

# Guidelines for Adversary Proceedings under 11 U.S.C. § 523(a)(8) in which the United States is a Defendant

## UNITED STATES BANKRUPTCY COURT

## NORTHERN DISTRICT OF CALIFORNIA

### Guidelines for Adversary Proceedings under 11 U.S.C. § 523(a)(8) in which the United States is a Defendant

Pursuant to 11 U.S.C. § 523(a)(8), individual debtors may seek a judgment declaring certain student loans and related obligations (“Student Loans”) dischargeable, where excepting Student Loans from discharge would impose an undue hardship on the debtor and their dependents. The United States Department of Justice (“DOJ”), in cooperation with the United States Department of Education (“DOE”), promulgated guidance for its attorneys with respect to Student Loan bankruptcy litigation (the “Guidance”). The Guidance became effective November 17, 2022 and applies *only* to loans held by DOE.

In order to accommodate this Guidance, the court deems it appropriate to provide its bar and litigants with these Guidelines. These Guidelines apply *only* to adversary proceedings under 11 U.S.C. § 523(a)(8) in which DOE is a defendant.

#### I. Summary of DOJ Guidance

The Guidance applies to future bankruptcy cases and proceedings, as well as (wherever practical) to pending matters. Given that the Guidance constitutes internal policy, it does not create any substantive or procedural rights enforceable at law. The Guidance seeks to promote three goals:

- 1) To set clear, transparent, and consistent expectations for discharge that debtors can understand, regardless of whether they are represented by counsel;
- 2) To reduce debtors’ burden in pursuing adversary proceedings aimed at obtaining a discharge of their Student Loans by simplifying the fact-gathering process; **and**
- 3) Where the facts support it, to increase the number of proceedings in which the government stipulates to facts demonstrating the existence of undue hardship and recommends that the court discharge a debtor’s Student Loans.

After a debtor commences an adversary proceeding under 11 U.S.C. § 523(a)(8), the DOJ attorney assigned to the proceeding should provide the debtor/plaintiff with an “Attestation”, along with the debtor’s Student Loan account history and details, which DOE will provide to DOJ.

The Attestation consists of a lengthy form, which must be completed under penalty of perjury. The Attestation requires the debtor to provide detailed information concerning the debtor’s current income and expenses, their future inability to repay their Student Loans, their prior efforts to repay their Student Loans, their current assets, and any additional circumstances relevant to the showing of undue hardship that the debtor bears the burden of proving in order to be entitled to a judgment of dischargeability. The Attestation also requests that the debtor provide documentation that corroborates the debtor’s stated income. The DOJ may request additional evidence where necessary to verify the information set forth in the debtor’s Attestation.

The Guidance offers detailed instructions for evaluating an Attestation and supporting documentation, focusing on the factors relevant to a court's determination of dischargeability under *Brunner v. New York State Higher Educ. Svcs. Corp.*, 831 F.2d 395 (2d Cir. 1987), which applies in the Ninth Circuit pursuant to *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998). The Guidance also requires DOJ to consult with DOE in reviewing a debtor's Attestation and corroborating documentation in order to determine an appropriate course of action in each proceeding.

Where DOJ and DOE determine that a debtor has shown that: **(a)** absent a discharge of their Student Loans, the debtor and their dependents would suffer undue hardship; **(b)** the debtor presently lacks an ability to repay their Student Loans; **(c)** the debtor's ability to pay their Student Loans is likely to persist in the future; **and (d)** the debtor has acted in good faith in the past in attempting to repay their Student Loans, the Guidance advises DOJ attorneys to stipulate to such facts and to recommend that the court issue a partial or full discharge of the debtor's Student Loans. DOJ must advise debtors that its stipulation and recommendation do not bind the court, which will render its own determination as to whether the Student Loans are dischargeable. The Guidance encourages debtors and DOE attorneys to cooperate in filing the appropriate documents to enable the court to consider whether to issue an order to discharge Student Loans.

## **II. Guidelines for the Prosecution of Adversary Proceedings Under 11 U.S.C. § 523(a)(8)**

Once a debtor commences an adversary proceeding under 11 U.S.C. § 523(a)(8), they must timely serve DOE with process.<sup>1</sup> Assuming timely, proper service of process, DOE must answer or otherwise respond to the complaint within 35 days following issuance of the summons.<sup>2</sup> The court must generally issue a scheduling order within 90 days following service of the complaint.<sup>3</sup> And the parties must convene a discovery conference, exchange the material described in Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure, and file a discovery plan within 21 days prior to the initial scheduling conference or the deadline for issuing a scheduling order.<sup>4</sup>

These deadlines do not allow sufficient time for DOE to provide DOJ with the debtor/plaintiff's Student Loan history and account details, for transmittal of that information and the Attestation to the debtor, for the debtor to gather the necessary documentation to complete the Attestation, for the DOJ and DOE to analyze the debtor's Attestation and corroborating documentation, and for DOJ to make its recommendation to the court, all as required by the Guidance.

The court believes that allowing time for the parties to comply with the Guidance will save the parties' and the court's resources, and will make management of adversary proceedings under 11 U.S.C. § 523(a)(8) efficient and fair. Accordingly, the court has promulgated and adopted these Guidelines, which apply to adversary proceedings in which DOE is a defendant and to which the Guidance applies.

After the Debtor/Plaintiff files their complaint and serves DOE with process in compliance with Rule 7004(e) of the Federal Rules of Bankruptcy Procedure, the parties shall file a Stipulation that conforms to that attached here as **Exhibit A**. This Stipulation sets forth the parties' agreement to, and requests the court's approval of, the following:

- 1) Extension of the deadline by which DOE must answer or otherwise respond to the Debtor/Plaintiff's complaint by 120 days;
- 2) Continuance of the initial scheduling conference to a date that is no sooner than 60 days after DOE's extended responsive pleading deadline;
- 3) Calculation of the deadlines set forth in Rules 26(a)(1)(C) (exchange of initial disclosures), 26(f)

(1) (conduct discovery conference), and 26(f)(2) (filing discovery plan), which apply to sections under 11 S.C. § 523(a)(8) pursuant to Rule 7026 of the Federal Rules of Bankruptcy Procedure, from the date of the continued scheduling conference; **and**

4) Good cause for delay in issuing a scheduling order after the deadline set forth in Rule 16(b)(2) of the Federal Rules of Civil Procedure, which applies to adversary proceedings pursuant to Rule 7016 of the Federal Rules of Bankruptcy Procedure.

When the parties file the Stipulation, they also shall upload a proposed order approving the Stipulation. Such order shall conform to the example attached here as **Exhibit B**.

If the parties are able to reach agreement that the Student Loans should be dischargeable in whole or in part, they shall upload a proposed Stipulated Judgment for review and entry by the court.

If the parties are unable to agree to a Stipulated Judgment, then the adversary proceeding will proceed in accordance with the Stipulation.

<sup>1</sup> See Fed. R. Bankr. P. 7004(e).

<sup>2</sup> Fed. R. Bankr. P. 7012(a)(5).

<sup>3</sup> Fed. R. Bankr. P. 7016 and Fed. R. Civ. P. 16(b)(2).

<sup>4</sup> See Fed. R. Civ. P. 16(b), 26(a)(1)(A), 26(a)(1)(C), 26(f)(1), and 26(f)(2); and Fed. R. Bankr. P. 7016 and 7026.