure their clients understand the dangers of private student loans.

As far as litigation is concerned, remember that but for the nondischargeability protection in bankruptcy, student loans are just as vulnerable to state court defenses and counterclaims as credit card debts. In some cases they are more vulnerable as the creditor usually cannot use the "account stated" allegation. All such defenses and counterclaims should be considered. In bankruptcy court, attorneys simply need to keep pushing not just on discharge issues, but on chapter 13 classification and use of §1322(b)(5) for dealing with student loans as long term debt.

Of course, there is always the option of the hardship discharge in bankruptcy. As discussed in the companion article by Natalie Scott, "Misconceptions & Muddied Waters," the first major change in hardship cases in years is taking place in the 9th Circuit. The change in the standard of review, along with the greater doubts expressed about the viability of the *Brunner* standards, should give debtors a better chance at a partial or total hardship discharge than they have had since the *Brunner* test was adopted by the 9th Circuit. This does not mean every client will qualify – the *Brunner* test is still there for now. What is does mean is that a larger number of cases should be appropriate for hardship discharge. But, counsel must still present the case in such a way as to show the court that a fact based decision can be rendered that will withstand appellate scrutiny. Even if the debtor does not in fact apply for Income Based Repayment or a similar program, counsel must be prepared to show that the option has been explored and what the payments would be under a repayment program. Then, counsel must explain why it is not feasible, perhaps due to the presence of private student loans which have no such programs.

While as attorneys we must press all possible arguments and explore all avenues of relief for our clients, such actions are only a partial solution. Counsel can also be active in contacting the offices of their Senators and Representatives to help educate them about the glaring flaws in the system. Unless the student-loan problem is dealt with on a national policy basis, we face another economic crisis and lasting damage to not just the millions of graduates, but to the entire economy.

PRIVATE STUDENT LOANS

WHAT TO DO

Once it has been determined that the student loan or loans in question are not federally insured and none of the work-out programs are available, you need to advise your client as to what can be done. Remember, the fact that you are told that a loan is "insured" or guaranteed does not mean they are federally insured. Much like the mortgage industry, you need to be aware of all of the players – lender, guarantor and servicers. The servicers will change frequently and your client may have no idea who the lender or guarantor may be. As a practical matter, Educational Credit Management Corporation (ECMC) is the largest guarantor and in one report was involved in over ½ of the student loan cases studied. The distinction may get more clarity as Sallie Mae announced in May 2013 that there were going to split into two companies – one servicing government backed loans and the other making private loans.

The options available for private student loans may include defense in state court, merely accepting the judgment and the results that follow, or filing of Chapter 7 bankruptcy in search of a hardship discharge. There is also the option of seeking Chapter 13 protection if the judgment collection impact is more than the debtor can withstand. The Chapter 13 can be used either to litigate the hardship discharge or just for the 5 years of protection it provides.

Some private loans do provide for forbearance and deferral options, but they are limited both in duration and number and are always discretionary

SETTLEMENT

Where federally insured student loans can be settled it is usually at between 90% and 100%, private lenders will in the right circumstances settle at between 30% and 80%.

COLLECTION POWERS

The somewhat awesome collection powers one hears about in student loan cases such as tax refund offsets, offset of social security payments and administrative wage garnishments without suit, are only available for federally insured student loans and not to private lenders. The only remedy available to private lenders, other than threats, is to obtain a judgment and use state laws for garnishment or execution. Be aware that some collectors for private lenders have been known to claim to have the collection remedies that are exclusive to federally insured loans.

DEFENSES

You need to remember that although non-dischargeable, in all other respects, private student loans are just like any other debt – in essence a glorified credit card. As a result, they are subject to all of the common law defenses of any other contract claim (other than "infancy.") This would include formation defenses and the applicable statute of limitations. And do not forget the Truth in Lending Act (TILA) and the Fair Debt Collection Practices Act (FDCPA). In addition, in appropriate situations the Servicemembers Civil Relief Act (SCRA) is available.

The private student loans suffer from the same flaws that may plague the mortgage and credit card collectors – chain of title, lack of adequate records, and for the more advance litigators there is always the securitization issues. Also, unlike credit cards, private student loan creditors probably cannot avail themselves of the "account stated" cause of action. They will have to prove the amount due.

Finally, a frequently ripe field for defenses is the category of school related claims. This would include not only schools that are scams, but use of the Federal Trade Commission (FTC) Holder Rule which has been determined to be applicable to loans to attend for- profit vocational schools.

BANKRUPTCY

While still subject to the provisions of a 523(a)(8) hardship discharge, private student loans may be more vulnerable to partial or total discharge based on the lender's unwillingness to make any kind of work-out arrangements similar to income based repayment. Remember that if you do file for a hardship discharge, to make sure that all necessary parties are named. Discharge of the lender will not discharge the debt due to the guarantor.

While it is beyond the scope of this article, every private loan should be examined to see if it really does fit the definition of "qualified education loan."

The use of Chapter 13 is particularly useful with private student loans as there is frequently a co-signer involved in the loan and this co-signer can potentially be protected by the Chapter 13 co-debtor stay. Whether student loans that are not co-signed can be given special treatment in Chapter 13 depends on the applicable commitment period, your judge and the availability of section 1322 (b)(5) to "cure and maintain" long term debt.

If you decide to take on a hardship discharge case, a recent article seems to indicate that your odds are not bad. An article in the American Bankruptcy Law Journal, Volume 86, Issue 3, 2012, made an empirical analysis and found that hardship discharges are granted to

nearly 40% of those debtors requesting them. The more important statistic may be that only 0.1% of those debtors with student loan debt ask for a hardship discharge. The study was based on 213 Student Loan Adversary Proceedings filed in 2007. Due to the study parameters, the actual number may be about 30% higher. Surprisingly for those of us who are apprehensive about undertaking the litigation, the study reported that debtors without counsel were almost as likely to obtain a hardship discharge as those with an attorney. So, apparently it is NOT "rocket science." On the other hand, a more detailed analysis of both reported and unreported cases seemed to indicate that a debtor with a more experienced attorney had a better chance of obtaining a hardship discharge. However, the other factoid dropped in the syllabus of the article was that the debtors who were most successful in obtaining a hardship discharge were unemployed, had a medical hardship and had low annual incomes the year prior to filing for bankruptcy. Thus, they are unlikely to be able to afford the costs of litigation.

CANCELLATION & DISCHARGE

While disability discharge and cancellation are generally available only with federally insured student loans, Wells Fargo and Discover Bank recently announced that such relief would be available on a case by case basis. An important difference from federally insured student loans is that death is NOT a release. The claim continues against the estate of the deceased student and any co-signers.

CO-SIGNER RELEASE

While no documentation has been located, it is rumored that some private lenders will release a co-signer in exchange for payment of 33% of the balance due, or for 24 to 36 months of payments at 15% above the standard payment. However, it is contingent upon the lender finding that the borrower has "good credit" before the co-signer is released.

THE FUTURE

No immediate relief is in sight but there have been and still are bills pending to take the protection of Section 523(a)(8) away from private loans. However, nothing is likely to happen with the current Congress unless the bill is attached to something urgent which must be passed.

More relief may be in sight as the new Consumer Financial Protection Bureau has taken an interest in student loans and has an ombudsman. However, while most student loan can be helped in some way, there are many situations in which all that you can provide is hope that someday there will be relief available.

TUITION CLAW BACKS

In the past few months a new potential nightmare has appeared for debtors. While most bankruptcy attorneys are used to the idea of a Trustee going after a preferential transfer under 11 USC 547 or the obvious fraudulent transfer under 11 USC 548, a new opportunity has arisen to fund bankruptcy estates. Aside from the actual intent to hinder, delay or defraud as described in section 548(a)(1)(A), the Trustee can also recover any asset transferred if the debtor did not receive reasonably equivalent value in return (548(a)(1)(B)(i) and was insolvent or became insolvent as a result. The look back period is now 2 years.

Enter the specter of payment of college tuition by a parent for an adult child. While this conduct has never been unusual, it is only in recent years that tuition payments have loomed so large for so many people as to make them a plump target. While there are many technical defenses to a section 547 preferential transfer, that section would ordinarily not apply in this setting as the parent is not paying a debt THEY owe. Thus, the payment is a fraudulent conveyance. Another technicality making this situation even worse is that when the Trustee recovers a preferential transfer, the target can file a proof of claim. That is not possible with a fraudulent conveyance as the "target" has no bona fide claim against the debtor.

While payment of tuition for a minor child might provide a defense, there is no legal obligation in most situations for a parent to pay college tuition for an adult child. While there have been many tuition claw backs mentioned in the media, none have appeared to involve a parent making payments ordered by a Decree of Dissolution. That MIGHT provide a defense.

If there is no defense and the school turns over the tuition to the trustee upon demand or after having been sued and lost, the student will most likely be considered to still owe that money to the school. In most cases involving what might be called an "innocent" fraudulent conveyance, the debtor does not care that the target of the Trustee has to turn over money. In some cases such a turnover might even be welcome, allowing the bankruptcy estate to pay priority tax debt. However, in this setting, the student is caught in the middle and may not be able to continue school and if school has been completed, may be sued by the college and be denied official transcripts.

While there are some defenses to section 548, they are limited and primarily apply to the protection of charitable contributions. This protection was placed into the Code via the "Religious Freedom and Restoration Act." Some of the senior lawyers may recall Chapter 7 Trustees in the past around the country going after large contributions to churches. It was these actions that prompted the Code change.

The Wall Street Journal did a survey and found 25 such suits and found that more than a dozen complied with a Trustee demand. Some colleges have caved in immediately and paid the Trustee, others have been sued and lost, while other cases are still pending. Marquette University lost a case in 2010 and had to return $21,500.

One unusual case was referenced in the Wall Street Journal on July 27th, 2015. In this particular case (Connecticut AP 15-03011), Johnson & Wales University is fighting back because the $46,909 at stake came from a Department of Education PLUS loan which went straight to the college and the funds could not have been used for any other purpose. From reading an update from the Wall Street Journal on September 25th, 2015, the defense appears to be that the funds were never property of the debtor and thus not property of the estate. The next hearing is set for December 2nd.

There is also litigation pending (Connecticut AP 14-11482) against Sacred Heart University in Fairfield, Connecticut for recovery of $66,275.18 (Wall Street Journal blog, September 9th, 2015). Yale, Brown and other schools are apparently filing Amicus briefs arguing that such lawsuits go against "societal and congressional expectations."

One case was located in which recovery by the Trustee was denied. As part of a 56 page opinion in Robert Shearer, Trustee vs. David Oberdick (AP # 08-2155) Judge Thomas Agresti decided on March 27th, 2013 that the Trustee could not recover payments to the University of Chicago and Robert Morris University totaling $82,536.22. This case has an unusual procedural setting. The Trustee had not sued the schools but was seeking recovery of the funds from an entireties account into which the debtor had transferred his paychecks. The colleges were paid from this entireties account and the spouse was not a debtor.

The Trustee was challenging several expenditures from this entireties account. The Debtor and his wife argued that the expenditures should be considered as necessaries for purposes of claims under the PaUFTA. Judge Agresti cited In re Cohen, 2012 WL 5360956 at 10, as follows: "While the Pennsylvania legislature has not yet enacted a statute that requires parents to pay for their children's post-secondary (undergraduate) education, this court holds that such expenses are reasonable and necessary for the maintenance of the Debtor's family for purposes of the fraudulent transfer statute only."

In citing the Cohen case, Judge Agresti said that "Even though there may not strictly speaking be a legal obligation for parents to assist in financing their children's college education, there is something of a societal expectation that parents will assist with such expense if they are able to do so." Due to the manner in which this case arose, it is unlikely that there is much in the case that could be used in a pure fraudulent conveyance action.

Now that we are confronted with this problem and the lack of defenses, probably all that we can do is to update our intake questionnaires and inquire if our clients have children in college and if so, how is their tuition paid. Sometimes timing will cure a problem and sometimes the debtor just needs to be aware of what is going to happen. The other possible cure of course is legislation. Representative Chris Collins (R. N.Y) introduced a bill (Protecting All College Tuition Act of 2015) which would prevent bankruptcy Trustees from filing suit against Colleges and Universities to recover tuition paid by parents. Stay tuned and be careful.

ADDITIONAL PLAN PARAGRAPHS

PLAN DATED 4/5/16

Paragraph 10.

Christian S. & Kia L. Swain, case 16-30800-rld13

"Buchanan" Provisions

* The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part, of her student loan obligations.

* The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment ("IDR") plan with the U.S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), without disqualification due to her bankruptcy.

* Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.

* The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.

* Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment other general unsecured claims as necessary to avoid any unfair discrimination.

* The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. A such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) ad adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.

* During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.

* In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.

* The Debtor's attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under IDR.

SAMPLE - Nonstandard provision requesting IDR participation

13. NONSTANDARD PROVISIONS

The nonstandard provisions listed below are restricted to those items applicable to the particular circumstances of the Debtor. Nonstandard provisions shall not contain a restatement of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules or the Mandatory Chapter 13 Form Plan. Any nonstandard provision placed elsewhere in this Plan is void and shall have no binding effect.

Nonstandard Provisions	
Debtor is currently on an Income Based Repayment (IBR) plan with Fed Loan Serv., Po Box 60610, Harrisburg PA 17106. Debtor's current monthly payment is zero and Debtor is current on her payments. Debtor shall continue with the IBR and provide the necessary information to adjust the monthly payment based upon current income. Debtor will file status reports and amended Schedules I & J when such adjustments are determined. Debtor shall pay the monthly IBR monthly payment until plan confirmation; thereafter, the Chapter 13 Trustee shall pay the monthly IBR payment.	

Chapter 13 Plan Non-Standard Section Template for Student Loan IDR Plans During Bankruptcy

For use by a debtor not in default on Federal student loans who wants to enroll in or remain in an IDR repayment plan while in a Chapter 13 bankruptcy plan.

Part 8 [or Insert Local Chapter 13 Plan Section Number] **Nonstandard Plan Provisions**

1) Student Loan Debt Non-Dischargeable
In accordance with 11 U.S.C. § 523(a)(8), this Chapter 13 plan of reorganization ("Chapter 13 Plan") cannot and does not provide for a discharge, in whole or in part, of the Debtor's federal student loan debt authorized pursuant to Title IV of the Higher Education Act of 1965, as amended ("Federal Student Loan(s)").

2) Identification of Federal Student Loan Debt

   a) Only Federal Student Loans that are currently in an income-driven repayment ("IDR") plan, or which Debtor is eligible to repay under an IDR plan during the pendency of this Chapter 13 case, are listed in subsection (2)(b), below. Debtor could owe other student loan obligations. The special provisions contained in this ___ [Insert "Part 8" or Plan Section Number] of the Chapter 13 Plan only apply to the Federal Student Loans listed in subsection (2)(b), below.

   b) As of [Insert date bankruptcy petition was filed], the Debtor's Federal Student Loan debt includes the following Title IV Student Loans:

Title IV Loan Holder	Date Loan Obtained	Type of Loan (Direct, FFEL, Subsidized, Unsubsidized)	Original Loan Amount

   c) The Federal Student Loans identified in subsection (2)(b), above, are held by the United States Department of Education ("Education") and / or [insert here other Title IV Student Loan Holders if applicable], pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070, et seq. Hereinafter, Education and other Title IV Student Loan Holders are referred to individually and collectively as "Title IV Loan Holder."

3) <u>Federal Student Loans not in Default</u>
As of [Insert date bankruptcy petition was filed], the Debtor is not in default, as defined in 34 CFR 682.200(b) or 685.102, as applicable, on any Federal Student Loans listed in subsection (2)(b) of this Section.

4) <u>Proof of Claim</u>
The Debtor affirms that a timely proof of claim has been filed with the Bankruptcy Court for each Federal Student Loan listed in subsection (2)(b) of this Section. If a Title IV Loan Holder has not filed a proof of claim for a Federal Student Loan listed by the Debtor in subsection 2(b), the Debtor will file a proof of claim for that Federal Student Loan within fifteen (15) days in advance of the date scheduled for the §1324 confirmation hearing on this Chapter 13 Plan. Such proof of claim is subject to later amendment by the Title IV Loan Holder.

5) <u>Continuation of Pre-Petition Federal Student Loan IDR Plan</u>

a) During the course of this Chapter 13 bankruptcy case until its dismissal or closure, the Debtor may continue participating in the IDR plan in which the Debtor participated pre-petition and for which Debtor otherwise continues to be qualified as determined by the Title IV Loan Holder.

i) The Debtor's monthly IDR plan payment is, as of the date of Debtor's bankruptcy petition, $_______________.

ii) The Debtor's monthly IDR plan payment is due to the Title IV Loan Holder on the [Insert day of the month] day of each month.

b) Debtor's Monthly Payments for Pre-Petition IDR Plan [use if Debtor will make IDR plan payment directly to Title IV Loan Holder]

i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

ii. Following confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section, outside of the Debtor's scheduled plan payments to the Chapter 13 Trustee.

ALTERNATIVE Subsection 5(b) [use if Debtor will make IDR plan payment through Chapter 13 Trustee's office]

b) Debtor's Monthly Payments for Pre-Petition IDR Plan

   i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

   ii. In order for the Chapter 13 Trustee to transfer timely the Debtor's first post-confirmation payment on the IDR plan, the Debtor must remit that IDR plan payment to the Chapter 13 Trustee *in advance* of the first post-confirmation payment due date, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of those funds to the Title IV Loan Holder.

   iii. The Title IV Loan Holder will be paid through the Chapter 13 plan as a Class _____ Creditor.

   iv. Following confirmation of this Chapter 13 Plan and in addition to the Debtor's scheduled Chapter 13 Plan payment to the Chapter 13 Trustee's office, the Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment. The Chapter 13 Trustee will transfer the IDR plan payment funds to the Title IV Loan Holder.

   v. The Debtor must remit each post-confirmation IDR plan payment to the Chapter 13 Trustee *in advance of the IDR payment due date*, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of the IDR plan payment to the Title IV Loan Holder.

   vi. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

   vii. Upon request of the Chapter 13 Trustee, the Debtor will request the Title IV Loan Holder modify Debtor's monthly IDR plan payment due-date to accommodate the Chapter 13 Trustee's disbursement schedule.

viii. The Chapter 13 Trustee may request the Title IV Loan Holder establish an automated clearinghouse (ACH) account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

ALTERNATIVE Paragraph 5 (use if Debtor will apply to and enroll in an IDR plan during Debtor's Chapter 13 plan)

5) Initial Participation in an IDR Plan

a) During the course of this Chapter 13 bankruptcy case until its dismissal or closure, the Debtor may submit an application for participation in any IDR plan for which the Debtor is otherwise qualified to any Title IV Loan Holder pursuant to 34 CFR 685.208, 34 CFR 685.209, 34 CFR 685.221 or 34 CFR 682.215.

b) The Title IV Loan Holder is not required to place the Debtor in an IDR plan.

c) The Debtor will provide notice to the United States Bankruptcy Court for the _________ District of ___________ ("Bankruptcy Court") and the Chapter 13 Trustee of Debtor's application for participation in an IDR plan.

d) If the Debtor submits an application for participation in an IDR plan and the Title IV Loan Holder determines the Debtor is qualified under the standard terms for participation specified in 34 CFR 685.208, 34 CFR 685.209 34, CFR 685.221, or 34 CFR 682.215, the Title IV Loan Holder may place the Debtor in an IDR plan while this Chapter 13 case is open.

(i) If the Title IV Loan Holder places the Debtor in an IDR plan, it is expressly understood and agreed by the Debtor that the Debtor's monthly IDR plan payments will be due to the Title IV Loan Holder while this Chapter 13 case is open, and will continue to be due monthly for a set period of time that extends beyond the Bankruptcy Court's entry of a Chapter 13 discharge and / or an order closing this Chapter 13 case.

(ii) If the Title IV Loan Holder places the Debtor in an IDR plan, it is expressly understood and agreed by the Debtor that the Debtor's full IDR plan monthly payments must be received timely by the Title IV Loan Holder.

(e) Within thirty (30) days of Debtor's receipt of a notice that the Title IV Loan Holder has determined Debtor's qualification for participation in an IDR plan and calculated

Debtor's monthly IDR plan payment, the Debtor shall notify the Chapter 13 Trustee of the IDR participation and the amount of the IDR plan monthly payment. Debtor is responsible to file with the Bankruptcy Court a motion to modify the Chapter 13 Plan to permit monthly payment under the IDR plan, indicating whether the payments will be made directly by the Debtor or through the Chapter 13 Trustee's office, and adjusting the Chapter 13 plan dividends, if necessary.

(f) [Use for Direct IDR Payment to Title IV Loan Holder]
The Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder outside of the Debtor's scheduled plan payments to the Chapter 13 Trustee.

ALTERNATIVE SUBSECTION (f)
[Use for IDR Payments Inside the Chapter 13 Plan]

The Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment for the Chapter 13 Trustee to transfer to the Title IV Loan Holder.

In order for the Chapter 13 Trustee to transfer Debtor's monthly IDR plan payment to the Title IV Loan Holder timely, the Debtor must remit each IDR plan payment in full to the Chapter 13 Trustee *in advance of the IDR payment due date*, and in good funds (money order, bank check, TFS payment, or payroll deduction).

i. The Title IV Loan Holder will be paid through the Chapter 13 Plan as a Class _____ Creditor.

ii. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

iii. Upon the request of the Chapter 13 Trustee, the Debtor will request the Title IV Loan Holder modify Debtor's monthly IDR plan payment due date in order to accommodate the Chapter 13 Trustee's disbursement schedule.

iv. The Chapter 13 Trustee may request the Title IV Loan Holder establish an ACH account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

6) Waivers

a. Debtor expressly acknowledges and agrees that regarding an application for initial participation and/ or continuing participation in an IDR plan while this Chapter 13 case is open, Debtor waives application of the automatic stay provisions of 11 U.S.C. § 362(a) to all loan servicing, administrative actions, and communications concerning the IDR plan by the Title IV Loan Holder, including but not limited to: determination of qualification for enrollment in an IDR plan; loan servicing; transmittal to the Debtor of monthly loan statements reflecting account balances and payments due; transmittal to the Debtor of other loan and plan documents; transmittal of correspondence (paper and electronic) to the Debtor; requests for documents or information from the Debtor; telephonic and live communications with the Debtor concerning the IDR plan application, payments, or balances due; transmittal to the Debtor of IDR participation documentation; payment information; notices of late payment due and delinquency; default prevention activities; and other administrative communications and actions concerning the Debtor's IDR plan.

b. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) with regard to and in consideration of the benefits of enrollment and participation in an IDR plan.

7) Annual Certification of Income and Family Size

Pursuant to 34 CFR 685.209, 34 CFR 685.221, or 34 CFR 682.215, as applicable, the Debtor shall annually certify (or as otherwise required by the Title IV Loan Holder) the Debtor's income and family size, and shall notify the Chapter 13 Trustee of any adjustment (increase or decrease) to the Debtor's monthly IDR plan payment resulting from annual certification.

a. Debtor expressly acknowledges and agrees that while this Chapter 13 case is open, Debtor waives application of the automatic stay provisions of 11 U.S.C. § 362(a) to all loan servicing, administrative actions, communications, and determinations concerning the certification of income and family size taken or effected during and for the certification process by the Title IV Loan Holder, including but not limited to: administrative communications and actions from the Title IV Loan Holder for the purpose of initiating certification; requests for documentation from the Debtor; determination of qualification for participation; and any action or communication listed in subsection (6) above, which is incorporated herein by reference.

b. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) associated with the IDR plan certification process, in consideration of the voluntary participation of and benefits to the Debtor of continued participation in an IDR plan.

c. If Debtor's annual certification of income and family size for an IDR plan results in changes to the Debtor's required monthly IDR plan payment amount, the Debtor will notify the Chapter 13 Trustee within seven (7) days of Debtor's receipt of notice from the Title IV Loan Holder of the revised monthly IDR plan payment amount. Either the Debtor or the Chapter 13 Trustee may file an 11 U.S.C. §1329(a) motion to modify this Chapter 13 plan to reflect the Debtor's revised monthly IDR plan payment.

d. If the Debtor fails to satisfy the requirements for annual certification for continued participation in the IDR plan, the Title IV Loan Holder will recalculate the monthly repayment amount according to the requirements of the IDR program.

   (i) Debtor expressly acknowledges and agrees that while this Chapter 13 case is open the Title IV Loan Holder's recalculation of the Debtor's repayment amount does not violate the automatic stay provisions of 11 U.S.C. § 362(a) as set forth in subsections (6) and (8) of this Section.

   (ii) Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) with regard to the recalculation of Debtor's Federal Student Loan repayment obligation while this Chapter 13 bankruptcy case is open.

8) <u>Discontinuation of Participation in IDR</u>

a. If during the course of this Chapter 13 case the Debtor no longer desires to participate in the IDR plan and seeks administrative forbearance status on the Federal Student Loans identified in subsection (2)(b) of this Section, the Debtor must contact the Title IV Loan Holder in writing by letter to inform the Title IV Loan Holder of this decision.

b. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan, Debtor shall contact and inform the Title IV Loan Holder in writing by letter. Based on the Debtor's information, the Title IV Loan Holder will place the Federal Student Loan into an appropriate status, such as administrative forbearance, and will stay collection action until after this Chapter 13 case is closed.

c. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan without notice to the Title IV Loan Holder, Debtor will incur a

delinquency and may default on the Federal Student Loan as defined in CFR 34 CFR 682.200(b) and 685.102.

i. Debtor expressly acknowledges and agrees that while this Chapter 13 case is open the Title IV Loan Holder's administrative communication and actions on the defaulted debt, which are the routine administrative processes that occur upon delinquency and default on Federal Student Loans, do not violate the automatic stay provisions of 11 U.S.C. § 362(a) as set forth in subsections (6) and (8) of this Section.

ii. The Title IV Loan Holder's administrative communication and actions do not include any form of active debt collection.

d. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of 11 U.S.C. § 362(a) with regard to the default status of Debtor's Federal Student Loan based on Debtor's non-payment while this Chapter 13 case is open, including communications with, correspondence to, or transmittal of statements to the Debtor, and telephonic and email contact with the Debtor, concerning and resulting from Debtor's Federal Student Loan default.

9) Opportunity for Title IV Loan Holder to Cure

Debtor first shall give notice to the Title IV Loan Holder in writing by letter of any alleged action by the Title IV Loan Holder concerning the Federal Student Loans and IDR plan that is contrary to the provisions of this Section and or 11 U.S.C. § 362(a). Debtor shall not institute any action in the Bankruptcy Court against the Title IV Loan Holder under 11 U.S.C. § 362(a) and (d) until after the Title IV Loan Holder has been given a reasonable opportunity to review, and, if appropriate, correct such actions. Notices provided to the Title IV Loan Holder under this subsection must include a description or identification of the actions that Debtor alleges to be in violation of this Section of the Chapter 13 Plan and/or 11 U.S.C. § 362(a).

10) Notice

Any Notice required to be given to the Title IV Loan Holder under this Section must include the Debtors' name(s), Debtor's bankruptcy case number and Chapter 13 designation, and identification of the Federal Student Loans, and must be made in writing by letter to:

[Title IV Loan Holder Name]
c/o The United States Attorney's Office
[_____DISTRICT of _______]
[Mailing Address]