MORGAN D. KING EDITOR

The King Law Letter

NEWS – EVENTS - UPDATES FOR BANKRUPTCY AND TAX PROFESSIONALS

LAW LETTER NO. 4 APRIL 6 2016

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IMPORTANT PRODUCT ANNOUNCEMENTS

King Law Publishing

NEW!

Release 2016 # 1

Christine Kingston's

Discharging Student Loans

in

Consumer Bankruptcy Cases

With co-authors Richard Parker, Esq., Nick Thompson, Esq., and

Catherine Christiansen, Esq.

PRICE $ 139.95 + s&h

IMPORTANT TOPICS ADDRESSED

- **A. TAKING ON STUDENT LOAN ISSUES**
- **B. FDCPA APPLIES**
- **C. FEDERAL LOANS**
- **D. PRIVATE STUDENT LOANS**
- **E. PAYMENT PLANS**
- **F. BANKRUPTCY OPTIONS**
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ABOUT THE AUTHOR

CHRISTINE A. KINGSTON, Esq.

Of the California Bar

Formerly Christine A. Wilton, Ms. Kingston practices law in Los Angeles and Orange Counties, California.

Her practice centers her private practice on Consumer Bankruptcy, litigation in bankruptcy, debt settlement and debt collection practice act claims, fair credit reporting act claim, and mortgages.

Christine is the author and publisher of the Los Angeles Bankrutpcy Law Monitor; a discussion on consumer bankruptcy issues relevant to California, and is acting President of Pacific Coast University School of Law Alumni Association.

She received her Juris Doctor from Pacific Coast University School of Law (2005), and undergraduate degree from California State University, Long Beach

practice law in California and before the United States District Court, Central District.

She was recently successful at trial in discharging approximately $57,000.00 in student loan debt for her clients.

On August 2 2013 Christine hosted the King Bankruptcy Academy Friday Teleconference on the topic, *Discharging Student Loans*.

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EXCERPT FROM
Kingston's
DISCHARGING STUDENT LOANS

By Christine Kingston, Esq.
Of the California Bar

DISCHARGING STUDENT LOANS

PART 5 The Law of Chapter 7

¶ 5.6 PARTIAL DISCHARGE

¶ 5.6(a) Is partial discharge available under § 523(a)(8)?

Section 523(a)(8) does not necessarily mandate an all-or-nothing discharge. It has been held that Bankruptcy courts may exercise their equitable authority under 11 U.S.C. 105(a) to partially discharge student loans. *Saxman v. Educ. Credit Mgmt. BJR Corp*. (In re Saxman), 325 F.3d 1168 (9th Cir. 2003).

To obtain even a partial discharge all three prongs of the Brunner test must be satisfied, at least as to the specific loans being addressed.*

The *Saxman* court ruled that it is now generally recognized that an "all-or-nothing" approach to the dischargeability of student debt contravenes Congress' intent in granting bankruptcy courts equitable authority.

The court in *Conway* fashioned a kind of hybrid approach to partial discharge. In that case the court held that there was no authority allowing a court to "partially" discharge a loan, but where the debtor had *multiple loans* the court could discharge some of them, and not others. *Conway v. National Collegiate Trust* _ B.R. _ (B.A.P. 8th Cir. 2013).

* Do not confuse the 3 "prongs" of the *Brunner* test, which address student loans, with the 4 "prongs" of the *Beard* test, which applies to tax discharge.

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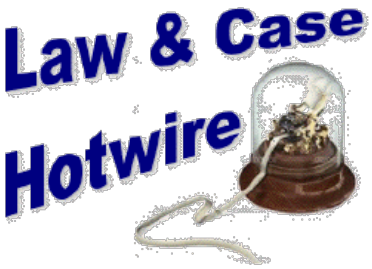
THE LAW & CASE HOTWIRE

11th CIR. APPLIES BEARD TEST IN TAX-DISCHARGE CASE

***Justice v. United States of America* _ F.3d _ (5th Cir. Mar. 30 2016)**

Among issues arising in recent years in connection with tax-discharge cases is the notorious "*McCoy*" rule, the 5th Circuit case that held, in essence, that a tax return that is filed late, even as little as one day late, is not a valid tax return, with the result that the debtor cannot satisfy the requirement to file a tax return more than 2 years from date of filing the bankruptcy case, to discharge the case.

The *McCoy* rule, also called the "one-day-late" rule, is based on the "applicable filing requirements" language that BAPCPA inserted into section § 523(a)(19) (hanging paragraph) of the Bankruptcy Code.



Many, if not most, debtors come into the lawyer's office with delinquent taxes and unfiled or late-filed tax returns. Hence, the issue is very important in a great many cases.

To date, three circuits have adopted the *McCoy* rule (1st Cir., 5th Cir., 10th Cir.). Four have rejected *McCoy* and employed, instead, the 4-prong test in *Beard v. Commr. Internal Revenue*, 82 T.C. 766 (1984), aff'd 793 F.2d 139 (6th Cir. 1986), 7th Cir., 9th Cir., 4th Cir.).

Just published is *Justice v. United States* from the 11th Circuit. The issue was, were tax returns filed not only late, but *after the IRS had made assessments* of taxes owed in each of the relevant tax years.

In *Justice* the question was raised in connection with the 4th prong of the *Beard* test, did the returns that were filed " ... represent an honest and reasonable attempt to satisfy the requirements of the tax law." See *In re Hindenlang* 164 F.3d 1029 (6th Cir. 1999).

The court held that in this case the lateness of the returns failed to establish the honest and reasonable prong of *Beard*, and hence they were not valid returns. In making its ruling the court acknowledged that some cases have employed the *McCoy* rule, but that in this case the court did not need to adopt or reject *McCoy*, because the returns were already deemed invalid based on *Beard*.

The opinion also observed that the IRS has rejected the *McCoy* rule in favor of the *Beard* test and argued that post-assessment returns fail the *Beard* test *as of course*. But the 11th Circuit ruling leaves the door open for a debtor to convince the court that the circumstances causing the returns to be filed late could represent a good-faith effort to comply.

So the question arises ... what circumstances could render the returns valid? The *Justice* court found the debtor's returns invalid. Why did the debtor's circumstances fail the *Beard* prong? It is noteworthy that the court remarked that "Justice has not offered any excuse or explanation for his tardiness in

filing his tax returns." So, the opinion does not provide us with any guidelines to assess good-faith efforts to justify the lateness of the filings.

Note: In situations where the tax return is filed late but *before* the tax is assessed, the IRS accepts the returns as valid unless there is evidence to the contrary.

As said above, the cases adopting the *McCoy* rule hold late-filed returns invalid *by definition*, and hence pull the rug out from under the debtor by denying the debtor any opportunity to convince the court that the returns are valid. In contrast, cases such as the 11th Circuit opinion in *Justice* at least leave the door open for the debtor to put on a case. Justice, apparently, didn't even try.

A great many bankruptcy courts have addressed this issue and are quite divided over the results - see LateFiledReturn.com.

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IN OTHER NEWS

Bankruptcy - Taxes - Consumer Protection

STUDENT DEBT RELIEF SCAMS OFTEN CONTAIN MISSPELLINGS

When you get the text message what should jump out at you right away are the misspellings.

Sherri Jiannuzzi works with financial aid at the University of Toledo. She's heard of the scam calls, emails, text messages. She knows students are getting them.

Our 13abc scam survivor was a grandparent who almost sent it along to a grandchild. Only seek out legitimate programs.

Remember this, legit student loan forgiveness program will always be free. If it's a scam that's when they will ask for money up front.

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Washington, D.C. (March 31, 2016)
By Michael Cohn

Scammers are trying new tactics to convince taxpayers to hand over their personal information, the Internal Revenue Service warned.

In a new email scam targeting taxpayers, people are receiving emails that appear to come from the Taxpayer Advocacy Panel, a volunteer board that advises the IRS on issues affecting taxpayers. They try to trick taxpayers into providing personal and financial information. The IRS said taxpayers should not respond or click the links in these emails. If they receive an email that appears to be from TAP regarding their personal tax information, they should forward it to phishing@irs.gov.

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NACBA & NCLC Laud CFPB for Stopping Illegal Practices by Student Loan Servicers & U.S. Dept. of Education Debt Collectors

By Dan LaBert | Latest News | March 9, 2016

(BOSTON) Advocates at the National Consumer Law Center (NCLC) and the National Association of Consumer Bankruptcy Attorneys (NACBA) applauded the Consumer Financial Protection Bureau (CFPB) for taking action against debt collectors and servicers who took advantage of student loan borrowers by making illegal garnishment threats and using illegal automatic default provisions in loan contracts.

First, CFPB examiners found that one or more debt collectors threatened wage garnishment against federal student loan borrowers who were not eligible for garnishment. NCLC documented abuses by private collection agencies that the U.S. Department of Education hires to collect federal student loans in its 2014 report, Pounding Student Loan Borrowers: The Heavy Costs Of The Government's Partnership With Debt Collection Agencies.

"Unfortunately, we found that the contract between the Department of Education and its private collection agencies prioritize profit over borrower rights," says report co-author and National Consumer Law Center's Student

Loan Borrower Assistance Project Director Persis Yu.

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