



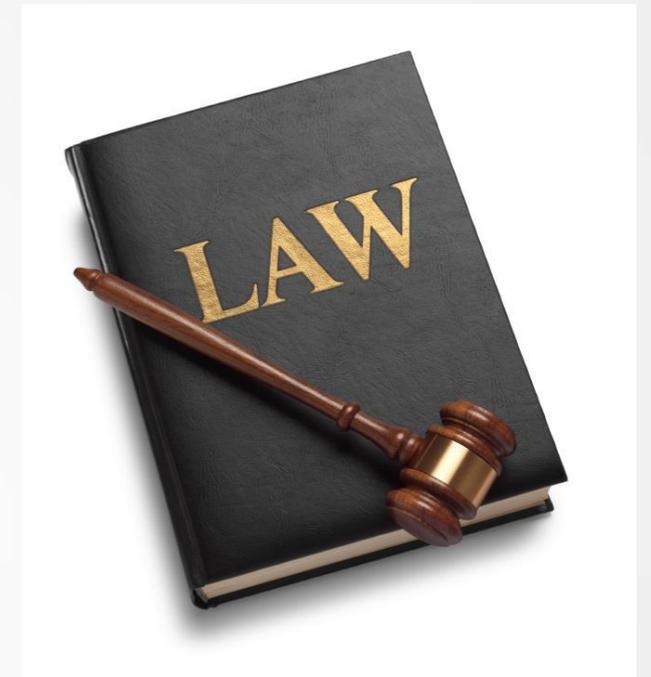
Bankruptcy

Second Alliance
Webinar March 2019

Presented by:

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Bankruptcy



This presentation is intended to give you an overview of Bankruptcy and Rulings that you will encounter while performing your duties regarding loans, tuition and contacting students on a daily basis

Who am I ???

I was the Associate Bursar and Director of the Office of Credit and Collections at Temple University

I was in charge of one of the Nations largest Loan Portfolios

My department dealt with Bankruptcy and Attorneys on a continual basis

We defended Bankruptcy for Loans and Tuition and Fees

I have been a Consultant in the Higher Education Industry and worked with Second Alliance as Director of Education for the past decade.

I have sat in your Chair and believe in passing on and sharing information to any school in need.

The information contained in today's webinar was learned through my experiences, research and the help of many friends in the Industry . Please take this information, Copy it, Steal it, Share it and if you have any questions call me!

Use the C.A.S.E Principal

Bankruptcy History

- ◆ The US Constitution granted Congress the power to create uniform laws for Bankruptcy throughout the United States
- ◆ The Constitution legislates that all bankruptcy laws are federal and handled only in federal courts (States are preempted from handling Bankruptcy)
- ◆ Bankruptcy was established to give debtors a “fresh start” and establish a priority system of repayment to creditors
- ◆ The Bankruptcy Code is found at 11 U.S.C. 101. et seq.

Bankruptcy Facts

- ◆ Over a Million bankruptcy filings a year
- ◆ Since 2005 and the implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act bankruptcy filings have increased
- ◆ The typical filer for Bankruptcy the past few years has been a white male, married, working full time with a net household income of less than \$30,000 per year and total debt of \$47,000 (not including mortgage debt)
- ◆ The BAPCA was the last significant legislation passed regarding bankruptcy

Student Loans & Bankruptcy

- ◆ How did student loans get in this picture? In the 1970s the government took a look at the perceived abuse of student loans in bankruptcy.
- ◆ It turned out that some students were actually financing their educations by taking out loans and filing bankruptcy upon graduation. Successive Congressional overhauls attempted to fix the perceived problem.
- ◆ The result of all the fixes in successive Congresses? Massive confusion and the need for a chart to know what was and was not dischargeable.
- ◆ When the BACPA* was signed into law in October of 2005, the game changed. Student loan debt was no longer dischargeable **UNLESS** the borrower filed for a hardship discharge.
- ◆ * The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub.L. 109-8, 119 Stat. 23, enacted April 20, 2005)

The Cost of Attending College

- ◆ For the first time ever student loan debt in America has eclipsed credit card debt. According to the National Association of Consumer Bankruptcy Attorneys, Americans now owe:
- ◆ 693 Billion in Credit Card Debt
- ◆ 730 Billion in Car loans
- ◆ 1.5 Trillion in Student Loan Debt (Barron's -March 2019)
- ◆ Graduates, drop-outs, those with advanced degrees and from all 50 States ...those buried in debt are everywhere!



Bankruptcy Terms

- ◆ Petition - Bankruptcy begins with the filing of a petition for relief filed in a federal bankruptcy court (voluntary or involuntary)
- ◆ Stay- Once filed an automatic Stay prohibits all entities (you or your agencies or attorneys) from any act to collect during the bankruptcy
- ◆ Trustee- A court appointee as fiduciary for the consumer. They may convert assets to cash, distribute the money or manage the consumers' repayment plan under Chapter 13

Bankruptcy Chapters

- ◆ Chapter 7 - Liquidation
- ◆ Chapter 11 - Business Reorganization
- ◆ Chapter 12 - Farm Protection
- ◆ Chapter 13 - Individual Reorganization
 - ◆ We will basically deal with Chapters 7 & 13

Chapter 7 - Liquidation

- ◆ Most Common
- ◆ Complete liquidation of debt
 - ◆ Priority payment by code (expenses, secured, unsecured)
- ◆ All debtors non-exempt assets sold to pay debts
- ◆ Runs about 90-180 days
- ◆ Generally not necessary to file a claim
 - Debtor is released from all dischargeable debt
 - Individual may file once every 8 years (Prior to 2005 was 6 years)

Chapter 13- Wage Earner

- ◆ For debtors with unsecured debts less than \$336,900 and secured debts less than \$1,101,650 (as of 1998) who **MUST** file a good faith plan to repay within 15-days of filing.
- ◆ Under the newest rules some leftover balances may no longer be discharged at the end of the plan depending on purchase date and cost.
- ◆ Debtor keeps all property and makes payments on debts from money earned **AFTER** filing.
- ◆ Under BACPA, if income exceeds means to pay, the debtor may be required to provide adequate fiscal protection to creditors to prevent their security from depreciating faster than they are being paid off.
- ◆ All money goes to a trustee who distributes all funds.
- ◆ Regular installments are paid according to a plan approved by the court.
- ◆ Runs 3 to 5 years.
- ◆ Educational debt is non-secured and not a priority. Most loans are not paid in full by the end of the bankruptcy.
- ◆ **TIP-PROACTIVE AND POSITIVE:** Contact the borrower's attorney and request reaffirmation of the debt. Suggest a payment plan because the debt is not dischargeable. *Rehabilitation may be an option to support a "Fresh Start".*

Dismissal

- ◆ Trustee or a creditor may petition the Bankruptcy Court for Dismissal
- ◆ Being dismissed means the debtor does not qualify under the code, as bankrupt
- ◆ The Court may also dismiss a case due to substantial abuse of the Bankruptcy Code
- ◆ Remember Dismissal does not mean Discharge

Discharge

- ◆ A debtor receives a discharge from Bankruptcy Court when they have met the requirements of the Code under the Chapter in which their bankruptcy was governed (All DISCHARGEABLE debts are effectively discharged and no longer owed).
- ◆ You should have students look at their Discharge Order (with you if possible)to see that their student debt has not been discharged.

The Law and Student Loans in Bankruptcy

- ◆ The US Bankruptcy code was amended under BACPA to include “qualified education loans” in the exceptions to discharge.
- ◆ An “education loan” can fail to qualify for non-dischargeability if:
 - ◆ It is used at a school that is a non-Title IV institution .
 - ◆ It is used for costs not included within the definition of cost of attendance.
 - ◆ It is used for study abroad not under the purview of the home institution.
 - ◆ **It is used for a previous year’s school charges.**

Changes You Need to Know

- ◆ 523(a)(8)(b) changes the definition of a Qualified Education Loan to match the IRS definition
- ◆ The term “qualified education loan” means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses-
 - ◆ (A) which are incurred on behalf of the taxpayer, the taxpayer’s spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,
 - ◆ (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and
 - ◆ (C) which are attributable to education furnished during a period which the recipient was an eligible student. Such term includes indebtedness used to refinance indebtedness which qualifies as a qualified education loan
- ◆ (This does not include money borrowed from a relative or an employer plan)

Qualified Higher Education Expenses

- ◆ The pertinent part of “qualified education expenses” means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087II).
- ◆ Qualified education expenses include tuition, fees, special needs services, supplies and equipment in the case of a special needs beneficiary. It includes transportation but not buying a car or a computer UNLESS it is part of the usual requirements for the school or specific class.
- ◆ The cost of room and board is a qualified education expense if the student is attending at least half-time.

Eligible Institutions

An **eligible educational institution** is any college, university, vocational school, or other postsecondary educational institution **eligible to participate in the student aid programs administered by the Department of Education.** (This category includes virtually all accredited public, nonprofit, and proprietary postsecondary institutions.)

At this point, this includes private loans granted by the school specifically to attend the school.

A school must be eligible but does not have to participate in federal student aid programs.

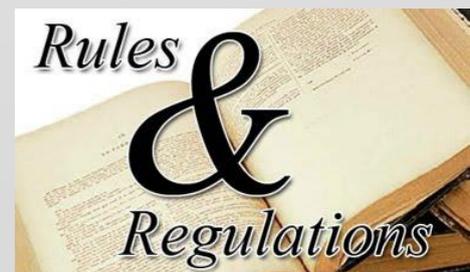
WHAT HAS CHANGED WITH BACPA?

Bankruptcy Abuse and Consumer Protection Act

- ◆ Presumptively, ALL qualified educational loans are no longer dischargeable-- including for-profit loans.
- ◆ If the debt incurred was "required of all students in the same course of study". This could be construed as bookstore charges and lab fees and equipment purchases that are REQUIRED.
- ◆ Be careful with fighting things like parking citations. Were they necessary to the student's education?

Prepare for Bankruptcy Battles

- ◆ Schools should be using a promissory note for all (tuition) debt to protect themselves.
- ◆ The law is a living thing and can change at any time with a new precedent setting case in any of the Circuit Courts across the country.
- ◆ Cover your assets with a note that has a signature, clearly indicates the debt is for educational purposes and lays out the expectations for repayment and any penalties for non-payment.
 - ◆ **TIP:** Speak to your school attorney about crafting an appropriate note for your institution.



Know The Requirements

- ◆ Determine the type: Chapter 7 (liquidation) or 13 (reorganization)?
- ◆ Your response will be determined by the type filed. FREEZE all accounts as of the date of the bankruptcy. Take a screen shot and save it for use to make sure everything is put back correctly after discharge notice is received.
- ◆ Billing activity must stop immediately.
 - ◆ Do not call, write or send bills to the borrower during the period of the “automatic stay”, also called “pendency”. Cease collection efforts and notify your agencies to cease collection.
- ◆ Communicate only with the borrower’s attorney or the courts.
- ◆ Understand that if you receive voluntary payments:
 - ◆ You MUST notify the borrower’s attorney. The judge has control of all of the borrower’s assets during a bankruptcy. You do not want to be perceived as receiving favorable treatment. In most cases, you will be permitted to receive payment or set up a plan because student debt is non-dischargeable

Do Not Ignore the Courts

- ◆ **RELEASE** transcripts if they are being held only for non-payment.
- ◆ **BE VERY CAREFUL** about not releasing transcripts! This is your chance to be **PROACTIVE!** If the borrower gets a transcript, perhaps she'll have a job and resume repayment on her loans. Think **POSITIVE!**
- ◆ **SET YOUR COURSE FOR SUCCESS:**
 - ◆ **WRITE LETTERS** to the borrower's attorney and copy the trustee to acknowledge the bankruptcy and state the school's position (or employ an attorney to do so).
 - ◆ **FILE a claim if directed to do so by the courts.**
 - ◆ Almost never in Chapter 7's and always in Chapter 13's.
- ◆ [NEVER IGNORE A NOTICE FROM THE COURTS!](#)

A Suggestion from Experience

- ◆ Student loans are considered “Self-executing”, and you are not required by law to file a claim unless directed to do so by the courts.
- ◆ However, it is still a good idea to file a claim in Chapter 13’s to make sure you are on the mailing matrix to receive notices regarding the case.
- ◆ **BEWARE!** Some unscrupulous attorneys have hidden “plain language discharge” in Chapter 13 proposed payment plans. Get a copy of the plan, review it and make sure there is no language that says you agree to discharge the loan at the end of the bankruptcy—whether or not it is paid in full!

Hardship Discharge

- ◆ The only way out of repaying a federal student loan in bankruptcy is via a **HARDSHIP DISCHARGE**, it doesn't happen often but it does happen.
- ◆ It is an adversarial proceeding, and you will be notified before the case is heard.
- ◆ Make sure you are on the mailing matrix for bankruptcy cases by communicating with the courts.

Hardship Discharge

- ◆ Courts use different tests to evaluate whether a particular borrower has shown an undue hardship.
- ◆ The most common test is the Brunner test which requires a showing that :
 1. the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the student loans;
 2. additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
 3. the debtor has made good faith efforts to repay the loans. (Brunner v. New York State Higher Educ. Servs. Corp., 831 F. 2d 395 (2d Cir. 1987). Most, but not all, courts use this test.)

Economic Hardship

- ◆ If one can successfully prove undue hardship, their student loan will be completely canceled. Filing for bankruptcy also automatically protects the borrower from collection actions on debts, at least until the bankruptcy case is resolved or until the creditor gets permission from the court to start collecting again
- ◆ If you contact me after the conference, I can provide you with a Worksheet to help determine if a borrower may qualify for this discharge.

UNDUE HARDSHIP EXAMPLES

It is up to the court to decide whether you meet the “undue hardship” standard. Here are a few examples of successful and unsuccessful cases.

1. A 50 year old student loan borrower earning about \$8.50/hour as a telemarketer was granted a discharge. The court agreed that the borrower had reached maximum earning capacity, did not earn enough to pay the loans and support minimal family expenses and appeared trapped in a “cycle of poverty.”
2. A college-educated married couple proved undue hardship and were able to discharge their loans. They both worked, but had income barely above poverty level. The court noted that the borrowers worked in worthwhile, although low-paying careers. One worked as a teacher’s aide and the other as a teacher working with emotionally disturbed children. Even with a very frugal budget, they had \$400 more a month in expenses than income. Their expenses included \$100 monthly tuition to send their daughter to private school. Relatives paid for most of this and the couple testified that they objected to the public school’s corporeal punishment policy. In agreeing to discharge the loans, the court also found that the couple had acted in good faith because they asked about the possibility of a more affordable repayment plan. Not all courts are as sympathetic to borrowers who work in low-paying careers. For example, one borrower was denied a discharge because he worked as a cellist for an orchestra and taught music part-time. The court suggested that this borrower could find higher-paying work. Another court came up with the same result for a pastor. The court found that it was the borrower’s choice to work as a pastor for a start-up church rather than try to find a higher paying job.
3. A number of courts have granted discharges in cases where the borrower did not benefit from the education or went to a fraudulent school.
4. There have been mixed results when borrowers have tried to show that their financial difficulties will persist into the future. For example, one court found that a borrower’s alcoholism was not an insurmountable problem, but some borrowers have won these cases. In one case, a borrower’s testimony about her mental impairment, including evidence that she received Social Security benefits, was enough to convince the court of undue hardship. The court agreed with the borrower that her ongoing mental illness was likely to continue to interfere with her ability to work.

Obtaining Bankruptcy Information

- ◆ Public Access to Court Electronic Records ([PACER](#)) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index via the Internet. Links to all courts are provided from this web site. Electronic access is available by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center.
 - ◆ Yes, it does cost money, but not much and most attorneys use this site
- ◆ VCIS (Voice Case Information System) is a FREE way to find out the status of a student's bankruptcy. You do however need to locate the appropriate Bankruptcy Court and obtain the telephone number.

After Bankruptcy

- ◆ Put the account back into active billing status.
 - ◆ Interest does accrue during bankruptcy and should be put back on as of the date the account was frozen, BUT the account should not reflect additional aging or months past due.
 - ◆ Holds can go back on for non-payment.
 - ◆ Send borrowers a letter apprising them of their return to repayment. **This is a great time to offer rehab, so they can get the account current and keep their credit clean.**
 - ◆ Be prepared for confused borrowers who think “all dischargeable debts” includes their student loans.
- ◆ TIP: DEVELOP A LETTER TO SEND TO BORROWERS AFTER BANKRUPTCY EXPLAINING THE SCHOOL'S POSITION.



In School and in Bankruptcy?

- ◆ An enrolled borrower who files for bankruptcy should have that loan closed immediately.
 - ◆ It will be included in the bankruptcy, but loans advanced after the date of filing will not. Give the borrower a new prom note and a new loan for additional advances.
- ◆ A student can qualify for more loans even if the last ones were discharged in bankruptcy.
 - ◆ A student may not be denied loans based on filing bankruptcy as long as any loans he has are current.
 - ◆ **HOWEVER** a school can consider the student's post bankruptcy payment/performance as an indicator of willingness to repay the loan.

Protect Your School

- ◆ Don't let debt accumulate. Begin debt collection early and be consistent!
- ◆ Have clearly WRITTEN POLICIES regarding your tuition/AR and private loans. Furnish them to students every year. Get those promissory notes in place!
- ◆ Remember students are allowed to inspect their records even if they owe money. This does not mean you have to give them a copy of their transcripts.

BE PROACTIVE!

- ◆ Establish a Promissory Note for Students who cannot prepay tuition and fees

Other Legal Highlights

The following are Laws and Rulings that we feel you should be aware of when dealing with the Collection of past due loans and related educational costs.

Undue hardship

- ◆ Court rulings identify 3 key elements that must be proven by a preponderance of the evidence:
 - ◆ Based on the debtors current income they cannot maintain a minimal standard of living
 - ◆ The current situation is likely to persist for the duration of the repayment period
 - ◆ A good faith effort has been made to repay the loans
- ◆ If granted you will see a major intervening circumstance dramatically affected the debtors ability to earn a living.

Institutional vs Federal Debt in Bankruptcy

- ◆ Various cases uphold Institutional Debt as an Education Necessity as long as:
 - ◆ Funds changed hands
 - ◆ There was a signed agreement
 - ◆ Upheld in 2nd, 3rd and 7th Circuit Courts (Mid Atlantic, New England & Midwest)

Telephone Consumers Protection Act (TCPA)

- ◆ Understand that creditors (Schools) and agencies and law firms are liable under this law. Also that creditors are liable for actions of their agencies.
- ◆ The key points are PRIOR -Authorization and dialing technology
- ◆ The Perkins Master Promissory Note in 2012 was changed to include language that should be adopted by all:
 - ◆ “ I authorize the School, the Department and their respective agents and contractors to contact me regarding my loan request or my loans at the current or any future number that I may provide for my cellular phone or other wireless device using automated telephone dialing equipment or artificial or prerecorded voice or text messages.”

Fair Debt Collection Practices Act (FDCPA)

- ◆ This law has been in effect since the 1970s and covers many aspects of collections. The area that has affected Schools has been in the wording of fees vs costs and the adding of collection costs to debts. Specific cases have determined that to add late fees and other fees the debtor must agree in advance and they must be in the contract language. Furthermore the collection agency fees are between the School and the agency and may not be added as an additional cost to the debtor.
- ◆ This is of course different than with loans and the courts have determined that “reasonable” may not be what the school and agency agree on and is an area of concern, so to be conservative I would suggest that collection fees be added only to loan debt.

And more.....

- ◆ Additional State Laws like the Rosenthal Act in California will apply to Schools with Students residing in those States and the Consumer Financial Protection Bureau (CFPB) that was created as part of the Dodd-Frank Wall Street Reform Act in 2010 all have areas that apply to us and should be covered in **future presentations**.
- ◆ My DISCLAIMER!!
 - ◆ I am not an attorney and therefore this presentation is not intended as legal advice and does not replace the advice of your University Counsel. This presentation is intended for educational and informational purposes for the Campus based community.

Thank you

Please feel free to contact me:

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Second Alliance, INC.

A Professional Student Loan Collection Service