

**TYPES NOT MAPPED YET** January 13, 2025 | TTR not mapped yet | Tres Cleveland, Scott Z. Goldschmidt, Brandt Hill, Aaron D. Lacey, Evan Moltz

# The Merry-Go-Round Continues: Supreme Court to Review 2022 Borrower Defense to Repayment Final Rule

The 2022 Borrower Defense to Repayment Final Rule ("[2022 BDR Rule](#)") has been the subject of litigation for almost two years. Thompson Coburn is closely following developments in this litigation. The latest of these developments could be the beginning of the final chapter in the saga.

The litigation began in February 2023 when Career Colleges and Schools of Texas ("CCST") sued the Department of Education seeking to invalidate the 2022 BDR Rule. In April 2024, the United States Court of Appeals for the Fifth Circuit issued a [ruling](#) siding with CCST and directed the trial court to enter an injunction preventing the 2022 BDR Rule from becoming effective while the case proceeds. In doing so, the Fifth Circuit determined that several substantive and procedural aspects of the 2022 BDR Rule were "almost certainly unlawful."

The Department of Education has since [petitioned](#) the Supreme Court for review of two questions posed by the Fifth Circuit's decision. First, it asked the Court to weigh in on whether the Higher Education Act "permit[s] the assessment of borrower defenses to repayment before default, in administrative proceedings, or on a group basis." Second, the Department asked for permission to challenge the Fifth Circuit's determination that the preliminary injunction should be applied nationwide to all institutions regardless of their involvement in, or connection with, the litigation.

Following additional briefing by [CCST](#), a [third-party](#) supporting the Department, and the [Department](#) itself, the Court [accepted](#) the Department's invitation on January 10, 2025. It did so, however, only to decide if the Department could process borrowers' defenses prior to default, in administrative proceedings, or on a group basis. The Court, in other words, will be deciding the scope of the Department's authority to issue the 2022 BDR Rule. It will not be ruling on the second question about whether it was proper to issue a nationwide injunction. Unless an extension is requested and granted, the Department's merits brief is due on or before February 24, 2025. CCST's response currently is due on or before March 26, 2025. And the Department's reply will be due on or before April 25, 2025.

A decision from the Supreme Court could have a considerable effect not only on the 2022 BDR Rule, but also on the 2016 and 2019 version of the rule, as well. These earlier versions of the rule still govern the adjudication of older claims, and they, like the 2022 version, permit the review of BDR claims prior to a borrower entering default and allow the Department to resolve them administratively. And while the 2019 did not permit adjudication on a group basis, the 2016 rule did. Beyond the direct impacts of the Court's ruling, any decision also would shape future rules promulgated by the Department.

Adding to the uncertainty, the incoming administration could rescind the 2022 BDR Rule altogether through a new rulemaking before the litigation plays out or it could stop defending the 2022 BDR Rule in the courts.

Time will tell what path the new administration chooses, and how any such path is impacted by the pending litigation. In the meantime, we emphasize that the 1994, 2016, and 2019 BDR rules remain in force and that the Department can (and we expect will) continue processing BDR claims. On January 13, 2025, in fact, the Department exercised its existing authority and [approved](#) borrower defense claims of approximately 85,000 students, discharging \$1,260,000,000 in student debt.



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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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