Robert S. Thomas, II
Chapter 13 Trustee
Towson, MD

Jeffrey M. Kellner
Chapter 13 Trustee
Dayton, OH

Strategies For Dealing with Student Loans in Chapter 13

Not surprisingly, between 1980 and 2010, the costs for college increased at a rate approximately five times the rate of inflation. Default rates on student loans in the U.S. have nearly doubled since 2006, with total outstanding student loan debt now topping $1 Trillion. In the last few years, student loan debt is becoming the second-largest consumer obligation after mortgages and invoking parallels with the housing bubble that precipitated the 2007–2009 recessions. Defaults have also been on the rise, adding to concerns about the repayment ability of struggling borrowers.

Student Loan Statistics: Overview

(As of 4Q 2016, New York Federal Reserve)

Total Student Loan Debt: $1.31 trillion

Total U.S. Borrowers With Student Loan Debt: 44.2 million

Student Loan Delinquency or Default Rate: 11.2%

Total Increase in Student Loan Debt In 4Q 2016: $31 billion

New Delinquent Balances (30+ days): $32.6 billion

New Delinquent Balances - Seriously Delinquent (90+ days): $31 billion

The 44 Million Borrowers had an average outstanding loan balance of $37,172

As we all know, unlike other types of financial obligations, student loan debts are generally nondischargeable, and repayment failure or delay may result in garnishing of wages, interception of tax refunds, and long-term credit score repercussions. These outcomes may, in turn, lead to reduced access to credit and further declines in consumer spending. If that's not bad enough, *The New York Times* reports, "… in 19 states, government agencies can seize state-

issued professional licenses from residents who default on their educational debts. Another state, South Dakota, suspends driver's licenses, making it nearly impossible for people to get to work."

The Plight of the Student Loan Debtor -

A. Policy Behind Excepting Student Loan Debt from Discharge in Bankruptcy

"The twin aims of bankruptcy are to provide equitable distribution of assets for creditors, and to provide a fresh start for a debtor." *In re Shelton,* 370 B.R. 861, 868 (Bankr. N.D. Ga. 2007) (citing *Burlingham v. Crouse*, 228 U.S. 459, 472-73 (1913)). However, the bankruptcy concept of equal distribution does not mean all creditors must receive equal distribution; instead, this concept means that there must be equal distribution with respect to similarly situated creditors. Regardless of the policy questions, those with heavy student loan debt who file for chapter 13 deserve relief that serves their best interests in the long run, and they should try not to delay the reckoning of their student loans by deferring payment any longer than absolutely necessary.

For most debtors, student loan debts are excepted from any bankruptcy discharge they may obtain. 11 U.S.C. § 523(a)(8). The only time that student loan debt may be discharged is when repayment "would impose an undue hardship on the debtor and the debtor's dependents." § 523(a)(8). Congress did not further define the term "undue hardship" in the Bankruptcy Code. As identified by the Court of Appeals for the Fourth Circuit in *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 399 (4th Cir. 2005), however, "undue hardship" must be "more than the usual hardship that accompanies bankruptcy." Thus, "[i]nability to pay one's debts by itself cannot be sufficient; otherwise all bankruptcy litigants would have undue hardship." *Id*. The Sixth Circuit has now opinioned – that "Debtors must be in a permanent state of hopelessness." *In re Barrett,* 487 F.3d 353 (2007).

Moreover, in excepting student loans from discharge, Congress made a policy choice to protect the viability of the student-loan program. As articulated by the Court of Appeals for the Fourth Circuit, student loan debts deserve special treatment in bankruptcy because the ability to fund an education is critical to the general welfare and prosperity of the United States, and the continuation of the tax-payer funded student loan program is essential to affording all individuals an opportunity to obtain an education to provide for a better future.

A bankruptcy debtor must file an adversary proceeding (See FRBP 7001) to obtain a determination of undue hardship and a discharge of a particular student loan (or loans). This applies to both publically owned and/or insured student loans, as well as student loans originating from private lenders. The Supreme Court unequivocally held in 2010 that an adversary proceeding is required to obtain a hardship discharge of a student loan, and a hardship discharge may not be achieved through the terms of a bankruptcy plan. See *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367 (2010). While not impossible, given the legal standard for discharge student loans adopted in the majority of Circuits in the country, debtors seeking a bankruptcy hardship discharge of their student loan(s) face an uphill battle. Moreover, it is very likely that any lender, regardless if it is a public or private student loan(s) at issue, will vigorously oppose any such relief.

B. The Standard in Student Loan Treatment and Dischargeability –

I. "Undue Hardship" Case Law:

Undue Hardship allows for the discharge of student loans under certain circumstances, decided on a case-by-case basis, and only under very limited circumstances.

Federal courts have established the legal standard for a student loan debtor to prove "undue hardship". In general, the courts have used the Brunner test to analyze whether undue hardship is proven.

(1). *Tenn. Student Asst. Corp. V. Hood*, 541 U.S. 440 (2204), where the burden of proof is -

- Solely on the debtor
- non-discharge is "self-effectuating"
- debtor must take affirmative action (file an AP) to securer discharge based on "undue hardship" (note – undue hardship is not defined by the Bankruptcy Code but see Brunner)
- debtor must prove that not discharging the student loan debt will impose an "undue hardship" on debtor and h is dependents
- "undue hardship" required, mere "garden-variety" hardship is insufficient justification for a discharge of student loan debt.

(2). *In re Brunner*, 46 B.R. 756 (S.D.N.Y. 1985), aff'd, *Brunner v. New York Higher Educ. Servs. Corp*, 831 F.2d 395 (2d Cir. 1987) (NOTE: nine circuits evaluate "undue hardship" via the Brunner test that even serious personal hardships are not "undue" enough to justify discharge, with courts instead requiring a showing of "total incapacity" or a "certainty of hopelessness") (2d Cir., 7th Cir., 3d. Cir., 9th Cir., 11th Cir., 5th Cir. ,10th Cir., 6th Cir., 4th Cir.). The Brunner test requires a three prong test to evaluate whether the debtor has established an "undue hardship" and each of three requirements must be satisfied in order to obtain a discharge:

1. that the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and their dependents if forced to repay the loans:
2. that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
3. that the debtor has made good faith efforts to repay the loans.

(3). *In re Wolff*, 22 B.R. 510 (9th Cir. BAP Cal. 1982) citing the test created in *In re Kovich*, 4 B.R. 403 (Bankr. Mich. 1080) and In re Dziedzic, 9 B.R. 424 (Bankr. Tex. 1981)– The test is:

(1) whether the discrimination has a reasonable basis;

(2) whether the debtor can carry out a plan without the discrimination;

(3) whether the discrimination is proposed in good faith; and

(4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination. Restating the last element, does the basis for the discrimination demand that this degree of differential treatment bed imposed?

I. Cases Allowing Classification and Separate Treatment –

In re Knowles, 501 B.R, 409 (Bankr. D. Kan. 2013) Debtors sought confirmation of their Chapter 13 Plan that treated debts owed to 2 unsecured creditors – a student loan and a Kansas Dept. of Labor – dramatically more favorably than the debts they owed to their other general unsecured creditors. The Court stated that the Code, since being amended in 2005, only prohibits above-median income debtors from voluntarily paying nondischargeable student loan debt using discretionary income outside of a plan when all projected disposable income is paid into a plan when unfair discrimination results from such treatment. The treatment of the student loan creditor in this case does not create unfair discrimination under Section 1322(b)(1) if debtors are not accelerating the repayment of the student loan.

Labib-Kiyarash v. McDonald (*In re Labib-Kiyarash*), 271 B.R. 189, 192(B.A.P. 9th Cir. 2001) (utilizing four part test from *Amfac Distribution Corp. v. Wolff* (*In re Wolff*), 22 B.R. 510 (B.A.P. 9th Cir. 1982): "(1) whether the discrimination has a reasonable basis; (2)whether the debtor can carry out a plan without the discrimination; (3) whether the is proposed in good faith; and (4) whether the degree of discrimination is directly related to thebasis or rationale for the discrimination.").

In re Orawsky, 387 B.R. 128, 146-47 (Bankr. E.D. Penn. 2008) (adopting framework using four "baselines" warranting consideration: 1. Equality of distribution, 2. Nonpriority of student loans, 3. Mandatory versus optional contributions, and 4. A fresh start for honest debtors; stating that the degree of departure from the baseline is relevant in determining whether discrimination is unfair).

Carrion v. Rivera (*In re Rivera*) 490 B.R. 130, 141 (B.A.P. 1st Cir. Apr. 5, 2013), separate classification for payment in full of a debt guaranteed by debtor's mother-in-law is fair discrimination when general unsecured creditors will be paid 4.5% and level payment plan would pay all unsecured 12%.

In re Natesan, 2013 WL 3939567 (Bankr. D. Md. July 29, 2013), Trustee's unfair discrimination objection overruled when student loan creditor failed to object to separate classification that would pay student loan debt "outside" the plan while other unsecured claims were paid in full by trustee. Court declines to protect student loan creditor from failure to act on its own behalf.

Bentley v. Boyajian (*In re Bentley*) 266 B.R. 229 (1st Cir. BAP 2001), which directed courts to look to "the principles and structure of Chapter 13 itself for the baseline against which to evaluate discriminatory provisions for fairness." The Bentley court looked at (1) equality of distribution; (2) non-priority of student loans; (3) mandatory versus optional contributions (a comparison of what the dischargeable unsecured creditors would receive in a pro rate distribution of the mandatory contribution under chapter 13; and (4) the debtor's fresh start. Note that this was an above-median income case and the debtors proposed to commit their discretionary income to their student loan payments.

In re Kindle, 17-1245 (Bankr. D.S.C. Nov. 1, 2017), the Court established through citation of authority that Section 1322(b)(1) allows discrimination so long as it is not unfair against any class. The Court explained that the voluntary contribution of more than the required amount of the debtors' disposable income "indicates good faith" because unsecured creditors would receive 33.3%, "a significant percentage in a chapter 13 case." Since cutting down on student loan payments would have the debtors owing more on student loans than they did on filing chapter 13, the Court stated that allowing higher payments would be consistent with providing the debtors a fresh start. Under the "totality of the circumstances," the Court confirmed the plan because higher payments on student loans would not unfairly discriminate against other unsecured creditors.

In re Engen, 561 B.R. 523, 535 (D. Kan. 2016) - Debtors' proposed plan satisfies § 1322(b)(1) because Debtors' separate classification and favored treatment of student loans does not discriminate unfairly, and the student loan claims are substantially similar. The opinion is one of the most elaborate and detailed and provides a complete analysis of the statutory provisions, case law and policy issues.

In re Salazar, 543 B.R. 669, 670 (Bankr. D. Kan. 2015) (noting that "[b]ecause interest on nondischargeable debts continues to accrue while a debtor is performing under a Chapter 13 plan but cannot be paid unless the debtor is paying all the unsecured claims in full, a debtor with student loan debts runs a very real risk of paying into a plan for three to five years only to find that she finishes her plan owing more on those debts than she did when she filed bankruptcy.").

In re Brown, 500 B.R. 255 (Bankr. S.D. Ga. 2013) (debtor curing default complies with § 1322(b)(1) when separate classification pays 78 percent of student loan debt and only 1 percent of unsecured debt).

Matter of Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012) (discriminatory classification favoring student loan that decreased general unsecured recovery from 20 percent to 15 percent allowed to preserve debtor's participation in the Public Service Loan Forgiveness program).

In re Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009) (separate classification and more favorable treatment of long-term student loan debt over general unsecured creditors was not unfairly discriminatory, at least not when debtor's default would potentially jeopardize her professional license).

In re Webb, 370 B.R. 418, 425-26 (Bankr. N.D. Ga. 2007) (confirming debtors' separate classification "because Debtors will suffer needless accrual of interest and penalties ... and unsecured creditors will enjoy a disproportionally small benefit otherwise.").

In re Cox, 186 B.R. 744 (Bankr. N.D. Fla. 1995) (while debtors' proposal to pay nondischargeable student loans outside their plan may be discriminatory, it is not unfair since such treatment is specifically allowed by § 1322(b)(5)).

In re Willis, 189 B.R. 203, 205 (Bankr. N.D. Okla. 1995) (quoting *Lawson*, 93 B.R. at 984) ("discrimination is `fair,' and therefore permissible, to the extent, and only to the extent, that is rationally furthers an articulated, legitimate interest of the debtor").

In re Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993) (holding that a Chapter 13 plan providing a 29 percent payment to unsecured creditors and 100 percent to student loan creditors did not discriminate unfairly because the unsecured creditors would receive nothing if debtors' case were converted to a Chapter 7).

In re Dodds, 140 B.R. 542, 543 (Bankr. D. Mont. 1992) (holding that the debtors' plan satisfied §§ 1322(b)(1) and (5) because treating student loan debt as a long-term obligation is one possibility of satisfying the confirmation standard against unfair discrimination).

Matter of Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992) (holding that a Chapter 13 plan's placement of student-loan debt in a separate class that provided for payment of that debt before other unsecured creditors did not unfairly discriminate against unsecured creditors because the plan provided for 100 percent of all unsecured claims and the student loan claims were nondischargeable).

In re Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991) (allowing a Chapter 13 plan to place student loans in a separate class and pay them 100 percent while only paying 15 percent to unsecured creditors as long as the unsecured creditors do not receive less than they would in a Chapter 7 liquidation).

In re Freshley, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (holding that Congressional intent encouraging the repayment of student loans is sufficient grounds for a debtor's separate classification of those debts in a Chapter 13 plan and that such classification does not unfairly discriminate against unsecured creditors).

What can a Student Loan Debtor do?

C. **Arguments of the Parties**

Generally most Debtors argue that their proposed chapter 13 plan does not unfairly discriminate against non-student loan unsecured creditors, because even though their student loan creditor is receiving a slightly higher percentage than other general unsecured creditors by being paid

outside the plan, the classification does not unfairly discriminate because the non-student loan unsecured creditors are receiving all they are entitled to under the means test. Debtors also argue that the separate classification of the student loan has a good faith, reasonable basis because requiring Debtors to pay the student loan with their other general unsecured creditors would result in substantial interest and late fees accruing on the student loans, increasing the amount owed on the loans at the conclusion of the bankruptcy case and interfering with the purpose of Debtors' bankruptcy case, obtaining a fresh start.

The typical argument raised by Chapter 13 Trustees or creditors is that the separate classification of the student loan creditor does in fact unfairly discriminate against other general unsecured creditors, because the student loan creditor will receive more favorable treatment than other unsecured creditors and that the discriminatory treatment is unfair under Section 1322(b)(1). Additional arguments have been seen raising accountability of payments being made outside of plans, etc.,

D. Separate Classification and Discriminatory Treatment – § 1322(b)(1)

Chapter 13 debtors must propose a debt adjustment plan that complies with 11 U.S.C. 1322.

Pursuant to 11 U.S.C. § 1322(b)(1), a "plan may – (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated . . . ."

The subsection has two parts: one dealing with the separate classification of claims, and the other dealing with whether unfair discrimination exists between designated classes.

1. Separate Classification of Student Loan Debts

As to the classification of claims, a debtor is able to "divide unsecured claims not entitled to priority . . . into classes in the manner authorized for Chapter 11 claims." S. Rep. No. 989, 95th Cong., 2d Sess. 141 (1978).

In the Chapter 11 context, classification of claims or interests is governed by § 1122 of the Bankruptcy Code, which states, "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. §1122(a). The term "substantially similar" is not defined in the Bankruptcy Code, but as the legislative history to § 1122 illustrates, the term "substantially similar" requires "Classification based on the nature of the claims or interests classified . . . ." H.R. Rep. No. 595, 95th Cong. 1st Sess. 406 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 118 (1978).

11 U.S.C. §1122(a) requires that all claims in a class be substantially similar, it does not "require that all substantially similar claims be placed within the same class, and it grants some flexibility in classification of unsecured claims." *Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII*), 961 F.2d 496, 502 (4th Cir.1992).

Accordingly in a Chapter 11 context, a debtor is free to separately classify similar claims so long as the reasons for doing so are "independent of the debtor's motivation to secure the vote of an impaired assenting class of claims." *Id*.. Creditors in a Chapter 13 case are not allowed to vote on a proposed plan; consequently, there is no reason to gerrymander classes of claims to manipulate voting. *Cf.*, 11 U.S.C. § 1129(a)(7) *with* § 1325(a).

In a typical Chapter 13 case, Debtors will have student loans and other general unsecured claims such as medical bills or credit cards. The student loans and credit cards are substantially similar as both are unsecured claims. Student loan debts are different in that student loans are generally excepted from discharge. They are inherently different and subject to separate classification. *McCullough v. Brown (In re Brown), 162 B.R. 506, 508 (N.D. Ill. 1993)* (explaining that in the student loan context, the right to separately classify the student loan is not an issue – the only issue is one of unfair discrimination, which is different from classification); *In re Potgieter*, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010) ("[T]he separate classification of the debtor's student loan obligations does not violate Section 1122."); *In re Coonce*, 213 B.R. 344, 345 (Bankr. S.D. Ill. 1997) ("Because this provision does not mandate that all similarly situated claims be classed together, the majority of courts have interpreted § 1122 to allow separate classification of claims. This Court agrees and finds that the debtors' separate classification of student loan debts in this case is permissible.").

2. Unfair Discrimination

11 U.S.C. § 1322(b)(1) prohibits unfair discrimination between designated classes. Importantly, not all discrimination among classes of claims is prohibited – it is only unfair discrimination that is impermissible. *In re Leser*, 939 F.2d 669, 672 (8th Cir. 1991). Any separate classification under section 1322(b) is "discrimination"; however, such discrimination may be permissible, unless it is unfair. *See Bentley v. Boyajian* (*In re Bentley*), 266 B.R. 229, 237 (1st Cir. 2001) ("Discrimination among classes of creditors, on the other hand, is subject to limitation. The plan 'may not discriminate unfairly against any class so designated.' Before determining what this phrase prohibits, we note first that it tacitly permits some measure of discrimination between different classes. In prohibiting only such discrimination as is unfair against any class, § 1322(b)(1) signals that a plan may, to an extent, treat different classes differently. So a plan may discriminate, but not unfairly.").

As in this case, the purpose of separately classifying student loan debts is to pay the student loan creditor more than what is being paid to other unsecured creditors. By its very nature, this treatment is discriminatory; however, just because treatment is discriminatory does not mean that it is unfairly discriminatory.

Courts holding that student loan debt may be paid a greater amount than other unsecured debt without being unfairly discriminatory generally reason that: (1) a debtor will not be afforded a fresh start in bankruptcy if the debtor is defaulting on student loan payments over the term of a 3-5 year plan, considering that on-going monthly plan payments are likely to be less than the amount owed on the student loan debt, interest is accruing, and the debts survive the debtor's discharge; (2) a strong public policy supports the repayment of educational loans; (3) Congress

prefers Chapter 13 over Chapter 7, and debtors in Chapter 7 fare better with making post-bankruptcy payments on student loan debts because a Chapter 7 debtor will not have been in forced default of student loan obligations for 3-5 years; and (4) other unsecured creditors in Chapter 13 are not harmed by the preferential treatment for student loan debt because unsecured creditors must receive a return in Chapter 13 that is equivalent to what they would receive in Chapter 7 pursuant to 11 U.S.C. § 1325(a)(4). *See generally*, Seth J. Gerson, Note: *Separate Classification of Student Loans in Chapter 13*, 73 Wash U.L.Q. 269, 290-92 (1995).

3. A Possible Solution?

Some courts have found that the Bankruptcy Code itself provides an approved method of preferring student loan claims over other unsecured claims.

Section 1322(b)(5) states that a plan:

> "may provide" for the curing of any default within a reasonable time and maintenance of payments on any unsecured or secured claim on which the last payment is due after the final payment under the plan is due.

While § 1322(b)(5) has traditionally been applied to home mortgages, its applicability is not limited to such debts; by its own terms, that section applies to student loan debt that matures after the debtor completes a Chapter 13 plan. In fact, the National Form Plan 113 has a designated paragraph for long term unsecured debts (See below). *See In re Labib-Kiyarash*, 271 B.R. 189, 193 (B.A.P. 9th Cir. 2001); *In re Benner*, 156 B.R. 631, 634 (Bankr. D. Minn. 1993) ("Long-term student loan obligations with payment terms that extend beyond completion of the plan fall squarely within the ambit of section 1322(b)(5)."). Many student loan claims will have remaining terms which extend beyond the life of the plan, and debtors will choose to classify their student debts as long-term under § 1322(b)(5) and thus pay them a higher percentage than other unsecured creditors will be receiving under the plan. The interplay between § 1325(b)(5) and § 1322(b)(1) has been considered by a number of courts.

Section 1322(b)(5) allows a debtor to cure a default and maintain direct payments on certain claims, such as student loan debts, stating that a plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due." Accordingly, the Bankruptcy Code expressly allows the discriminatory treatment – the remaining issue then, is whether the discrimination is unfair.

4. Plan Treatment of Creditors

Depending on the jurisdiction and plan provisions classification treatment can be drafted that encompasses using precise language and accurately identifies the creditors in the plan. Ambiguity or confusion can arise if the language or identification of the claim is not accurate.

Many District Approved Chapter 13 Plans do not provide specifically for student loans and prohibit any changes of the plan without a motion and order to do so. All plans must have a

"Special Plan Provision" box to allow non-standard provisions. In Dayton, we require any payment of a student loan to be provided for in this "Special Plan Provisions" box. However, as the IDR language may take several pages of agreed upon language to satisfy the DOE, we only require that the debtors' attorney provide that an IDR is in place and will be submitting an Agreed Order with the Assistant U.S. Attorney with the terms set forth. Prior to confirmation, debtors' attorney will submit the Agreed Order (with the approval of the Trustee and the DOE) and it will be incorporated as part of the confirmation order.

1. **Example of separate class- student loan – maintenance, cure, on long term debt**

After payment of priority and secured claims the balance of funds will be paid as follows:

> **Class One (1) –** Pursuant to 11 U.S.C. §1322(b)(5), continue to pay the contractual monthly payments for student loans on which the last payment is due after the date on which the final payment under the plan is due on all claims identified as an educational benefit overpayment or loan, scholarship or stipend or any other educational loan or generally referred to and treated as Student Loan Claims, including but not limited to Court Claim #of the_____, any and all servicers, agents, successors, assigns and subsidiaries, shall be paid inside the plan - as long term unsecured debt or shall be paid outside the plan –as long term unsecured debt
>
> **Claimant - Monthly Payment Amount Paid Inside Plan Interest Rate**

2. **Example of separate class – student loan – paid in full inside the plan.**

After payment of priority and secured claims the balance of funds will be paid as follows:

> **Class One (1) –** Pursuant to 11 U.S.C. §1322(b)(5), 523(a)(8), 1328 the Debtor shall pay inside the plan 100 percent due on all claims identified as an educational benefit overpayment or loan, scholarship or stipend or any other educational loan or generally referred to and treated as Student Loan Claims, including but not limited to Court Claim #of the_____, any and all servicers, agents, successors, assigns and subsidiaries, shall be paid 100 percent or in full inside the plan – with interest at 5.25 percent.
>
> **Claimant - Monthly Payment Amount Paid Inside Plan Interest Rate**

3. **Example from National Form Plan Form 113**

Maintenance of payments and cure of any default on nonpriority unsecured claims.
Check one.

□ **None**. *If "None" is checked, the rest of § 5.2 need not be completed or reproduced.*

□ The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. The claim for the arrearage amount will be paid in full as specified below and disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of Creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
	$_____ Disbursed by: □ Trustee □ Debtor(s)	$_____	$_____
	$_____ Disbursed by: □ Trustee □ Debtor(s)	$_____	$_____

Insert additional claims as needed.

4. **Example Template for an IDR in a Chapter 13 Plan**:

Attached is a template for Student Loan IDR Plans during a Chapter 13 bankruptcy. This template can be used for an existing IDR or if the debtor applies for an IDR during the Chapter 13. This template has been developed in cooperation with the U.S. Attorney's Office in Washington D.C., the Department of Education (DOE) and several Chapter 13 Offices. The templates have numerous options as some Trustees will require the IDR payments to be paid through the Trustee's Office while others would rather have the payments made directly by the debtors. All IDR plans must be resubmitted annually and approved by the DOE or the IDR will be cancelled. Many of the IDR plans we are reviewing in Chapter 13 are low amounts based on the debtors' income and family size. However, the Agreed Order does require the debtors to reapply each year and the Chapter 13 Office will not change the amount unless the debtors provide the information to document the amount change. There is no liability on the Trustee Office. In Dayton, we will require all IDRs to be paid through the Chapter 13 Office in order to monitor the amount over the 3-5 years of the Chapter 13 Plan. This template is a work in progress and any suggestions are appreciated.

Income-Driven Repayment Plans (IDR) – If a debtor has a federal student loan (private student loans are not eligible) then he/she may be eligible to apply for an Income-Driven Repayment plan. This program sets the monthly student loan payment at an amount that is intended to be affordable based on your income and family size. The length is

typically twenty (20) years (Public Service Loan Forgiveness participants should repay their federal student loan under an IDR as that length may be 10 years).

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) Federal Student Loans not in Default

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) Proof of Claim

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) Continuation of Pre-Petition Federal Student Loan IDR Plan

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) Discontinuation of Participation in IDR

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]

I. Federal Student Loans:

A. Most common types of federally insured student loans include, but are not necessarily limited to:

1. **Perkins Loans**: need based student loans available to both under-graduate and graduate students; loans issued by individual educational institutions; loan amounts are capped ($5,500 annually; $27,500.00 for under-graduate students, and $8,000.00 annually; $60,000.00 total for graduate students).

2. **Direct Subsidized Loans**: United States Dept. of Education is the direct lender of these loans. For under-graduate students based upon financial need. During enrollment periods of at least 50% and during grace and deferment periods, no interest is charged to the borrower.

3. **Direct Unsubsidized Loans**: Available to under-graduate, graduate and professional students. Showing of financial need is NOT required. Unlike subsidized loans, interest is charged to the borrower even during periods of enrollment and deferment.

4. **Direct PLUS Loans**: Available for graduate and professional students, and also, for parents of dependent under-graduate students. Showing of financial need is likewise NOT required. Interest is also charged to the borrower during all periods of enrollment and deferment.

5. **Direct Consolidation Loans**: Available to student and parent borrowers who wish to consolidate multiple loans into a single payment. May also be available for borrowers with only one student loan that is currently in default. "Consolidation" of the loan may assist the borrower to become eligible for certain repayment options, listed below. Most types of Federal Direct Loans are eligible for consolidation.

B. Repayment Options: Two (2) Common repayment plans available through Direct Loans include:

1. **Standard Repayment**: Fixed monthly payment plan over a 10-year period. Payments are calculated to pay loan in full. All Direct Subsidized and Unsubsidized, as well as PLUS loans qualify for this option.

2. **Extended Repayment**: Eligible borrowers with direct loans in excess of $30,000.00 may be eligible. Qualified borrowers are allowed a 25-year period to repay loans. Available in either fixed or graduated monthly repayment schedule). All Direct Subsidized and Unsubsidized, as well as PLUS loans qualify for this option.

3. **Income Contingent Repayment**: based upon financial need, with payments based upon AGI of household, family size and amount of qualified Direct Loans. Qualified borrowers will have balance of unpaid loans discharge if all required payments made for a 25 period; however, borrowers may have tax consequences on any unpaid and discharged balances of student loans under this option. All Direct Subsidized and Unsubsidized, Direct Consolidation Loans, as well as PLUS loans made to student Borrowers (but NOT parent borrowers) qualify for this option.

4. **Income Based Repayment**: similar to income contingent repayment, although eligibility contingent upon income and financial hardship, and payments may be adjusted annually. Eligible borrowers may be eligible for loan forgiveness at end of repayment period, which can last up to 25 years. All Direct Subsidized and Unsubsidized, Direct Consolidation Loans, as well as PLUS loans made to student Borrowers (but NOT parent borrowers) qualify for this option.

5. **Pay as You Earn**: Based upon borrower's income and family size, and may increase or decrease each year based upon fluctuations in income. At least partial financial hardship required to qualify for option. Financial hardship determined if borrower's payment under standard 10-year repayment would be greater than based upon borrower's ability to pay. All Direct Subsidized and Unsubsidized, Direct Consolidation Loans, as well as PLUS loans made to student borrowers (but NOT Parent borrowers) qualify for this option.

C. Other Available Options:

1. Total and Permanent Disability Discharge3: borrowers that demonstrate not only need, but a total and permanent disability, may be eligible for this option. Availability for this type of relief includes any Direct Federal Loans and Perkins loans. Borrowers may demonstrate total and permanent disability either with documents from the Social Security Administration (if social security disability has been awarded) or with a certification from a borrower's physician. Moreover, in most, if not all cases, a borrower's income cannot exceed poverty guidelines to qualify. In some instances, there is a 3-year probationary period before permanent discharge of loans is granted.

2. Death: in most instances, if a borrower dies during a repayment period, any loans will be cancelled if family or heirs can provide sufficient documentation of death.

3. Public Service Cancellation: borrowers working in public service who make 120 consecutive payments without default may likewise be eligible for cancellation of remaining student loan debt.

II. Private Student Loans:

These types of loans originate with private lenders and terms and conditions will vary depending on the lender. Some private student loan lenders include, but are not limited to: Wells Fargo Bank, Navient (may also service federal loans); Sun Trust Bank and PNC Bank. Private student loans are still subject the undue hardship provisions of 11 U.S.C. §523(a)(8), which was amended in 2005 and included with the amendments passed with BAPCPA. Private student loans are generally not eligible for consolidation with federally insured or issued loans and therefore do not qualify for administrative relief programs available through the United States Department of Education.

A. Non-Bankruptcy Options for Private Student Loans

1. Lump Sum Settlement
2. Court Ordered Installment Agreements
3. Consolidation with other private loans (for better interest rate(s) or reasonable Monthly payments).
4. Refinance/home equity loan taken out to pay off student loans?
5. Other?