

HIGHER EDUCATION INFORMATION MEMO

JANUARY 9, 2024

Second Circuit Litigation Threatens to Further Confuse Regulatory Standards Applied to Borrower Defense Applications

The Second Circuit Court of Appeals released a new decision in the *NYLAG v. Cardona et al.* case that may have implications for the everchanging legal and regulatory environment of Borrower Defense to Repayment (BDR) claims. Here are the key takeaways from this latest ruling:

1. The decision has no impact on the post-class *Sweet v. Cardona* applications filed between June and November 2022. The U.S. Department of Education (ED) will continue to review post-class applications under the 2016 Borrower Defense regulatory standards. ED has indicated that additional institutions may until April 2024 receive batches of such applications for response.
2. The ruling does not affect the 2022 regulations, which are currently under an injunction by the Fifth Circuit pursuant to the *Career Colleges & Schools of Texas v. U.S. Department of Education (CCST v. Cardona)* litigation.
3. The processing of current BDR applications remains unaffected until the Southern District of New York (SDNY) delivers a verdict on whether the statute of limitations (SOL) provision in the 2019 regulations is severable from the rest of the regulatory scheme. Following this, the matter will return to the Second Circuit for further deliberation.
4. If the SDNY rules to sever and invalidate the 2019 SOL, the 2019 regulations will still be in effect pending the outcome of the *CCST v. Cardona* case in the Fifth Circuit. Since the Biden administration did not include a similar provision in its 2022 regulations, it is unlikely to move to reinstate the SOL.
5. In the event that the SDNY, and eventually the Second Circuit, invalidates the entire 2019 regulations, there is a possibility that the 2016 regulations could govern current BDR application processing, especially if the Fifth Circuit litigation leads to the invalidation of the 2022 regulations.

How ED responds to the various court rulings expected throughout 2024 will have an oversized impact on BDR for the foreseeable future. Therefore, the policy direction of the administration in charge of ED in 2025 will have significant implications for BDR.

The *NYLAG v. Cardona et al.* case carries significant potential to further disrupt the ongoing saga of BDR regulations, reflecting the complex interplay of legal decisions and regulatory changes affecting borrowers, their defense to repayment claims, and the institutions they attended.

If you are currently working with Bond and/or other legal counsel to respond to recent BDR claim notifications, stay the course. Bond will continue to monitor relevant aspects of BDR litigation and