

TYPES NOT MAPPED YET April 10, 2024 | TTR not mapped yet | Scott Z. Goldschmidt, Jeffrey R. Fink

# Borrower Defense to Repayment (BDR) Round-Up

As many REGucation readers know, Thompson Coburn has followed the U.S. Department of Education's Borrower Defense to Repayment (BDR) rules closely over many years. This blog post will outline three recent BDR-related developments that institutions of higher education should have on their radar.

## Fifth Circuit Enjoins Biden Administration BDR Rule Pending Final Judgment of the District Court

In February 2023, the Career Colleges and Schools of Texas (CCST), an association of proprietary schools, challenged the Biden Administration's BDR Rule ([2022 BDR Rule](#)) under various theories, including arguments that it exceeds ED's statutory authority under the Higher Education Act, that it is arbitrary and capricious under the Administrative Procedures Act, and that it violates the Due Process Clause of the Constitution.

CCST asked the District Court to enjoin the enforcement of the regulation until the court decides on the merits of the case. A federal district judge in Texas denied CCST's request. On August 7, 2023, however, a three-judge Fifth Circuit of Appeals panel granted an [emergency preliminary injunction](#) with respect to the 2022 BDR rule.

On April 4, 2024, the Fifth Circuit issued a [ruling](#) that reversed the District Court's order and put a permanent injunction in place. The Fifth Circuit was particularly critical of the 2022 BDR Rule in their decision. In particular, the Court found that not only would the rule cause CCST irreparable harm by increasing costs of compliance, requiring necessary alterations in operating procedures, and demonstrating immediate threats of costly and unlawful adjudications of liability all inflicted by the Rule's new provisions, but CCST would also likely succeed on the merits of its case.

Among a multitude of other concerns, the Fifth Circuit reasoned that CCST will be harmed, as it will be required to "scale-up and redesign their defensive recordkeeping dramatically in order to protect against future borrower defense and recoupment proceedings." The Court further reasoned that the Rule transforms previous BDR regulations from borrower defenses to affirmative borrower claims that raise "separation of powers concerns because it establishes new federal causes of action without clear congressional authorization." In expressing a concern of the impact of the rule on CCST, the court further stated that "many borrowers who receive full discharges will be third-party beneficiaries of liability for misconduct that inflicted no injury on them."

This decision ensures that an injunction will be in place during the duration of the litigation and signals the Court's conclusion that ED is likely to lose on the merits. Consequently, ED is prevented from enforcing the borrower defense (and closed school loan discharge) provisions of the 2022 BDR rule nationwide.

Further, and significantly, it is important to note that the 1994, 2016, and 2019 BDR rules remain in place. This means ED can continue to process BDR claims but must do so under the existing regulatory framework while the CCST case makes its way through the courts.

## Sweet v. Cardona Judge Orders ED to Show Cause Why Department Should Not Be Held in Contempt

Under the June 2022 *Sweet v. Cardona* [settlement agreement](#), ED was required to effectuate full settlement relief for borrower entitled to such relief no later than January 28, 2024. As of March 29, 2024, however, only 72.8% of eligible class members have fully processed discharges.

Despite the court mandate requiring this relief, on March 1, 2024, the Department of Education [recognized that they were in breach](#) of the settlement agreement, as some borrowers still had not seen their loans discharged. In defense of its breach, the Department of Education in part blamed the loan servicers for the failure to comply with settlement agreement and its inability to identify a specific timeline for discharge of the loans. After plaintiffs filed a

[motion to enforce the settlement agreement](#) on March 19, 2024, the U.S. District Court for the Northern District of California [ordered](#) the Department to appear at a hearing with their loan servicers and show cause as to why the defendants should not be held in contempt for “frustrating the settlement agreement.” A hearing has been set for April 24, 2024.

### 2019 Borrower Defense Rule the Subject of Continued Second Circuit Litigation

In February 2020, the New York Legal Assistance Group (NYLAG) an advocacy organization, filed litigation asserting that the 2019 BDR rule procedurally and substantively violated the Administrative Procedure Act.

In 2021, the District Court largely ruled in favor of ED, rejecting arguments that the 2019 BDR rule was arbitrary and capricious as a whole. However, the District Court did rule in favor of NYLAG with respect to the three-year statute of limitations rule for certain claims, remanding the matter to the Department for further proceedings consistent with the court’s order.

In January 2024, the Second Circuit Court of Appeals remanded this case back to the District Court to consider whether it should sever and vacate the statute of limitations provision while keeping the rest of the 2019 Rule intact. Following the decision of the District Court on this issue, either party may seek to return this appeal to the Second Circuit.

### Managing BDR Claims

Institutions responding to BDR claims, now or in the future, may wish to review our [Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims](#) or past webinars explaining the [2022 BDR Rule](#), the [2019 BDR rule](#), or the [2016 BDR rule](#).

Institutions that would like assistance responding to BDR claims are welcome to contact Scott Goldschmidt ([sgoldschmidt@thompsoncoburn.com](mailto:sgoldschmidt@thompsoncoburn.com)) or Jeff Fink ([ffink@thompsoncoburn.com](mailto:ffink@thompsoncoburn.com)). Scott and Jeff lead our BDR Claim Response Team, which also includes Stephanie Cohan and Aaron Lacey. In 2017, Aaron was selected by ED to serve as one of 17 negotiators charged with developing the 2019 BDR rule. ED appointed him to negotiate on behalf of general counsels, attorneys, and compliance officers at postsecondary institutions nationwide.

Please also visit our [Higher Education Resources page](#), which includes links to our most recent webinars, training series, desk guides, whitepapers and blog posts.



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