Fall 2016

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

PRESIDENT'S MESSAGE

by Kelley Petry
Kelley Petry, P.A.

It has become almost universally true that attending law school will require a student to obtain educational loans. Not only graduate level education, but bachelor degrees and even trade degrees have become a cost that frequently exceeds what an individual can pay without financial aid. As a result, many individuals enter their career with debt that not only seems insurmountable, but often affects their ability to develop their futures by buying homes, having families, and even saving money for retirement. A statistic from a reliable source states that there are 44 million student loan borrowers in the United States, with an estimated total of $1.3 trillion owed.

Without several aspects of the system changing, a crisis seems inevitable. What can be done to address the situation? The cost of schooling itself has increased due largely to increased administration costs due to rising six and seven-figure salaries, not faculty expenses. In fact, many colleges and universities no longer offer tenure, rather turning many positions into part time positions.

Once a student has incurred the loans, the options for repayment are limited. Interest applied is not negotiable. Maybe an income contingent plan is feasible. One of the best changes that could be made is to allow refinance or modification of loans, just as many home mortgages have been modified through the framework of HAMP.

Of course, dischargeability of student loans through bankruptcy has historically required a nearly insurmountable burden of proof. Fortunately, it does seem that the standard may be evolving. The interpretation of "undue hardship" is becoming more broadly interpreted by some Courts, expanding the possibility of more debtors qualifying for partial or full discharge.

Based on a Pacer search, I found three (3) adversaries that were filed in 2016 and are currently pending under 11 U.S.C. §523(a)(8) in the Middle District of Florida. One of these is my case of Ramos vs. Navient filed October 21, 2016. I hope in a future edition of the Cramdown to submit an article explaining my wildly successful challenge to dischargeability and the great success achieved for my client.

In the meantime, we need more adversaries filed. We can't change case law without cases. If you believe you have a client with a strong case, but you are unable to handle the adversary for whatever reason, please send your client to either myself or Christie Arkovitch, who is also current prosecuting one of the three (3) cases, for a consultation. We want to find every opportunity to make changes in the ability to discharge student loans.

As always, if you have any issues that you would like to have the TBBBA consider, or just have a question, please feel free to call me.

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The *Cramdown* can be accessed via the Internet at www.flmb.uscourts.gov and www.TBBBA.com

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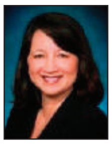

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College-Favorable Ruling Protecting Tuition Payments Funded by Bankrupt Parents for Dependent Child From Avoidance Certified for Direct Appeal to the First Circuit

by: Lynne Xerras, Holland & Knight LLP

It is the start of a new semester, and all across the country, parents are writing tuition checks to the colleges and universities that their children attend. Colleges accept the checks on behalf of the students, the tuitions are marked paid and the students are enrolled. Nothing unusual or improper about this scenario, right? Bankruptcy trustees may disagree: When the parents who wrote those checks are in Chapter 7 bankruptcy, trustees may view those checks as fraudulent transfers. (See Holland & Knight's alert, *"Reversing the Trend: Will Congress Act to Except College Tuition Payments from Clawback in Bankruptcy?,"* July 21, 2015.)

Background

It has become increasingly common for trustees administering individual bankruptcy cases to take the position that tuition payments paid by a parent to a college on an adult child's behalf prior to the parent's bankruptcy are avoidable as "constructively fraudulent" transfers.[1] The trustee's theory is based on the premise that, while the matriculating student receives consideration from a college or university in the form of education, the parent writing the check to that college or university receives nothing of "value" in exchange, let alone the required "reasonably equivalent value."[2] So long as the trustee can meet his or her burden of proof on the remaining elements of the governing avoidance statute, there is risk that a defending university will be required to refund up to four years' worth of tuition and housing payments to the trustee to pay the parent/debtor's creditors, *even though the debtor's child was educated at the university.* According to a Wall Street Journal analysis of docket activity, colleges and universities have been the subject of demand or suit in more than 31 instances in the past 18 months.[3] Most colleges and universities, however, appear to have elected to compromise the trustee's claims – and refund a portion of the tuition paid on behalf of a student – rather than bear the cost of litigating these suits in the bankruptcy courts.

Bankruptcy courts that have considered the merits of litigation involving suit by a trustee to recover tuition payments from colleges and universities have reached disparate rulings. Two bankruptcy courts have held tuition payments to be avoidable fraudulent transfers on the basis that parents without a legal obligation to support their children past the age of adulthood or without proof of receipt of indirect consideration did not receive the necessary "reasonably equivalent value" from the college or university that received the tuition payments at issue.[4] Two Pennsylvania bankruptcy courts, on the other hand, have denied such claims, finding "reasonably equivalent value" to have been received by the debtor/parents since the tuition payments were made out of a reasonable sense of parental obligation based on societal expectation that parents will assist with such expense if they are able to do so.[5]

***Palladino* Ruling in Favor of Sacred Heart University**

A ruling by Chief Judge Melvin Hoffman of the U.S.

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1 In any chapter 7 bankruptcy case, it is common for the acting trustee to examine the individual debtor's pre-bankruptcy transactions and transfers to determine if such transactions can be "unwound" using the trustee's statutory avoidance powers to ultimately increase the pool of assets available pay a debtor's creditors.
2 These "constructively fraudulent" pre-bankruptcy transfers are generally recoverable under either Section 544 or Section 548 of the U.S. Bankruptcy Code, codified at 11 U.S.C. §§ 101 *et seq.*, along with applicable state law. Avoidable transfers include, among others, those made by a debtor while insolvent and for which transfer the debtor did not receive "reasonably equivalent value".
3 See, http://blogs.wsj.com/bankruptcy/2016/04/19/colleges-continue-to-return-tuition-money-in-bankruptcy-fights.
4 Gold v. Marquette University (In re Leonard), 454 B.R. 444 (E.D. Mich. 2011); Banner v. Lindsay (In re Lindsay), No. 06-36352 (CGM), 2010 WL 1780065 (Bankr. S.D.N.Y. May 4, 2010).
5 Sikirica v. Cohen (In re Cohen), No. 05-38135 (JAD), 2012 WL 5360956 (Bankr. W.D. Pa. October 31, 2012); Shearer v. Oberdick (In re Oberdick), 490 B.R. 687 (Bankr. W.D. Pa. 2013)

College - Favorable Ruling

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Bankruptcy Court for the District of Massachusetts in the pending Chapter 7 bankruptcy case of *In re Steven and Lori Palladino, et al.*, U.S.B.C. District of Massachusetts, Case No 14-11482, has tipped the scales ever so slightly in favor of institutions of higher education. In the Palladino case, the acting Chapter 7 trustee, Mark G. DeGiacomo (Trustee), sued Sacred Heart University (SHU) to avoid and recover a series of tuition payments totaling $64,696.22 funded by the Palladinos for their daughter's college tuition on the alternate theories of "actual" and "constructive" fraud.[7] In his motion for summary judgment, the Trustee urged that the tuition payments were avoidable given that the Palladinos had no legal obligation to pay for their adult daughter's college education and there was no evidence of any other direct or indirect *economic value* having been received from SHU, as that term is defined in the Bankruptcy Code.[8]

While SHU urged that the Palladinos received *direct economic benefit* in exchange for the payments to SHU in the form of development of a "financially self-sufficient daughter," its primary argument in support of summary judgment in its favor was that the evidence established that the required "reasonably equivalent value" took the form of "indirect benefit" to the Palladinos resulting from payment of the tuition to the university. SHU stressed that this *"indirect benefit"* took the form of satisfaction by the Palladinos of their "reasonable sense of parental obligation" as well as of societal expectation. SHU submitted affidavits of the Palladinos[9] and their daughter, demonstrating that the daughter qualified as a "dependent" for purposes of applying for financial aid using the Free Application for Federal Student Aid form distributed by the U.S. Department of Education, a form that required the collection of the details of the Palladinos' own financial information. Additionally, over objection of the Trustee, SHU submitted the expert testimony of the former director of financial aid services of the State of Connecticut, who opined through affidavit regarding how colleges compute federal need-based financial aid for a dependent student, and a higher education consultant who separately opined on which students receive financial aid, why parents choose to pay for their children's college education, and the societal benefits of parental financial support and of attending college.[10] Having established the *factual* evidence of "value," SHU urged that the Massachusetts Bankruptcy Court to conclude that "reasonably equivalent value" includes the *indirect value* that flows to a parent and that the payments received by SHU, therefore, were not avoidable fraudulent transfers on any theory.

On Aug. 10, 2016, Judge Hoffman issued his *Memorandum of Decision on Cross Motions for Summary Judgment*, Docket No. 76 (Decision). For SHU and other colleges and universities, it was a decision worth waiting for. After finding that the transfers to SHU were not *per se* avoidable merely based on the Palladinos' involvement in a Ponzi scheme, Judge Hoffman expressed that the central issue in the case before him was really

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6 The Trustee asserted that the payments were presumed to have been made with actual intend to hinder or delay the Palladino's creditors given that the Palladinos had admitted involvement in a Ponzi scheme.

7 The Trustee's claims were based on Section 548 of the U.S. Bankruptcy Code and Section 544 of the U.S. Bankruptcy Code and the Massachusetts Uniform Fraudulent Transfer Act, codified at M.G.L. c. 109A.

8 Early in the litigation, SHU moved to dismiss the Trustee's complaint, on the basis that the Trustee had failed to adequately plead the necessary elements of the various counts, in particular, facts supporting the allegation of lack of "reasonably equivalent value." At a September 2, 2015 hearing, the Bankruptcy Court denied that motion and therefore, refused to adopt a blanket rule insulating payments of college tuition from avoidance in all circumstances, instead suggesting that through the litigation the parties could "get to the facts of the nature of these payments and the nature of the relationship between the school, the parents and the student" to determine whether the facts justified the Trustee's cause of action. *Palladino* Case, Docket No. 24.

9 In her Affidavit, Lori Palladino stated: "As Nicole's mother, I feel obligated to pay Nicole's tuition because I am her mother and she shouldn't have to come out of SHU saddled with thousands of dollars in loans. Assisting Nicole with her loans gives her the best chance of graduating from SHU. Upon graduating, Nicole will be in the best position to go to graduate school, secure a job and become financially self-sufficient by finding her own place to live, paying her own bills and paying for her own food…If Nicole is unable to graduate from SHU, she will either move back home with me, or she will obtain her own place to live in which case I will have to pay for her housing, bills and food costs. Either of these options result [sic] in a financial burden on me. The value to my husband and I [sic] in exchange for paying the tuition to SHU is a financially self-sufficient daughter resulting in an economic break to us." *Palladino Case, Docket No. 40-3, at Pars. 16-17.*

10 In her Affidavit, Lori Palladino stated: "As Nicole's mother, I feel obligated to pay Nicole's tuition because I am her mother and she shouldn't have to come out of SHU saddled with thousands of dollars in loans. Assisting Nicole with her loans gives her the best chance of graduating from SHU. Upon graduating, Nicole will be in the best position to go to graduate school, secure a job and become financially self-sufficient by finding her own place to live, paying her own bills and paying for her own food…If Nicole is unable to graduate from SHU, she will either move back home with me, or she will obtain her own place to live in which case I will have to pay for her housing, bills and food costs. Either of these options result [sic] in a financial burden on me. The value to my husband and I [sic] in exchange for paying the tuition to SHU is a financially self-sufficient daughter resulting in an economic break to us." *Palladino Case, Docket No. 40-3, at Pars. 16-17.*

College - Favorable Ruling
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about "value" – whether the tuition payments were avoidable "because the Palladinos did not receive reasonably equivalent value from SHU in exchange for the payments?" *Decision* at p. 6. While noting that the Trustee was correct to point out that under Massachusetts law, a parent has no *legal* obligation to support an adult child and so, as the Trustee suggested, the only possible justification the Palladinos could have had for paying their daughter's college costs were of a "recondite variety," the Court nonetheless found the Trustee's approach to valuing the Palladinos' payments to SHU to be "overly rigid." *Decision* at p. 7.

Instead, the Court accepted SHU's argument that the Palladinos' payments to SHU were made in exchange for "reasonably equivalent value" because the Palladinos believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to her financial self-sufficiency. In doing so, the Court held that:

> A parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent. This, it seems to me, constitutes a *quid pro quo* that is reasonable and reasonable equivalence is all that is required.

Decision at p. 8

The Trustee filed a swift notice of appeal of the Decision on Aug. 15, 2016. The Massachusetts Bankruptcy Court countered with a rarely invoked right of the bankruptcy courts to certify an appeal of its order for direct appeal to the U.S. Court of Appeals for the First Circuit[1] under 28 U.S.C. § 158(d)(2). In his certification, Judge Hoffman urged that direct appeal is warranted as the Decision involves questions of law as to which there is no controlling decision in the First Circuit or from the Supreme Court, involves a matter of public importance and involves questions of law that have resulted in conflicting decisions among lower courts around the country.[2] The Trustee will likely attempt to challenge this certification, but it is not likely that those efforts will be fruitful.

Conclusion and Considerations

Judge Hoffman's certification may have cleared an expeditious path for the Court of Appeals to establish the controlling law on an issue that, one way or another, will have an impact on providers of higher education, at least those with a student population that have a permanent residence in any of the states comprising the First Circuit.

Predicting the outcome of the Trustee's appeal is difficult given the lack of guidance within the Bankruptcy Code and the conflict between 1) use of avoidance powers to recover assets transferred pre-petition for the benefit of unpaid creditors of a bankrupt debtor and 2) the pro-education policies that generally encourage and support higher education.

In the meantime, a proposed bill to amend Bankruptcy Code Section 548 to preclude trustees from avoiding a good-faith payment by a parent for a child's post-secondary education tuition has languished in Congress.[3] Given this stalled legislative effort, there will likely be no shortage of *amicus* briefs filed by major players in the higher education field desiring to shape Judge Hoffman's reasoning and ruling.

Federal Student Loan Remedies for ITT Graduates

by: Christie D. Arkovich, Esq.

ITT Tech closed its doors on September 7, 2016 after 50 years in operation. What was originally a respected technical school, turned into a for-profit private school nightmare for students who were misled into trying to better their lives but instead ended up tens of thousands of dollars in debt with virtually nothing to show for it. With an annual cost of $22,000, tuition alone for a four year degree would run $88,000, for a degree that some students later learned was better left off their resumes.

Expectations are that with the new federal guidelines coming out on November 1, 2016 allowing students to raise a Borrower Defense to Repayment ("BDTR") for their federal student loans that ITT could cost taxpayers up to 1 billion dollars in a student loan bailout.

The school had many of the warning signs of a poor-quality institution: aggressive recruiting tactics, high dropout rates, low loan repayment rates, grade inflation, and a large percentage of revenue derived from government subsidies. Evidence of fraud is coming to light about ITT's representations about job placement, the cost of education and its accreditation.

Borrower Defense to Repayment:

So what is BDTR and how did it come about? It was originally promulgated in 1994 by the Department of Education. It provides that "[i]n any proceeding to collect on a Direct Loan" – including, without limitation, a tax refund offset proceeding, a wage garnishment proceeding, a salary offset proceeding or a consumer reporting agency reporting proceeding – "the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law."[1] The BDTR is found in the set of regulations that governs the William D. Ford Direct Loan Program. The Direct Loan Program is a 2010 federal loan program under which the government extends loans directly to students. In July 1995, the Department issued an interpretation of the regulation, indicating that the claim must "directly relate[] to the loan or to the school's provision of educational services for which the loan was provided."[2]

But then for 20 years, BDTR was virtually dormant as there were only five reported cases filed under BDTR. So the DOE elected not to promulgate any forms, instructions or regulations regarding how to implement BDTR. Then came Corinthian Colleges, Inc.'s April 2015 closure and subsequent bankruptcy which was quickly followed by over 26,000 applications for closed school discharge and defense to repayment from students who attended Heald, Everest and WyoTech among others.[3] In response, the DOE placed the BDTR claimants in a holding pattern while it proceeded to utilize a Special Master and a negotiated rules committee to develop a protocol including a universal application form to facilitate the application process for students who were not covered by specific ED findings. The regulations finished a comment period at the end of August and are expected to be released on November 1.

These new regulations apply in ITT's situation. While ITT is presently undergoing multiple investigations by the DOE, the SEC, the CFPB and 19 state attorney generals, there has been no official finding of fraud by the DOE, nor any court rulings to date. The actual cause of the shutdown was the DOE's determination after consulting with ITT's national accreditation agency, (ACICS) that it was too risky to continue federal funding of student loans at ITT and requested ITT increase its reserves for potential claims. ITT shut its doors for good a week later.

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1 See C.F.R. § 685.206(c)(1).
2 See F.R. 37768, 37769.
3 U.S. Department of Education Fourth Report of the Special Master for Borrower Defense to the Under Secretary June 29, 2016.

Loan Remedies

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The application process requires specific and detailed information about the representations made by ITT's staff as well as arguments as to how the student relied upon the representations in deciding to enroll in ITT. A BDTR claim must be based on a school's act or omission that would give rise to a cause of action against the school under applicable state law.

The DOE has determined that it will allow FFEL and Perkins borrowers' claims of BDTR to be evaluated under the same standards as those available to Direct Loan borrowers if those borrowers consolidate their FFEL and/or Perkins loans into Direct Consolidation Loans. Any refunds will be treated differently, but the discharge of remaining balances will be available through this route. Federal Parent Plus loans will also be eligible for relief.

In our efforts to seek solutions for unaffordable private and federal student loans, we are hopeful that BDTR will result in widespread discharges of federal student loans for students who attended for profit schools like ITT, provided we can allege sufficient acts or omissions that were deceptive and unfair trade practices under Florida's Unfair and Deceptive Trade Practices Act ("FUDTPA") or other state law violations. State usury laws may come into play for the temporary credits ITT used to fill the gaps in its tuition that exceeded available federal aid. While the Truth in Lending Act ("TILA") is a federal law, Florida Statute §516.031 limits the interest rate and requires disclosure as required by TILA. While the present BDTR is silent on the timeframe in which a borrower can raise a BDTR defense, we are waiting for the final regulations to see if there is a statute of limitations. If so, we imagine it will likely be 3 years (the present time frame for the DOE to recover the amount of loss from a school) or 4 years (the SOL under FUDTPA or any state

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SAVE THE DATE

Consumer Lunch Schedule
courthouse, 5th floor training room

December 6, 2016
January 17, 2017
March 7, 2017
April 4, 2017
May 2, 2017

Monthly CLE Lunch – University Club

December 13, 2016
January 10, 2017
February 14, 2017
March 21, 2017
April 11, 2017
May 9, 2017

Happy Hour

January 26, 2017 – Location TBD
February 23, 2017 – Location TBD
March 23, 2017 – Location TBD
April 27, 2017 – Location TBD
May 25, 2017 – Location TBD

Holiday Party
December 1, 2016

Annual Dinner
June ___, 2017

Loan Remedies

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tort for misrepresentation or fraud) – but a usury violation would have no statute of limitations.

Income Based-Debt Forgiveness Plans:

For clients who are not likely to prevail under BDTR, there are some excellent income based debt forgiveness programs out there for federal loans. There is not one program that fits all, but most borrowers can obtain a reasonable and affordable payment utilizing these programs. The repayment period varies from 10-25 years at 10-20% of discretionary income at the end of which any balance remaining is forgiven.[4]

Borrowers are only eligible for income based debt forgiveness plans if they are current in their student loans. This means that any default must be cured by either a consolidation or rehabilitation. There advantages and disadvantages to each. For instance, a rehab takes longer, but it allows for the default to be removed from the borrower's credit, and for Direct Loans, can result in potentially zero collection costs. A consolidation will leave on roughly 18% of the 24% collection costs normally tacked onto a federal student loan upon default. A consolidation also leaves the default on the borrower's credit report. However,

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4 A Repayment Estimator can be found at: https://studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action?blockid=98%2c120%2c122%2c119%2c134#view-repayment-plans (caution: this site does not offer legal advice as to how to improve your client's payment options).

Loan Remedies

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a consolidation is good for changing a loan type for accessibility of other repayment programs including PSLF or ICR for Parent Plus loans, it only takes 45 days instead of 9 months, and can combine different loans for ease of payment and to change servicers. If an administrative wage garnishment order exists, then consolidation is no longer an option unless the AWG order is lifted through a bankruptcy.

After the default is cured or a federal loan(s) is otherwise current, then the borrower becomes eligible for an income based plan with the potential for debt forgiveness. The different programs include: Income-Based Repayment (IBR), Pay-As-You-Earn (PAYE), Revised Pay-As-You-Earn (REPAYE), Income-Contingent Repayment and an IBR for New Borrowers that starts with loans dated after July 2014.

Under the IBR plan and the IBR plan for New Borrowers, the loan repayment will cap at 10-15% of the borrower's discretionary income depending on when the loans were taken out. Most will be at 15% because the 10% payment only applies for new borrowers with loans dated after July 2014. Lower payment plans are available under the PAYE and REPAYE programs. However, PAYE is very limited in the loan dates: it only applies for those with no loan balances before October 1, 2008 and received a Direct Loan after October 1, 2011. REPAYE is much broader in the date of loan, but it only applies to Direct Loans, which would be those taken out after 2010 or that are consolidated into Direct Loans. Both PAYE and REPAYE allow for a 10% of discretionary income payment, but under REPAYE, a borrower must also use his or her spouse's income to determine the payment. Taxes can be filed separately under all of the programs except for REPAYE.

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Loan Remedies

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There are differences in how the discretionary income is calculated under the various programs. Some require a hardship be shown, and some have governmental subsidies that help to keep interest low for those borrowers who earn enough and likely will not receive any of the debt forgiveness at the end of the program. For public service workers, the Public Service Loan Forgiveness program (PSLF) reduces the repayment period to 10 years and also provides a waiver of taxes for forgiven debt upon its completion. Those with Parent Plus loans are only eligible for ICR, which has a higher cap of 20%, and requires 25 years rather than the 10% and 20 years under REPAY. ICR also uses a lower threshold for expenses, which results in a higher payment. Borrowers should never consolidate a Parent Plus loan with other federal loans, or else all the loans are tainted and are then only eligible for the higher payment ICR plan.

Current Students:

Additionally, for current students, area community colleges are accepting transfers of credits on a limited basis. There is the Closed School Discharge Program for students who attended ITT within 120 days of its closure and who cannot transfer their credits elsewhere. If students do transfer their credits elsewhere, that will limit their ability to apply for a closed school discharge for their federal loans. They will need to weigh the value and time commitment of the education received at ITT and whether they want to seek to continue their education and repay the federal loans, or discharge their federal loans and start anew.

Private Loans:

The options above are all solely for federal loans. If your clients have private loans, please contact us for other available options.

Bankruptcy Options:

Bankruptcy can be used to stop a garnishment, cure a default and otherwise get onto an income based plan. In cases where a debtor can show an undue hardship under the *Brunner* test[5] (presently under review by the 11th Circuit in *Acosta Conniff v. ECMC*, 16-12884 (11th Circuit 2016) they can seek a partial or full discharge of both federal and private loans.[6] There may also be an argument that ITT loans were not qualified educational loans and therefore are not exempt from discharge particularly if the BDTR results in a discharge of the federal loans.

5 *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)
6 11 U.S.C. 523(a)(8)(B) (defines term "qualified educational loan") and 26 U.S.C. 221(d)(1) (defines qualified higher education expenses and eligible educational institution").

Signs of Change? Recent Dischargeability Exceptions under § 523(a)(8)

by: Lara E. McGuire
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Although the *Brunner* "undue hardship" test[1] has become the quintessential determination for student loan dischargeability, recent courts have turned to principles of statutory construction to allow for the discharge of certain education-related expenses. The outcomes of these cases have turned on the definitions of "educational benefit" and "qualified education loans," rather than seeking discharge through more traditional means.

In *In re Campbell*,[2] the debtor sought to discharge her CitiAssist Bar Exam Loan, a loan of $15,000 she incurred to fund her bar study upon graduation from Pace University Law School.[3] In evaluating the dischargeability under Section 523(a)(8)(A)(ii), the court specifically focused its analysis on whether the Bar Loan was an "educational benefit" within the subsection.[4] The court at the outset rejected a broad reading that assumed that an "educational benefit" encompassed *any* loan that is tangentially related to education.[5] Such an interpretation, the court reasoned, would render the specific subsections superfluous.[6] Additionally, the court addressed the inclusion of an "educational benefit" in a list form under Section 523(a)(8)(A)(ii), finding that "when a statute contains a list, each word in that list presumptively has a 'similar' meaning."[7] "Educational benefit," under this theory, should be presumed to have a meaning similar to "scholarship" and "stipend" within the section as they related to types of conditional grants.[8] Furthermore, because the word "loan" exists elsewhere in Section 523(a)(8), an "educational benefit" "must be understood to refer to something other than a loan."[9] Through this analysis, the court held that "educational benefit" within the subsection "cannot properly be understood to include a consumer loan such as the Bar Loan."[10] Moreover, the court held that the requirement that the debtor be a law student to obtain the loan "does not turn an arm's length consumer credit transaction into a 'benefit' within the meaning of Section 523(a)(8)(A)(ii)."[11]

Turning to a different subsection, the court in *In re Decena*[12] evaluated the definition of "qualified education loan" under Section 523(a)(8)(B). In this case, the debtor's loans were incurred from her attendance at an unaccredited medical school in Senegal.[13] In citing affirmatively to the Campbell decision, the court first evaluated dischargeability under Section 523(a)(8)(A)(ii) and concluded that the loans in this case were not "obligation[s] to repay funds received as an educational benefit, scholarship, or stipend."[14] Going one step further, the court continued its analysis to the definition of "qualified education loan" in determining the dischargeability of the debt. Looking first at the definition of "qualified education loan" under the

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Signs of Change?

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Internal Revenue Code, the loan must arise from payment towards “qualified higher education expenses” as defined in 26 U.S.C. § 25A(f)(2).[15] Under this section, an “eligible educational institution” must both be described in section 481 of the Higher Education Act of 1965 and be eligible to participate under title IV of the Act.[16] The medical school the debtor attended was not an eligible institution on the Federal School Codes List; as such, the court found that it was not an “eligible education institution” and further that the loans are not “qualified education loans” exempt from discharge.[17]

Although these cases present both very recent and very narrow analyses, they may signal the changing approach courts might employ in addressing the student loan crisis and dischargeability.

1 Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).
2 547 B.R. 49 (Bankr. E.D.N.Y. 2016).
3 Id. at 52.
4 Id. at 54.
5 Id.
6 Id. (describing the theory that if § 523(a)(8)(A)(ii) were interpreted to extend to all education-related loans, it “would swallow both provisions.”).
7 Id. at 55 (citing Yates v. United States, —U.S.—, 135 S.Ct. 1074, 1089, 191 L.Ed.2d 64 (2015) (Alito, J., concurring in the judgment).
8 Id.
9 Id.
10 Id. at 59.
11 Id.
12 549 B.R. 11 (Bankr. E.D.N.Y. 2016).
13 Id. at 15.
14 Id. at 20. The court conducted a similar analysis to the Campbell decision from one month prior in its statutory interpretation. In agreeing with the Campbell court’s conclusion that Congress did not intent for the superfluous outcome a broad approach to § 523(a)(8) would create, the court favored an approach that evaluates “the manner in which the debt arose” rather than “focusing solely on the stated educational purpose giving rise to the debt.” Id. at 19.
15 26 U.S.C. § 221(d).
16 26 U.S.C. § 25A(f)(2).
17 Decena, 549 B.R. at 21. See also In re Meyer, 15-13193, 2016 WL 3251622, at *2 (Bankr. N.D. Ohio June 6, 2016) (citing with approval to Decena, the court found that, despite being serviced by domestic entities that service other student loan debts, the student loan from a foreign, for-profit university not accredited by the United States falls within the exception to discharge as they are not “qualified educational loans.”).

Bankruptcy Trustees May Take Advantage of the IRS' Ten-Year Limitations Period to Bring Avoidance Actions Under Section 544(b)

by: Linda Young
Buchanan Ingersoll & Rooney PC

Under *In re Kipnis*, No. 14-11370-RAM, 2016 WL 4543772 (Bankr. S.D. Fla. Aug. 31, 2016), trustees in bankruptcy now have ten years to bring an avoidance action that the Internal Revenue Service (IRS) could have timely pursued on the petition date.

In *Kipnis*, a debtor filed for chapter 11 on January 21, 2014, which was subsequently converted to chapter 7. The IRS had assessed over $1 million in taxes against the debtor back in March 2005. The IRS filed a proof of claim in the bankruptcy case, a portion of which was unsecured. The chapter 7 trustee instituted adversary proceedings under Florida's fraudulent transfer law, seeking to set aside and recover certain allegedly fraudulent transfers the debtor had made in August 2005 to his wife and to himself and his wife as tenants by the entireties.

The debtor's wife filed motions to dismiss both adversary proceedings, arguing that the trustee's actions were barred by the four-year statute of limitations under Florida law. The trustee responded that because the IRS is an unsecured creditor, he can step into its shoes under Section 544(b) of the Bankruptcy Code and not be bound by state statutes of limitation, but instead apply the ten-year IRS collection period. In other words, because the IRS could have timely filed a complaint to avoid the transfers on the petition date, the trustee could as well pursuant to Section 544(b).

The bankruptcy court agreed with the trustee. It started by noting that 11 U.S.C. § 544(b) allows a trustee to avoid a transfer "that is voidable under applicable law by a creditor holding an unsecured claim." It then turned to the Internal Revenue Code (IRC), Section 6502(a)(1) of which establishes a ten-year deadline for the IRS to make a levy or begin a proceeding to collect unpaid taxes. Section 6901(a)(1)(A) of the IRC permits the IRS to pursue avoidance actions against transferees of a taxpayer's property, subject to the same limitations applicable to collection from the taxpayer. Together, these sections give the IRS ten years from the date of assessment to bring an avoidance action to collect unpaid taxes.

The bankruptcy court noted the split of authority in bankruptcy courts outside the Eleventh Circuit regarding whether a trustee can use Section 544(b) to utilize the IRS's ten-year collection window. It noted that the majority of bankruptcy courts around the country have answered this question in the affirmative. The bankruptcy court agreed with the majority position, reasoning that it must look to the text and plain meaning of Section 544(b). It reasoned that Section 544(b) imposes no limitation on the "applicable law" or the type of unsecured creditor a trustee can use as the triggering creditor.

Moreover, the policy underlying the IRS's ten-year limitations period – namely, that the federal government is defending public rights and should not be bound by state law statutes of limitations – is irrelevant. Since the trustee is stepping into the shoes of a creditor with sovereign immunity, the focus is not whether the trustee is performing a public or private function, but whether the IRS (the creditor from whom the trustee is deriving his or her rights) would have been performing that public function if it had itself pursued the avoidance action. As a result, the bankruptcy court concluded that the trustee is permitted to step into the shoes of the IRS as an unsecured creditor under Section 544(b) to take advantage of the ten-year collection period provided for under 26 U.S.C. § 6502(a)(1).

The bankruptcy court commented that its ruling "would be a major change in existing practice," since trustees previously may not have realized that the longer, ten-year look-back period is a "weapon" in their arsenal. It noted that while Congress may have indeed intended to limit Section 544(b) to avoidance actions brought by non-governmental creditors, the court cannot read such a limitation into the text. Accordingly, if the IRS is an unsecured creditor, a bankruptcy trustee has ten years, as opposed to the four years under Florida law, to bring an avoidance action to set aside a fraudulent transfer.

Strict Compliance with Chapter 727, Florida Statutes, Required

by: Linda Young
Buchanan Ingersoll & Rooney PC

In case there was any doubt that one must strictly comply with the requirements in Florida's assignment for the benefit of creditors statute (Chapter 727, Florida Statutes), the Fourth District Court of Appeal of Florida just eliminated all such doubt. In Pro Finish, Inc. v. Estate of All Am. Trailer Mfrs., Inc., No. 4D15-2966, 2016 WL 4132721 (Fla. 4th DCA Aug. 3, 2016), the district court reversed a trial court's order approving an assignee's sale of assets free and clear of liens and approving the assignee's final report of distributions.

Although the Assignment itself met the Section 727.104(1) form requirements, the assignee failed to satisfy a number of other statutory requirements of Chapter 727, including: (a) failing to record the Assignment in the public records under Section 727.104(2)(a), (b) failing to file the petition commencing the ABC proceeding within ten days after delivery of the Assignment to the assignee under Section 727.104(2)(b), and (c) failing to publish notice of the Assignment in the newspaper within ten days after filing the petition under Section 727.111(1).

The district court noted that while there is little case law addressing Chapter 727, the "intent of chapter 727 is to provide a uniform procedure, ensure full reporting to creditors, and ensure equal distribution per priority." It held that the assignee's failure to strictly comply with certain petition and notice requirements of Chapter 727 rendered the assignment invalid and void. The district court agreed with the creditor's argument that the public policy behind the ABC framework is the "expedient payment of just debts to creditors and prompt notice to creditors of an assignment of the debtor's assets." It therefore also reversed the trial court's order denying the creditor's motion for reinstatement of its lien.

As a result, to avoid an entire assignment proceeding being deemed null and void, it is important to be sure to satisfy the strict statutory requirements of Chapter 727, particularly the time frames set forth therein to complete certain notice and filing obligations.

The HCBA's Military and Veterans Affairs Committee: Memorandum re: recruitment of volunteer bankruptcy lawyers
Bankruptcy Attorneys Needed to Help Veterans

The HCBA's Military and Veteran's Affairs Committee ("MVAC") is recruiting additional volunteer attorneys to be included in our Veterans Legal Assistance Registry ("VLAR") that can be found on the MVAC landing page within the HCBA's website (www.hillsbar.com). Volunteers are needed to provide pro bono bankruptcy assistance or legal help at a reduced or variable rate to both military veterans and active duty military members in need of pre and post filing advice and representation. Please consider visiting the website and volunteering your assistance for the men and women who have so bravely served our country.

To be included on the registry, email Robert Nader at rjn@naderlawfl.com or Alexandra Srsic at asrsic@bals.org.

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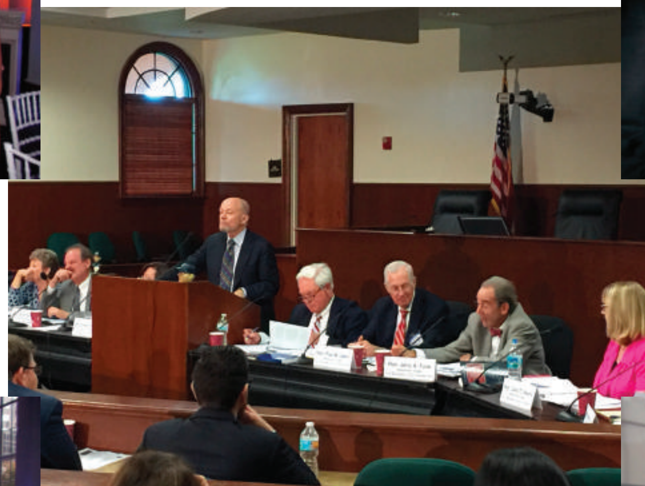

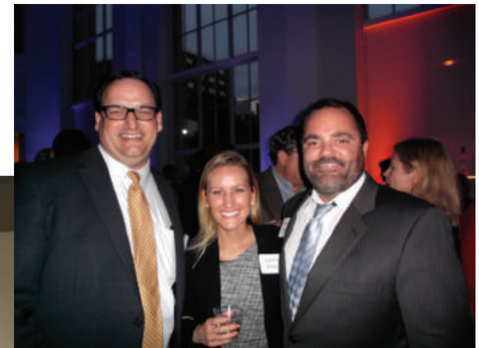

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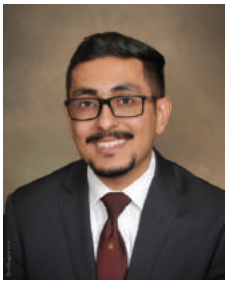

Shayaan Raja Joins Anthony & Partners, LLC

Anthony & Partners, LLC is proud to announce that Shayaan Raja has joined the firm as an associate. He received his B.A. from the University of Florida and his J.D. from the University of North Carolina at Chapel Hill. During law school Shay worked as a summer associate in Tampa and Naples, gaining experience in transactional law and commercial litigation. He also interned with the Research Triangle Regional Transit Authority, working on a number of issues related to real estate and environmental law.

Bella Vivian was welcomed to this world on August 8, 2016, at 7 lbs. 2 oz. and 21 inches, to proud parents Steven and Nicole Wirth, and her two-year-old sister Penelope.

Congratulations Nava and Donald Kirk! They became proud parents to Levi Kap Kirk on July 25, 2016.

Chapter 13 Debtors May Be Entitled to Certain Exempt and Non-Exempt Tax Credits from their Federal Income Tax Refund

by Maria D. Boudreaux, legal assistant to Kelley M. Petry, Esq.

On November 8, 2016, Judge Colton ruled that Chapter 13 Debtor's Earned Income Credit, Additional Child Tax Credit, and Health Care Credit will be exempt from Debtor's Federal Income Tax Return and that the Chapter 13 Trustees are not entitled to recover funds under this exemption.

Debtor, Julie T. Gardiner, represented by Jamie K. Proctor, Esq., filed for a Chapter 13 bankruptcy under case number 8:15-bk-11892-RCT. The Chapter 13 Trustee confirmed Debtor's plan with the provision that Debtor must annually turnover her tax return and any refund to the Trustee while she is in the Chapter 13. Debtor is a self-employed hairdresser with three dependent children. On Debtor's 2015 Federal Income Tax Return she had no $0.00 taxable income; however, Debtor owed self-employment tax of $3,191.00 and was entitled to three separate tax credits: the Earned Income Credit (EIC), the Additional Child Tax Credit (ACTC) and Health Care Credit (HCC) that resulted in a total refund to the Debtor in the amount of $5,323.00.

Debtor filed a motion with the Court to retain the tax refund in the amount of $5,323.00. The Chapter 13 Trustee argued that the tax refund was based on the exempt EIC and non-exempt tax credits: ACTC and HCC and the refund should be divided between the debtor and the trustee. The Debtor argued that she is entitled to the full tax refund as it is exempt under Florida Law as EIC.

The Court ruled that Florida has elected to opt out of most federal exemptions of the Bankruptcy Code; instead, Florida residents filing bankruptcy may exempt property only permitted by Florida Law. Under Fla. Stat. §222.25(3) A debtor's interest in a refund or a credit received or to be received, or the traceable deposits in a financial institution of a debtor's interest in a refund or credit, pursuant to s. 32 of the Internal Revenue Code of 1986, as amended. This exemption does not apply to a debt owed for child support or spousal support. Thus, Florida Law exempts any tax credit authorized under 26 U.S.C. §32 and one of these credits is the EIC. However, Florida Law does not exempt the Child Tax Credit (CTC), ACTC or the HCC.

The Court looked at the purpose behind the EIC and stated that the purpose of Florida exemption is to "immunize earned income credit due to eligible low income workers from claims of creditors regardless whether the credit has been received or commingled with a debtor' financial account, so long as it is traceable." *In Re Sanderson*, 283 B.R. 595, 597 (Bankr. M.D. Fla. 2002.). The court then looked at each individual additional credit (CTC, ACTC and the HCC) and discussed the purpose behind each credit and what is the intent of that credit when the credit was created. Finally, Court rationalized that due to the original intent when creating the exemption for EIC this Bankruptcy Court will allow all Chapter 13 Debtor's to first reduce Debtor's tax liability using the CTC/ACTC and the HCC, then by using the EIC. Therefore, if all of the Debtor's tax refund is made up of the exempt EIC and non-exempt credits of CTC/ACTC and HCC then the refund belongs to the Debtor and is not property of the estate.

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