

## insights

TYPES NOT MAPPED YET September 01, 2023 | TTR not mapped yet | Jeffrey R. Fink, Scott Z. Goldschmidt, Aaron D. Lacey

# Time to develop protocols for responding to borrower defense claims (despite Sweet and Fifth Circuit injunction)

On August 7, 2023, the Fifth Circuit Court of Appeals issued a nationwide [injunction](#) in *Career Colleges and Schools of Texas v. Cardona*, preventing the U.S. Department of Education (ED) from enforcing the latest version of its [borrower defense to repayment \(BDR\) rule](#), which was published in 2022 ([2022 BDR rule](#)). Meanwhile, ED continues processing BDR claims under the June 2022 [settlement](#) reached in the *Sweet v. Cardona* litigation, as well as under the existing BDR rule, which was published by the Trump administration in 2019 ([2019 BDR rule](#)). In fact, we have observed a decided rise in the number of BDR claim letters being sent to institutions and expect more will be forthcoming.

In an effort to assist institutions as they prepare for, or manage, BDR claims, we are circulating [Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims](#), a brief desk guide that offers ideas for developing a BDR response process. Institutions also may wish to review our webinar, [Responding to Student Borrower Defense to Repayment \(BDR\) Claims](#), which provides an overview of the historic and current BDR rules and an extended discussion regarding how best to respond to such claims. Finally, below we offer a brief overview of the current state of BDR claims activity.

### The Sweet Litigation

The *Sweet* settlement addressed the processing of borrower defense applications filed on or before November 15, 2022. In response to a FOIA request filed by the National Student Legal Defense Network, the Department last year supplied a list of BDR claims pending as of July 31, 2022, organized by institution. This [data set](#) indicates that as of July 31, 2022, over 350,000 claims had been filed, alleging misconduct on the part of over 4,500 institutions. **This suggests that at least one claim has been filed against approximately 75% of Title IV participating institutions.**

The *Sweet* settlement creates the following, three-part framework for the processing of BDR claims filed on or before November 15, 2022:

- Group 1: For a borrower who attended one of the schools listed on Exhibit C of the *Sweet* settlement agreement and had a BDR claim pending as of June 22, 2022, the borrower will receive “Full Settlement Relief.” Full Settlement Relief means that the federal student loan(s) associated with the borrower’s attendance at the school will be discharged, ED will refund any amounts paid to ED on those loans, and the credit tradeline for those loans will be deleted from the borrower’s credit report.
- Group 2: For a borrower who did not attend one of the schools listed on Exhibit C of the *Sweet* settlement agreement and had a BDR claim pending as of June 22, 2022, ED will render decisions within specified periods of time correlated to how long the applications have been pending (regardless, no later than July 28, 2025). ED will review these applications using the BDR standards and processes set forth in the Obama-era BDR rule, which was published in November 2016 ([2016 BDR rule](#)). However, ED will not require evidence outside of the written application, require proof of reliance, or apply any statute of limitations. Rather, ED will determine whether the application states a claim that, if presumed to be true, would assert a valid basis for borrower defense under the applicable regulation. If the Secretary does not render a decision within the periods of time set out in the agreement, those borrowers receive full, automatic relief. For any borrower who received a notice from ED in December 2019 or later informing them that their borrower defense application was denied, that denial has been voided and ED will review the application pursuant to the terms described above.

- Group 3: For a borrower submitted a BDR claim between June 22, 2022, and November 15, 2022, ED will issue a decision on the application no later than January 28, 2026. ED will review these applications using the 2016 BDR rule and will issue a decision on the application no later than January 28, 2026. If ED doesn't issue a decision within this time period, the borrowers will receive Full Settlement Relief.

Importantly for schools, ED [confirmed](#) during the *Sweet* proceedings that “[p]roviding a class member with Full Settlement Relief under the Settlement Agreement does not constitute the granting or adjudication of a borrower defense pursuant to the Borrower Defense Regulations, and therefore provides no basis to the Department for initiating a borrower defense recoupment proceeding against any institution identified on Exhibit C to the Settlement Agreement.” However, we observe that there is nothing that would prevent the Department from initiating a separate program review or other enforcement action based on the allegations made in the BDR claims covered by *Sweet*.

Institutions wishing to monitor ED's progress with discharging loans under *Sweet* can visit the agency's [Sweet settlement](#) web page and review the quarterly progress reports ED is required to post. Finally, we note that an appeal challenging the *Sweet* settlement is pending in the Ninth Circuit. We fully expect that ED will continue processing BDR claims during the pendency of the appeal and anticipate that even if the appeal is successful, only the schools that appealed would get the benefit of a favorable ruling.

### *Fifth Circuit Injunction*

ED published the 2022 BDR rule last November, and it took effect July 1, 2023. The expectation was that BDR claims filed after November 15, 2022 (i.e., not covered by *Sweet*), would be adjudicated under this latest version of the rule. However, in February 2023, the Career Colleges and Schools of Texas (CCST), an association of proprietary schools, challenged the 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 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 appeal, however, a three-judge Fifth Circuit panel granted a [preliminary injunction](#) with respect to the 2022 BDR rule. As a result, ED is prevented from enforcing the borrower defense (and closed school loan discharge) provisions of the 2022 BDR rule nationwide.

We observe that other aspects of ED's 2022 BDR rule, including those relating to the use of pre-dispute arbitration agreements or class action waivers, are *not* affected by the Fifth Circuit's ruling and remain in effect. Further, and significantly, the 2019 BDR rule remains in place. This means that ED can continue to process BDR claims received after November 15, 2022. It must simply do so under the 2019 BDR regulation while the CCST case makes its way through the courts.

### *Managing BDR Claims*

As many REGucation readers know, Thompson Coburn has followed the BDR rule closely over many years. In addition to the desk guide and webinar referenced above, institutions may wish to review our past webinars explaining the final [2016 BDR rule](#), the [2019 BDR rule](#), and the [proposed 2022 BDR rule](#) (a comprehensive review of the final 2022 BDR rule is forthcoming).

If you would like assistance responding to BDR claims, institutions are welcome to contact Scott Goldschmidt ([sgoldschmidt@thompsoncoburn.com](mailto:sgoldschmidt@thompsoncoburn.com)) or Jeff Fink ([jfink@thompsoncoburn.com](mailto:jfink@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.

[Click here to watch the recording of our webinar, Responding to Student Borrower Defense to Repayment \(BDR\) Claims: 2023 Edition.](#)

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Our goal is to serve as a practical, concise, and accessible resource for institutions confronting regulatory and policy issues. The blog focuses on the extraordinarily broad and sophisticated set of legal challenges faced by contemporary post-secondary institutions, including those involving real estate, construction, joint ventures, litigation, intellectual property, immigration, taxation, financing, employees and benefits, and government relations, to name a few. We also cover the staggering collection of federal, state, and accrediting agency laws and standards specific to higher education.

If there are topics you would like us to cover, or questions you may have regarding a topic that already has been addressed, please do not hesitate to reach out. Finally, if you would like to contribute a guest article, we would love to hear from you.



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