

# NORTON BANKRUPTCY LAW ADVISER

Monthly Analysis of Important Issues and Recent Developments in Bankruptcy Law

Editor in Chief: Hon. William L. Norton, Jr., United States Bankruptcy Judge (1971-1985), Gainesville, Georgia

Managing Editor: Hon. Keith M. Lundin, United States Bankruptcy Judge, Nashville, TN

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## STUDENT LOANS FROM THREE MILLION FEET (IT ALL BEGAN WITH SPUTNIK)

*Steven L. Thomas*

*Kay Casto & Chaney PLLC  
Charleston, WV*

On October 4, 1957, the USSR launched Sputnik 1, causing a perception that American scientists were falling behind their Soviet counterparts in technological ability. Within a year, President Eisenhower and Congress responded by creating three programs to increase the technological power of the United States: the Advanced Research Projects Agency (nka DARPA), the National Aeronautics and Space Administration, and the National Defense Student Loan Program. Eight years later, this latter program was transformed by the Higher Education Act of 1965 (HEA) into the student loan program that remains with us today.<sup>1</sup> Today, the portfolio of federal direct and federally guaranteed student loans tops one trillion dollars. Another \$150 billion in private student loans is also outstanding. In the immortal words of Everett Dirksen, this is real money. After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), all of these student loans—including privately sourced debt—are nondischargeable in bankruptcy under 11 U.S.C.A. § 523(a)(8) in the absence of undue hardship.

In the past three decades, the cost of a college education has risen by an average of about 4% per year *in inflation adjusted dollars*.<sup>2</sup> While the cost of a college education, financed in large part by student loans, has increased year by year, the jobs available to college graduates today frequently do not offer salaries sufficient to service the student loan debt

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<sup>24</sup>“The court concludes that the plaintiffs have stated valid, non-preempted theories upon which the defendants may be held subject to the students’ school related defenses under certain portions of state statutory law. . . . [G]iven the Secretary’s policy articulations, . . . the court finds that plaintiffs have stated a valid claim against the Secretary for discharge of their loan obligations . . . . Furthermore, inasmuch as HEAF is, as a practical matter, the entity which holds the majority of the notes in question and is required to pursue collection activity against the loans with due diligence, the court finds that HEAF should likewise be held subject to the Secretary’s apparent policy of non-collection on GSLP loans deemed unenforceable against the original lenders . . . .” Tipton, 768 F. Supp. at 570-71.

<sup>25</sup>34 C.F.R. § 682.402 (d) & (e).

<sup>26</sup>34 C.F.R. § 682.402 (c).

<sup>27</sup>34 C.F.R. § 685.213.

<sup>28</sup>Information regarding these programs can be found at the Department of Education’s website: [www.loanconsolidation.ed.gov](http://www.loanconsolidation.ed.gov); <https://studentaid.ed.gov/repay-loans/understand/plans/income-driven>; <https://studentaid.ed.gov/sites/default/files/income-driven-repayment.pdf>.

<sup>29</sup>See <https://studentaid.ed.gov/repay-loans/understand/plans/income-driven>.

<sup>30</sup>This information comes from the references found at endnote 28, *supra*.

<sup>31</sup>That is, that the debtor cannot, based on current income and expenses, maintain a “minimal” standard of living for himself of herself and his or her dependents if forced to repay the loan. Brunner, 46 B.R. at 756. See, e.g., *Straub v. Sallie Mae Educ. Credit Mgmt. Corp.* (In re *Straub*), 435 B.R. 312 (Bankr. D.S.C. 2010). Or, that the debtor has not made a good faith effort to repay the loan. See, e.g., *Educational Credit Mgmt. Corp. v. Mosko* (In re *Mosko*), 515 F.3d 319, 326 (4th Cir. 2008). But see *Krieger v. Educational Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013).

<sup>32</sup>See endnote 29, *supra*.

<sup>33</sup>See, e.g., *Roth v. Educational Credit Mgmt. Corp.* (In re *Roth*), 490 B.R. 908 (B.A.P. 9th Cir. 2013).

## DEMONSTRATION PROGRAM ON HELPING BORROWERS IN DEFAULT OF EDUCATION LOANS

*David A. Lander\**

As Bob Lawless has noted,<sup>1</sup> one reason consumer bankruptcy filings are down is that more and more of the debt on consumer balance sheets is nondischargeable student loan debt. As more American consumers confront

the reality of default on their education loans they are faced with very limited sources for independent high quality advice. The Center for Excellence in Financial Counseling (“CEFC”) at the University of Missouri St. Louis has been working to develop more and better opportunities.

CEFC was founded and funded to develop ways to improve the quality of education and counseling that is provided to consumers in financial distress. For its first program, the organization has been exploring ways to help consumers who are behind on the repayment of student loans. This is the first such program in the country and CEFC is encouraged about the results thus far and for the prospects going forward.

As a result of this program:<sup>2</sup>

- Prior to the counseling sessions, 37% of borrowers knew about repayment options available to borrowers of federally guaranteed student loans. Following the counseling sessions, 93% of borrowers knew that they may qualify for federal student loan repayment options. Nearly 54% of borrowers responded that they qualified for a lower monthly repayment amount and changed their federal student loan repayment plan.
- The vast majority (93%) of borrowers responded that their federal loan payments were too high for their income, prompting their decision to seek counseling.
- Two-thirds (67%) of borrowers responded they were making progress in lowering their monthly student loan payments, with more than half (54%) responding they were able to find a less costly plan to repay their student loans than their current plan.

\*David Lander is a partner at Greensfelder, Hemker & Gale, P.C. in St. Louis and is the chair of the Leadership Council for the Center for Excellence in Financial Counseling.

- More than four-fifths (80%) of borrowers reported that the counseling session and their interaction with the counselor gave them increased confidence and enhanced their sense of control of their student loan debt.

### **Program Background**

During the first stage of this program, CEFC worked with the National Consumer Law Center to train nearly 400 counselors how to diagnose and implement solutions for consumers with defaulted student loans.

Once it became clear that this effort required more follow-up oversight and quality control with the trainees and their employers, CEFC implemented the second stage of the program to combine the training with program reporting and quality control. When it became further apparent that an even more comprehensive approach would lead to better results, CEFC implemented a third stage, which provided intensive training in both the technical aspects of distressed student loans and behavior-change counseling techniques. This included an intensive program of post-counseling borrower follow-up, monitoring implementation of program protocol, and third-party evaluation. Program training and counseling materials were developed and provided under contract by the National Consumer Law Center and the Counseling and Family Therapy Department at the University of Missouri-St. Louis. In addition, each financial counseling provider was paired with a legal services provider so that the borrowers who needed legal help could be referred to a lawyer with student loan knowledge, expertise and a commitment to help.

In the third stage of the program, CEFC contracted with three first-rate providers of general financial and credit counseling and education services. Each of these providers contracted with a legal services partner to fully

implement the program. A total of 626 student loan borrowers were helped.

### **Program Features**

The program has several innovations that set it apart from the way that financial and credit counseling services have been delivered historically, including:

- An emphasis on scheduled follow-up counseling sessions;
- a combined emphasis on diagnosis, education, and behavior-change elements;
- a contractual relationship with a legal service provider that has expertise in the student loan area;
- close monitoring for implementing program protocol for quality control; and
- professional third-party evaluation.

CEFC provided monthly and performance-based stipends to the three partnered service providers during the third stage of the enterprise. Starting January 1, 2014, CEFC and two of these direct providers and their respective legal services partners have contracted to continue the program for 12 additional months.

### **Preliminary Program Evaluation Highlights**

Preliminary program evaluation highlights from survey responses from borrowers counseled between March 1, 2013, and September 30, 2013, include:

- Nearly 75% of borrowers felt confident that they knew the options available for repaying their student loan debt.
- More than 72% of borrowers somewhat or strongly agreed that they were more confident that they could get their student loan situation under control as a result of the counseling session.

- 65% agreed with the statement: “I wish I had found a counseling program like this sooner.”
- 76% reported adhering to a monthly budget.
- 71% indicated they had more willpower to keep from further increasing their debt load.

### Program Future

CEFC funded these first stages of the demonstration which continues until the end of 2014 and is now searching for funding for the next stage of the program to commence in 2015. The plan is to add six to eight additional high quality direct financial counseling providers partnered with local legal services providers and to continue monitoring and evaluating program protocol and outcomes. A number of credit counseling agencies are lining up to begin student loan counseling; it is essential that they implement and maintain the extensive training, monitoring and evaluation that are necessary for an effective program as well as the capacity to have multiple sessions with a high percentage of the indebted borrowers. This is the first program that has made contracted counsel available to the client and that seems to be especially important in this complicated arena.

### ENDNOTES:

<sup>1</sup>Bob Lawless, Bankruptcy Filings Will Be the Lowest Since 1995—Here Is a Reason Why, available at <http://www.creditslips.org/creditslips/2014/08/bankruptcy-filings-will-be-the-lowest-since-1995-here-is-a-reason-why.html> (Aug. 6, 2014).

<sup>2</sup>Source: Third-party survey of borrowers counseled March 1 to September 30, 2013.

## NEW APPELLATE BANKRUPTCY RULES EFFECTIVE DECEMBER 1, 2014

*William L. Norton, III*

*Bradley Arant Boult Cummings LLP  
Nashville, TN*

The Bankruptcy Rules relating to appellate procedure were substantially revised effective December 1, 2014. The Rules were expanded from 20 rules to 28. Some existing Rules have been combined and other provisions have been moved to new locations. In some instances the language of the existing Rule has been re-styled, but most substantive provisions remain.

In a general sense, the appellate Bankruptcy Rules apply to appeals under 28 U.S.C.A. § 158(a) from the bankruptcy courts to either the district courts or the bankruptcy appellate panels. The Federal Rules of Appellate Procedure generally govern bankruptcy appeals to the circuit courts, except for stays and direct appeals as provided below:

1. Rule 8004(e) provides that the authorization by a court of appeals of a direct appeal of a bankruptcy court’s interlocutory order or decree constitutes a grant of leave to appeal.
2. Rule 8006 governs the procedure for certification under 28 U.S.C.A. § 158(d)(2) of a direct appeal from a judgment, order or decree of a bankruptcy court to a court of appeals.
3. Rule 8007 addresses stays pending a direct appeal to a court of appeals.
4. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals.
5. Rules 8009 and 8010 govern the record on appeal in a direct appeal to a court of appeals.
6. Rule 8025 governs the granting of a stay of a district court or BAP judgment pending an appeal to the court of appeals.
7. Rule 8028 authorizes the court of appeals to suspend applicable Part VIII rules in a