

Defending Borrower Defense Claims

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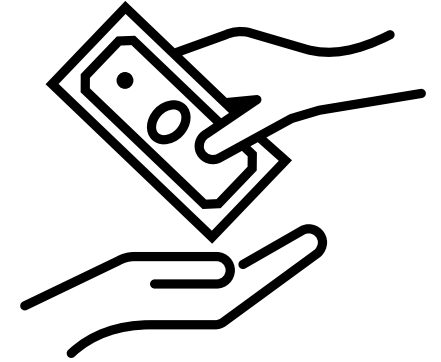
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The Student Loan Landscape

- 45 million Americans owe a collective 1.6 trillion
 - Roughly the GDP of Brazil or Australia
 - 40% of loans held by individuals with no degree
- Relief is a central Biden Administration policy objective
 - New Federal Programs
 - Forgiveness?
 - Revamped REPAYE
 - Borrower defense & closed institution rulemaking
 - Very Active Investigations and Enforcement
- Historic low levels of confidence in high education institutions



What is Borrower Defense?

- Federal law/regulation that allows student borrowers to seek forgiveness for their student loans if they were “defrauded” by their college, university, or career school.
- When the U.S. Department of Education (“DOE”) approves a borrower defense claim, the borrower may receive loan discharge and a refund of payments previously made on the loan(s).
- Under certain circumstances, DOE may then recoup those funds from the institution.
- Borrower defense has been part of the Higher Education Act for many years, but has recently undergone significant changes due to rulemaking and litigation.

Litigation - *Sweet v. Cardona*

- Class action lawsuit filed by thousands of student loan borrowers against DOE.
- Claimed that DOE unlawfully denied or delayed relief for borrower defense applicants during the Trump administration.
 - The borrowers alleged that their colleges defrauded them and asked that their loans be forgiven.
- The court granted final approval to a settlement on November 16, 2022.
 - The settlement paved the way for \$6 billion in student loan discharges to more than 200,000 borrowers.
 - Some automatic, others require application and processing

Why Now?

Sweet v. Cardona Loan Discharge Application Decision Schedule

Application Submitted	ED Decision
Between Jan. 1, 2015, and Dec. 31, 2017	No later than July 28, 2023
Between Jan. 1, 2018, and Dec. 31, 2018	No later than Jan. 28, 2024
Between Jan. 1, 2019, and Dec. 31, 2019	No later than July 28, 2024
Between Jan. 1, 2020, and Dec. 31, 2020	No later than Jan. 28, 2025
Between Jan. 1, 2021, and June 22, 2022	No later than July 28, 2025

If ED doesn't make a decision on an application within the timelines outlined above, the borrower will receive Full Settlement Relief.

2023 Regulatory Changes

- Went into effect July 1, 2023
- Goal is to expand eligibility, remove barriers and provide for automatic discharges in some cases
- Claims can be brought by individuals or groups
- Borrowers with approved claims will receive full relief
- Allows for recoupment from institution and places the burden of persuasion on the institution once DOE has made factual determinations

Litigation - Career Colleges & Schools of Texas v. United States Department of Education

- Brought by for-profit trade association, which argued that DOE's 2022 Borrower Defense to Repayment (BDR) final rules aimed to accomplish "massive loan forgiveness for borrowers and to reallocate the correspondingly massive financial liability to institutions of higher education."
- The Fifth Circuit granted a nationwide injunction on August 8th
- The injunction will remain in effect at least until the case is heard on appeal on November 6th.

Eligibility for Borrower Defense Relief

Six grounds for borrower defense relief discharge under the **2023** regulations, for applications received after July 1, 2023 and applications pending with DOE on July 1, 2023:

1. Substantial Misrepresentation
2. Substantial Omission of Fact
3. Breach of Contract
4. Aggressive and Deceptive Recruitment
5. Judgment (including state courts)
6. Prior “Secretarial Action” (against Title IV participation)

Eligibility for Borrower Defense

Other than the 2023 regulatory standards, there are at least four additional standards that may be applied to evaluate a borrower defense claim:

- (1) For loans first disbursed before July 1, 2017, the claim would have been approved under the standard in § 685.206(c)(1);
- (2) For loans first disbursed on or after July 1, 2017, and before July 1, 2020, the claim would have been approved under the standard in §§ 685.222(b) through (d); or
- (3) For loans first disbursed on or after July 1, 2020, and before July 1, 2023, the claim would have been approved under the standard in § 685.206(e)(2).
- (4) Sweet v. Cardona Settlement procedures.

Claim evaluation under Sweet v. Cardona

- DOE will use a “streamlined review” process to make decisions on applications received between 1/1/2015 and 6/22/2022.
- DOE will review applications using the 2016 Borrower Defense Regulation but will not require evidence outside of the written application, require proof of reliance, or apply any statute of limitations.
- DOE will determine whether an application states a claim that, if presumed to be true, would assert a valid basis for borrower defense.
- Borrowers whose applications are approved will receive full relief.
- Silent as to recoupment.

Recoupment

- Six year SOL
- Broad authority to DOE for findings under applicable borrower defense standards
- Adjudicated using *Appeal Procedures for Audit Determinations and Program Review Determinations*
- This is basically just a standard administrative hearing
- Does this apply to claims evaluated under the *Sweet* settlement?

Institutional Response – 2023 Regulations

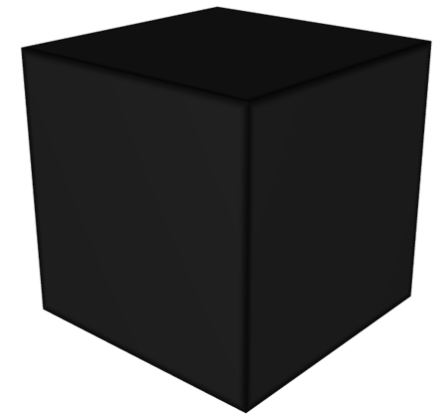
- DOE notifies the institution of the group claim or individual claim and **requests** a response from the school.
- Such notification also may include, but is not limited to, requests for documentation to substantiate the school's response.
 - The notification tolls any limitation period by which DOE may recover from the institution.
 - DOE requests a response from the institution, which will have 90 days to respond from the date of the Department official's notification.
- The institution must submit an affidavit under penalty of perjury that the information submitted is true and correct.

Should You Bother Responding?

Yes.

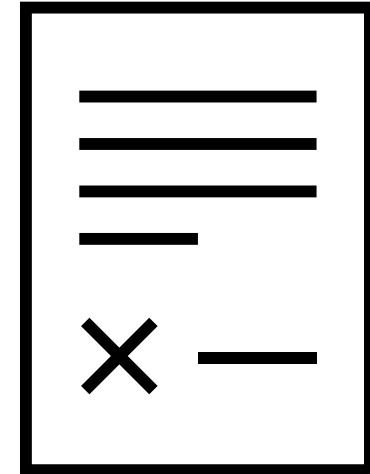
Why You Should Respond

- DOE adjudicates BDR claims using materials submitted as part of the application, evidence in DOE's possession, evidence provided by the institution, and any other relevant information.
- The consequences of an adverse finding are potentially severe
- The evaluation process and criteria are opaque
- You need to preserve your legal defenses
- If the institution does not respond, DOE will *presume* that the institution does not contest the claim



Institutional Response – Practically

- Factual Refutation
 - Include documentation, where available
- Legal Argument
 - Legal defenses arising from claim
 - Some may be easy
 - Address actual damages
 - Tuition and fees may be less than loan
 - Factor-by-factor breakdown
 - Preservation of arguments and affirmative defenses



What To Do Now

- Designated a point-person
- Collect documents
- Track claims
- Engage counsel
- Draft and submit responses
- Watch & Wait



Questions?



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Thank You

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