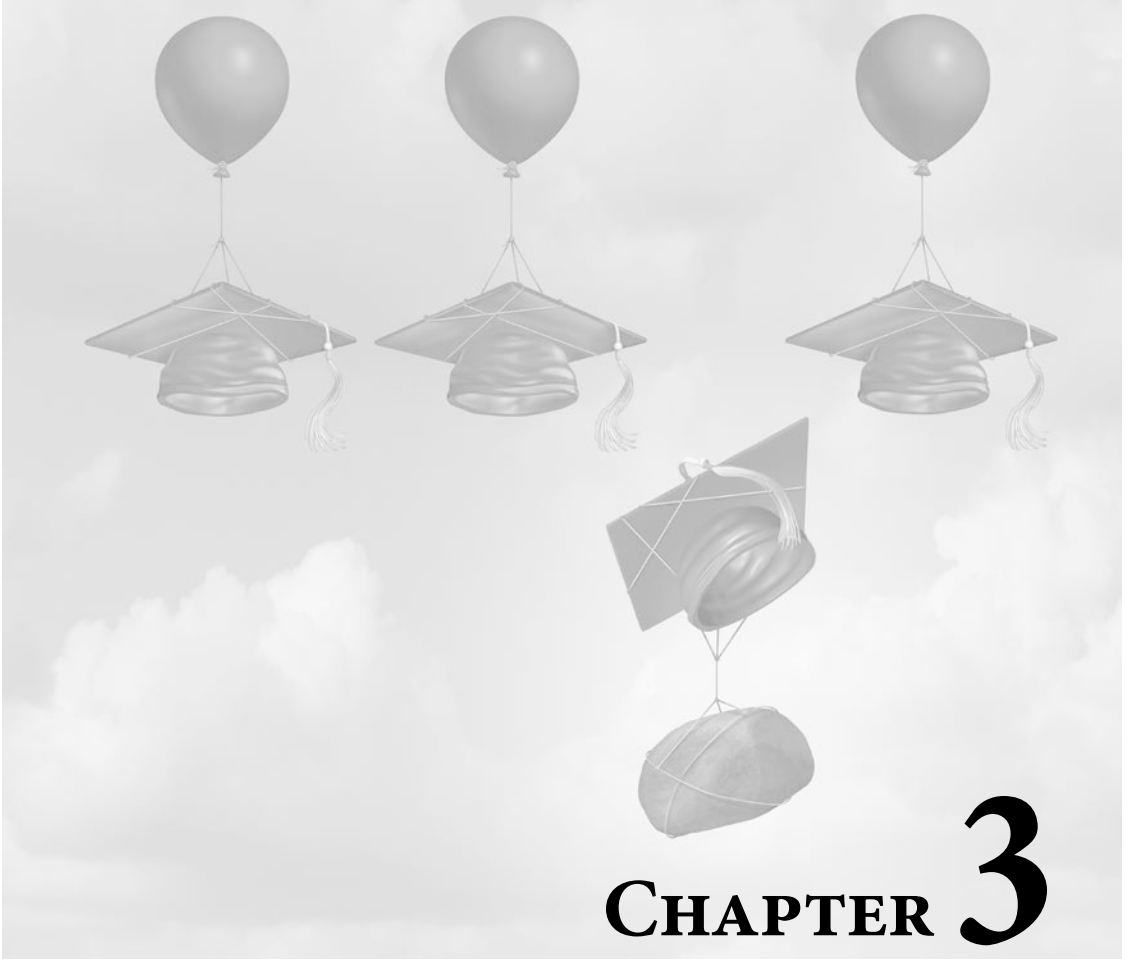

Chapter 3

Undue Hardship

A. The Majority Test: *Brunner v. New York State Higher Education Services Corp.*

Because the term "undue hardship" is not defined in the Code, bankruptcy courts have created case law to determine whether a debtor's circumstances constitute undue hardship. Most courts use the three-prong test set forth in *Brunner v. New York State Higher Education Services Corp*.[202] The elements of the test are as follows:

1. The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;

202 831 F.2d 395 (2d Cir. 1987).

2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

3. The debtor has made good-faith efforts to repay the loan.[203]

The test is based on the debtor's circumstances as of the date of the trial,[204] and the burden is on the debtor to establish each element by a preponderance of the evidence.[205] *Brunner* has been adopted by the Third,[206] Fourth,[207] Fifth,[208] Sixth,[209] Seventh,[210] Ninth,[211] Tenth[212] and Eleventh Circuits,[213] and is the majority rule.

1. *Brunner*'s First Prong

Under the first prong of *Brunner*, the debtor must show that with his current income and expenses, he cannot maintain a "minimal standard of living" if he is forced to repay the student loans.[214] Although not required to live in poverty, "the debtor is expected to do some financial belt-tightening and forgo amenities to which he may have become accustomed."[215] Thus, he must do everything possible to maximize income and minimize expenses,[216] including seeking a job in any field, not just one that the debtor prefers.[217] Courts also look at whether the debtor has imposed his financial hardship on himself, such as through unnec-

203 *Id.* at 396.
204 *Nixon v. Key Educ. Res. (In re Nixon)*, 453 B.R. 311, 326 (Bankr. S.D. Ohio 2011).
205 *Grogan v. Garner*, 498 U.S. 279, 291 (1991).
206 *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995).
207 *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 399 (4th Cir. 2005); *Ekenasi v. United Student Educ. Res. Inst. (In re Ekenasi)*, 325 F.3d 541, 546 (4th Cir. 2003).
208 *U.S. Dep't of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003).
209 *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005).
210 *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).
211 *United Student Aid Funds Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998).
212 *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004).
213 *Hemar Ins. Corp. v. Cox (In re Cox)*, 338 F.3d 1238, 1241 (11th Cir. 2003).
214 *See Nixon*, 453 B.R. at 315. This requires the debtor to produce sufficient financial records for the court to determine the debtor's income and expenses. *Turturo v. Access Group (In re Turturo)*, 522 B.R. 419, 426 (Bankr. N.D.N.Y. 2014) ("Due to the incompleteness of financial records, Debtor's current gross income cannot be ascertained.").
215 *Campton v. U.S. Dep't. of Educ. (In re Campton)*, 405 B.R. 887, 891 (Bankr. N.D. Ohio 2009).
216 *Nixon,* 453 B.R. at 327-28.
217 *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 681 (6th Cir. 2005) ("Tirch should have sought employment in another field when the stress of clinical social work became debilitating."); *Healey v. Mass. Higher Educ. (In re Healey)*, 161 B.R. 389, 395 (Bankr. E.D. Mich. 1993) (a debtor cannot ignore reasonable options in other fields in order to work in one's "field of dreams").

essary spending.[218] Luxury spending or excessive amounts spent on otherwise reasonable expenses could show that the debtor is able to maintain a minimal standard of living.[219]

The Bankruptcy Code does not define "minimal standard" of living. Most courts agree that a minimal standard of living is not such that the debtor must live in abject poverty, but it does require a showing of more than just "tight finances."[220] In the absence of specific guidance from the Code, some courts look to the expenses considered in *In re Ivory*,[221] which include (1) shelter (including heating and cooling); (2) basic utilities such as electricity, water, natural gas and telephones; (3) food and personal hygiene products; (4) vehicles, along with insurance, gas, licenses and maintenance; (5) health insurance or money to pay for health care; and (6) some amount of entertainment or diversion, even if only a television or a pet.[222] The *Ivory* list is not intended to be applied mechanically:

> Rather, in appropriate circumstances, the court must be prepared to depart from the list based on its own experiences, common sense, knowledge of the surrounding area and culture, and assessment of the reasonableness of what debtor claims he or she needs. In addition, what is minimal can and probably should change over time (*e.g.*, with new technology driving down the cost of things that might have previously been cost-prohibitive).[223]

Because what qualifies as a "minimal standard of living" can change over time, a debtor's reasonable expenses may include the cost of cell phones, cable and internet.[224]

To determine whether repaying a student loan would result in undue hardship, some courts use the monthly payment the debtor would pay under an income-

218 *Educ. Credit Mgmt. Corp. v. DeGroot (In re DeGroot)*, 339 B.R. 201, 208 (Bankr. D. Or. 2006). The court found that as the debtor had a three-bedroom house and no dependents, she should have taken on a roommate to share expenses. *Id.* at 210.

219 *Mandala v. Educ. Credit Mgmt. Corp. (In re Mandala)*, 310 B.R. 213, 221-22 (Bankr. D. Kan. 2004) (holding that debtors could maintain minimal standard of living if they adjusted expenses, including food expenses).

220 *Johnson v. Sallie Mae Inc. (In re Johnson)*, 550 B.R. 874, 879 (Bankr. M.D. Ala. 2016) (rejecting rote application of Federal Poverty Guidelines, but finding that since the debtor has no disposable income, she was unable to maintain minimal standard of living).

221 *Ivory v. United States (In re Ivory)*, 269 B.R. 890 (Bankr. N.D. Ala. 2001).

222 *Id*. at 899.

223 *Miller v. Sallie Mae Inc. (In re Miller)*, 409 B.R. 299, 312 n.26 (Bankr. E.D. Pa. 2009).

224 *See, e.g., Nixon*, 453 B.R. at 329 (holding that telecommunications expenses are reasonable to permit debtors to have a source of entertainment, apply for employment online and communicate).

based repayment plan rather than the full contract amount that would be due under the student loan agreement. Using this approach, the debtor would fail the first prong of *Brunner* if he refused to enter into an income-based repayment agreement.[225] If strictly applied, such a rule would effectively replace undue hardship discharge under § 523(a)(8) with income-driven repayment (for federal loans), since no debtor could pass the first prong of the *Brunner* test if he was unwilling to participate in income-driven repayment.[226]

2. *Brunner*'s Second Prong

For the second prong of *Brunner*, the debtor must demonstrate "additional circumstances" that show that the debtor's state of affairs is likely to persist for a significant portion of the repayment period.[227] One court has grimly described this as a "certainty of hopelessness."[228] The second prong can be difficult to meet because it requires the debtor to prove that she will be unable to repay her student loan debt in the future for reasons outside her control.[229]

In a widely cited opinion, *Educational Credit Management Corporation v. Nys*, the Ninth Circuit Court of Appeals offered the following nonexclusive list of additional circumstances that a court may consider:

> (1) serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; (2) the debtor's obligations to care for dependents; (3) lack of or severely limited education; (4) poor quality of education; (5) lack of usable or marketable job skills; (6) underemployment; (7) whether the debtor has maximized his income potential in

225 *Conner v. U.S. Dep't of Educ.,* 526 B.R. 218, 225 (Bankr. E.D. Mich. 2015), *aff'd*, 2016 WL 1178264 (E.D. Mich. March 28, 2016) (debtor failed first prong of *Brunner* because he refused to enter into income-based repayment program, which court determined would allow him to maintain minimal standard of living).

226 *Booth v. U.S. Dep't of Educ. (In re Booth)*, 410 B.R 672, 676-77 (Bankr. E.D. Wash. 2009) ("Holding that an administrative decision to temporarily defer monthly payments [under income-driven repayment] precludes application of undue hardship standards usurps the Bankruptcy Code."). It also deprives the bankruptcy court of jurisdiction, since the U.S. Department of Education could later change the payment amount, outside the scope of review of the bankruptcy court.

227 *See Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 359 (6th Cir. 2007).

228 *Oyler*, 397 F.3d at 386.

229 *See Matthews-Hamad v. Educ. Credit Mgmt. Corp. (In re Matthews-Hamad)*, 377 B.R. 415, 422-23 (Bankr. M.D. Fla. 2007) (debtor failed to show special circumstances despite assertion that she was at the top of her profession and unlikely to find other employment that would pay more).

> the chosen educational field and has no other more lucrative job skills; (8) limited number of years remaining in [the debtor's] work life to allow payment of the loan; (9) age or other factors that prevent retraining or relocation as a means for payment of the loan; (10) lack of assets, whether or not exempt, which could be used to pay the loan; (11) potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; (12) lack of better financial options elsewhere.[230]

The most common circumstances that support undue-hardship discharges are chronic mental or physical ailments that interfere with the debtor's ability to work and generate income.[231] The mere existence of a medical condition will not suffice; the debtor must demonstrate that the medical condition is the primary cause of the debtor's inability to pay his loans.[232] Depression caused by debt, without more, does not appear to suffice.[233]

The debtor's adverse financial circumstances must be beyond the debtor's control and not a result of the debtor's own choices.[234] Thus, a debtor's decision to keep a low-paying but more satisfying job when better earning options are available suggests that the debtor's circumstances are a result of his own decisions.[235] A debtor who left a well-paying nursing career at age 45 to enter chiropractic school could not complain that, at age 54, the profession did not provide enough

230 *Educ. Credit Mgmt. Corp. v. Nys (In re Nys*), 446 F.3d 938, 947 (9th Cir. 2006).

231 *See, e.g., Ablavsky v. U.S. Dep't of Educ. (In re Ablavsky)*, 504 B.R. 709 (Bankr. D. Mass. 2014) (disbarred attorney whose malpractice was linked to severe bipolar disorder granted discharge of $82,000 in student loan debt); *Myhre v. U.S. Dep't. of Educ. (In re Myhre)*, 503 B.R. 698 (Bankr. W.D. Wis. 2013) (debtor was quadriplegic whose minimal expenses exceeded his modest income, with no reasonable likelihood of increased income); *Todd v. Access Group Inc. (In re Todd)*, 473 B.R. 676, 680, 682, 695 (Bankr. D. Md. 2012) (loans discharged for 63-year-old debtor with lifetime Asperger's syndrome, osteoporosis and post-traumatic stress disorder); *Larson v. United States (In re Larson)*, 426 B.R. 782, 787 (Bankr. N.D. Ill. 2010) (debtor suffered from diabetes, total blindness caused by diabetes, heart condition and kidney transplant).

232 *Trudel v. U.S. Dep't of Educ. (In re Trudel*), 514 B.R. 219, 226 (B.A.P. 6th Cir. 2014) (*Brunner* second prong not met where debtor's treating physician opined that debtor could work four days per week, even with chronic bronchitis and beginning stages of emphysema).

233 *See* Katheryn E. Hancock, "A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans under the Bankruptcy Code," 33 *Law & Psychol. Rev.* 151, 162-63 (2009) (analyzing mental health as a factor in student loan debt-discharge cases).

234 *Barrett*, 487 F.3d at 359, citing *Oyler v. Educ. Credit Mgmt. Corp*., 397 F.3d at 386.

235 *Bene v. Educ. Credit Mgmt. Corp. (In re Bene)*, 474 B.R. 56 (Bankr. W.D.N.Y. 2012).

income for her to repay her student loan debts within her lifetime.[236] In another case, the debtor, an adjunct professor, refused to apply for permanent work at other schools because she deemed them to be too far from her home, even though the increased income would more than offset the extra transportation costs.[237] At least one court has recognized the circular effect of excessive student debt driving down the debtor's credit score, which in turn deters prospective employers from hiring her, thereby preventing the debtor from increasing her income.[238]

Some courts have found that a debtor's choices were not necessarily *free* choices. In a case where a debtor discontinued her studies in order to care for her infirm parents, the court characterized her decision as a *moral* choice, not a choice to be poor:

> The *Brunner* test looks to the present and future, not to the distant past.… A moral choice that some debtor made 24 or more years ago to forego opportunities she then had to improve herself, and thus to optimize her potential to earn enough money to repay her student loan debt, is not relevant to a *Brunner* analysis.[239]

In another case, a debtor incurred $200,000 of student loan debt for undergraduate and medical school, but by the time of her bankruptcy petition, she had become a full-time stay-at-home mother with five young children, including two children with special needs.[240] The court found that "[t]his is not a case in which a debtor willfully chose to avoid payments that could have been made or was underemployed or unemployed for no discernible reason. Caring for her five young children has become [the debtor's] full-time occupation."[241]

236 *DeRose v. EFG Technologies (In re DeRose)*, 316 B.R. 606 (Bankr. W.D.N.Y. 2004).

237 *Gipson v. U.S. Dep't of Educ. (In re Gipson)*, Adv. Pro. No. 11-00827, 2012 WL 2249619, at *3-4 (Bankr. D. Md. June 15, 2012). The debtor also refused to reactivate her law license to seek work in law, which would provide more income, for the reason that "I'm not interested in being an attorney. I do not consider myself an attorney. I am an educator." *Id.* at *5. *See Nixon*, 453 B.R. at 327-28 (holding that debtor could not satisfy the second prong of *Brunner* without looking for all possible teaching positions).

238 *Jolie v. U.S. Dept. of Educ.*, Adv. Pro. No. 13-00009, 2014 WL 929703, *9 (Bankr. D. Mont. March 10, 2014) (employer refusal to hire debtor because of her excessive student loan debt one factor in satisfying *Brunner* second prong).

239 *Bene*, 474 B.R. at 61.

240 *Walker v. Sallie Mae Servicing Corp. (In re Walker)*, 650 F.3d 1227 (8th Cir. 2011).

241 *Id.* at 1234. *See also Lamento v. U.S. Dep't of Educ. (In re Lamento)*, 520 B.R. 667 (Bankr. N.D. Ohio 2014) (debtor's financial difficulties not of her own making where abusive ex-husband forced her to drop out of college and vocational training).

The distinguishing element in these cases is whether the debtor had options that could increase income or decrease expenses.[242] Foregoing career plans to care for elderly parents or raise children were found to not constitute free choice, whereas personal career choices or preferences were within a debtor's control. In addition, the timing of the choice, *i.e.*, a recent choice of the debtor or one in the distant past, can also be a factor to be considered by the courts.[243]

The inability to find employment has been held by most courts to be insufficient to meet the second prong of the *Brunner test*. However, in *Krieger v. Educational Credit Management Corp.*, a *pro se* debtor who had trained as a paralegal tried unsuccessfully for 10 years to land any type of a job.[244] The bankruptcy court, observing the debtor's worn demeanor at trial, held that the debtor's prolonged inability to find employment satisfied the second prong of *Brunner*:

> Rarely has the Court seen the kind of persistent job search efforts in which this debtor has engaged over the past decade. Never has the Court seen such utter futility be the result of a debtor's job search efforts. This debtor is truly destitute and has been in these straits for many years without any respite.... If the term "certainty of hopelessness" is to ever have any application, it is in this case.[245]

The bankruptcy court's order discharging the debt was reversed by the district court but was reinstated on appeal by the Seventh Circuit. The ruling appears to be the first appeals court decision finding that a prolonged unsuccessful career search constitutes the requisite "additional circumstances," and it may signal a less-strict interpretation of *Brunner*.[246] It certainly suggests that courts need not find the same "certainty of hopelessness" and proof of prior payment that earlier cases had demanded. As the *Krieger* court stated, "[i]t is important not to allow

242 *See Bene*, 474 B.R. at 70 (noting that moral choices made a long time ago are different from lifestyle options that debtor can feasibly modify after bankruptcy).

243 *Id.* In *Bene*, the debtor, who was 64 years old, had worked on an assembly line for 12 years, but with the plant closing and no other skills or degree, the court found that the debtor "[had no choice], and has not had such a choice for a very long time." *Id.*

244 *Krieger v. Educ. Credit Mgmt. Corp. (In re Krieger)*, Case No. 11-80144, 2012 WL 1155687, at *2 (Bankr. C.D. Ill. April 5, 2012), *rev'd sub nom., Educ. Credit Mgmt. Corp. v. Krieger,* 482 B.R. 238 (C.D. Ill. 2012), *rev'd and remanded*, 713 F.3d 882 (7th Cir. 2013).

245 *Id.* at *6.

246 *See, e.g., Barnett v. U.S. Dep't of Educ. (In re Barnett)*, 545 B.R. 625, 633 (Bankr. N.D. Cal. 2016) (56-year-old attorney in good health and no dependents and was unable to establish a viable practice after 28 years of diligent effort granted discharge of $264,000 of student loan debt); *Lamento*, 520 B.R. at 667 (finding that "additional circumstances" are likely to persist where debtor "does not have the time, money, or family support to return to school to get additional education that might lead to a better job").

judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself."[247]

Courts are divided on whether a debtor's advanced age is an additional circumstance that satisfies the second prong of *Brunner*. In *Brunner*, the court held that no additional circumstances exist where the debtor "is not disabled *nor elderly*."[248] Thus, one court cited the debtor's age (early 50s) as limiting her earning capacity and thus her ability to afford her loan repayment.[249] Other courts have held that age alone is not a factor to be considered in the second prong of the *Brunner* test,[250] and people who take on education debt at an older age do not suffer undue hardship because they owe debt into their retirement age,[251] even if a debtor asserts that he will be unable to pay the loan in his lifetime.[252]

3. *Brunner*'s Third Prong

The third prong of *Brunner* is whether the debtor has made good-faith efforts to repay the loan. "Good faith" is measured by the debtor's efforts to obtain employment, maximize income and minimize expenses.[253] The debtor's failure to make a payment does not in and of itself establish a lack of good faith,[254] but failure to make *any* payments when earning an income can be evidence of a lack of

247 *Krieger v. Educ. Credit Mgmt. Corp.,* 713 F.3d 882, 884 (7th Cir. 2013).

248 *Brunner*, 831 F.2d at 396.

249 *Hinkle v. Wheaton Coll. (In re Hinkle)*, 200 B.R. 690, 694 (Bankr. W.D. Wash. 1996).

250 *Spence v. Educ. Credit Mgmt. Corp. (In re Spence)*, 541 F.3d 538, 544 (4th Cir. 2008) (second prong not met where debtor over 65 years of age "articulated no additional circumstances beyond her age and current financial distress…").

251 *See, e.g., Degroot*, 339 B.R. at 212 ("[W]here debtors choose to incur educational debt later in life, the fact that they will reach retirement age during the loan repayment period is not enough alone to justify discharge...."); *Mandala*, 310 B.R. at 222 (where debtor chose to return to school late in life on borrowed money, "[t]hat [the] student loan payment periods may progress beyond a borrower's retirement age, standing alone, should not skew the second prong of the *Brunner* test against lenders"). *See also Tetzlaff v. Educ. Credit Mgmt Corp.*, 794 F. 3d 756, 759 (7th Cir. 2015), *cert. denied,* 136 S. Ct. 803 (2016) (no discharge for unemployed 56-year-old law grad who failed to pass the bar exam where debtor "is not mentally ill and is able to earn a living").

252 *Fabrizio v. U.S. Dep't of Educ. Borrower Servs. Dep't Direct Loans (In re Fabrizio)*, 369 B.R. 238, 245-46 (Bankr. W.D. Pa. 2007) ("Debtor's personal belief as to the effect of payment is totally irrelevant on this issue.").

253 *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007), citing *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993).

254 *Polleys*, 356 F.3d at 1311 (holding that debtor's "failure to make a payment, standing alone, does not establish a lack of good faith").

good-faith efforts.[255] The debtor's financial plight must be due to factors beyond the debtor's control.[256] Interestingly, the fact that the debtor has paid down (or paid off) one student loan debt might not constitute evidence of good faith if the debtor neglects to pay other education debts.[257]

Some courts look to whether the debtor has participated in alternative repayment options.[258] However, in *In re Mosley*, the U.S. Court of Appeals for the Eleventh Circuit rejected a *per se* test.[259] In that case, although the debtor's payment under an income-contingent repayment plan would be zero, interest on the debt would continue to accrue, and the amount forgiven at the end of 25 years could be treated as taxable income.[260] As the court pointed out, an income-contingent repayment plan is not always a viable option for debtors because it would require them to "trade one nondischargeable debt for another."[261]

The Sixth Circuit has also refused to hold that the good-faith prong of *Brunner* requires the debtor to participate in income-contingent repayment, finding that such a rule would in effect eliminate the undue-hardship discharge of student loans from the Bankruptcy Code.[262] The majority of courts agree and do not require that the debtor have participated in income-based repayment programs or other programs in order to establish undue hardship.[263] Some courts, however,

255 *Johnson v. Sallie Mae Inc. (In re Johnson)*, 550 B.R. 874, 881 (Bankr. M.D. Ala. 2016) (finding lack of good faith where debtor paid only $1,000 on her loans over six years but purchased a new car during that time); *Fabrizio*, 369 B.R. at 245 (finding lack of good faith where debtor who made $37,000 per year failed to make any payments for two years).

256 *Davis v. Nat'l Coll. Trust (In re Davis)*, 526 B.R. 136, 142 (Bankr. W.D. Pa. 2015) (debtor's failure to seek employment for more than a year after closing her business is evidence of lack of good faith).

257 *Tetzlaff*, 794 F. 3d at 761, *citing Spence*, 541 F.3d at 545.

258 *Hertzel v. Educ. Credit Mgmt. Corp. (In re Hertzel)*, 329 B.R. 221, 233-34 (B.A.P. 6th Cir. 2005).

259 *Mosley*, 494 F.3d at 1327.

260 *Id*.

261 *Id*. (quoting *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 364 (6th Cir. 2007)); *see also Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010) ("[T]he [income-contingent repayment program] might be beneficial for a borrower whose inability to pay is temporary and whose financial situation is expected to improve significantly in the future. Where no significant improvement is anticipated, however, such programs may be detrimental to the borrower's long-term financial health." (citations omitted)).

262 *Barrett*, 487 F.3d at 364.

263 *See, e.g.*, *Dorsey v. U.S. Dep't of Educ.,* 528 B.R. 137, 143 (E.D. La. 2015) (debtor with disability seeking undue hardship discharge was not required to first apply for administrative discharge from DOE); *Bene*, 474 B.R. at 58 (holding that requiring income-contingent repayment would effect a repeal of § 523(a)(8)); *Cagle v. Educ. Credit Mgmt. Corp.* (*In re Cagle*), 462 B.R. 829 (Bankr. D. Kan. 2011); *Crawley v. Educ. Credit Mgmt. Corp. (In re Crawley)*, 460 B.R. 421, 444-45 (Bankr. E.D. Pa. 2011); *Ben-*

find that the debtor's failure to consider loan consolidation or income-based repayment may contribute to a finding of bad faith.[264]

4. Critique of *Brunner*

It is questionable whether *Brunner* constitutes sound precedent when considering discharge of student loans under the current Bankruptcy Code. In 1987, when *Brunner* was decided, private loans were fully dischargeable, and federal loans were subject to the undue-hardship test only if the debtor filed her bankruptcy petition within five years of the start of the repayment period. Thus, when determining whether the debtor was able to repay the loan "for a significant portion of the repayment period," the *Brunner* court was referring only to debtors five years or less into their loan repayment. Debtors such as the one in *Krieger* and in the vast majority of published cases would never have come before the *Brunner* court because they were well outside the five-year bar to student loan discharge. The *Brunner* case as currently applied by bankruptcy courts requires a judge to gaze into the indeterminate future and surmise about the debtor's lifetime financial prospects — something the *Brunner* court never intended. Thus, *Brunner* may not be appropriate in interpreting "undue hardship" today.

As an example of *Brunner*'s questionable utility, consider a debtor who is in default on her student loans and the contractual loan-repayment period had expired by the time she filed her bankruptcy petition (such as in the case of a long-term default). As noted, when *Brunner* was decided, the undue-hardship exception only applied to federal loans in repayment for less than five years. Because the standard education loan-repayment term is 10 years, *all* loans that were subject to the undue-hardship test at the time of *Brunner* were within the repayment period. Now, however, *Brunner* applies even to student loans that are older than the original 10-year repayment term. Because the second prong of *Brunner* looks to whether the debtor's state of affairs is likely to continue "during the repayment period" based on a strictly literal reading of *Brunner*, the second

jumen v. AES/Charter Bank (In re Benjumen), 408 B.R. 9, 21-22 (Bankr. E.D.N.Y. 2009); *Allen v. Am. Educ. Servs. (In re Allen)*, 324 B.R. 278, 281 (Bankr. W.D. Pa. 2005) (whether debtor has participated in deferment or restructuring program "'is but one of the factors for the court to consider'").

264 *Stitt v. U.S. Dept. of Educ.*, 532 B.R. 638 (D. Md. 2015); *Davis*, 526 B.R. at 143 ("[A]lthough consideration of any attempt by her to consolidate her loan obligations is neither dispositive nor a prerequisite to dischargeability … such conduct can support a finding that the debtor takes her loan obligation seriously….").

prong should not apply to a student loan for which the original repayment period has expired.

B. The Totality of the Circumstances Test: Eighth Circuit and Courts in the First Circuit

Bankruptcy courts in the Eighth Circuit use a "totality of the circumstances" test in which the court considers (1) the debtor's past, present and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the debtor and her dependents; and (3) "any other relevant facts and circumstances surrounding each particular bankruptcy case."[265] Such "other relevant factors" can include whether the debtor's inability to pay the debt is within the debtor's control, and whether the debtor has made payments on the student loan or made good-faith efforts to obtain deferment or forbearance.[266] Thus, a debtor established undue hardship when she cared for five children, including two autistic children, and where her spouse's income as a police officer was insufficient to meet their reasonable expenses, much less pay anything toward her $300,000 student loan debt.[267] In another case, a 40-year-old debtor with no job skills other than as a driver was entitled to the discharge of $37,000 in education debt.[268] On the other hand, a 66-year-old debtor who planned to work until age 70 and who could afford to make the $42-per-month payment was not entitled to an undue-hardship discharge when she never made any attempt to pay or address the student loan for more than 20 years, thus her hardship was of her own making.[269]

The First Circuit has not adopted a specific test but rather focuses on the debtor's ability to earn an income in the future: "We see no need in this case to pronounce our views of a preferred method of identifying a case of 'undue hardship.' The standards urged on us by the parties both require the debtor to demonstrate that her disability will prevent her from working for the foreseeable future."[270]

265 *Walker*, 650 F.3d at 1230 (citing *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003)).

266 *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F. 3d 775, 783-84 (8th Cir. 2009) (Smith, J. concurring).

267 *Walker, 650 F.3d.* at 1234-35.

268 *Abney v. U.S. Dep't of Educ (In re Abney),* 540 B.R. 681 (Bankr. W.D. Mo. 2015) (where debtor "made every humanly possible effort to pay his child support and student loans…. Undue hardship should not be interpreted so harshly as to prevent this debtor … from ever getting the fresh start that the Bankruptcy Code is intended to provide"). *Id.* at 691.

269 *Hurst v. S. Ark. Univ. (In re Hurst*), 553 B.R. 133 (B.A.P. 8th Cir. 2016).

270 *Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 190-91 (1st Cir. 2006).

In the absence of specific instructions from the First Circuit Court of Appeals, Massachusetts bankruptcy courts employ a totality-of-the-circumstances test.[271] In *Bronsdon v. Education Credit Management Corp.* (*In re Bronsdon*),[272] the U.S. Bankruptcy Appellate Panel for the First Circuit held that neither the second prong of *Brunner* (the debtor's state of affairs is likely to persist) nor the third prong (good-faith effort has been made to repay the loan) was required under the Code:

> The party opposing the discharge of a student loan has the burden of presenting evidence of any disqualifying factor, such as bad faith. The debtor is not required under the statute to establish prepetition good faith in absence of a challenge. The debtor should not be obligated to prove a negative, that is, that he did not act in bad faith, and, consequently, in good faith.[273]

The *Bronsdon* court found that a debtor's efforts to repay a loan is just one of the elements in the totality-of-the-circumstances test, not a dispositive requirement on its own. For example, income-contingent or income-based repayment programs allow for the suspension or reduction of payments, but they can result in the continued accrual of interest. Such "negative amortization" in fact increases the debtor's ultimate debt burden.[274] In addition, federal loan forgiveness effectively trades nondischargeable loan debt for nondischargeable tax debt.[275] Accordingly, many loan-repayment programs may not be suitable for debtors, and the court should not consider them when determining whether a debtor should be allowed a discharge.[276]

271 *See, e.g.*, www.military.com/Resources/ResourcesContent/0,13964,44245--,00.html; *Bronsdon*, 435 B.R. at 800 (considering both tests and applying totality-of-the-circumstances test).

272 *Bronsdon, 435 B.R.* at 802.

273 *Id.* at 800 (discussing *Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks)*, 331 B.R. 18, 27-28 (Bankr. D. Mass. 2005)).

274 *Id.* at 802.

275 *Id.* at 802-03.

276 *Id.*

C. Partial Discharge

A number of courts have allowed debtors to discharge part of their student loan debt, using either the three *Brunner* factors or the totality-of-the-circumstances test. For example, the Sixth Circuit has held that partial discharge is permitted under § 105(a)[277] using the three-part *Brunner* criteria.[278] The debtor must satisfy each prong of the *Brunner* test with respect to the portion of the debt to be discharged, and the discharge is allocated *pro rata* among the debtor's loans.[279] In one case, a bankruptcy court found that the debtor's circumstances satisfied the *Brunner* test for discharge of all but $8,045.02 of her total student loan debt of $36,284.81.[280] The debtor had cancer, and thus "it is highly likely that [the debtor's] financial predicament will persist for many years, and possibly the rest of her life."[281] Courts in the Ninth,[282] Tenth[283] and Eleventh[284] circuits also grant partial discharge of student loans using the *Brunner* criteria.

Other courts have granted partial discharge under the totality-of-the-circumstances test. For example, a Massachusetts bankruptcy court held that although the debtor had not proven undue hardship at trial, her long-term income pros-

277 *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 440 (6th Cir. 1998); *see also Miller v. Pa. Higher Assistance Agency (In re Miller)*, 377 F.3d 616, 620 (6th Cir. 2004) ("[W]hen a debtor does not make a showing of undue hardship with respect to the entirety of her student loans, a bankruptcy court may — pursuant to its § 105(a) powers — contemplate granting … a partial discharge of the debtor's student loans.").

278 *Oyler*, 397 F.3d at 385; *Nixon*, 453 B.R. at 336 (stating that court may grant partial discharge of student loan debt).

279 *Nixon*, 453 B.R. at 336 (debtor with education debt of more than $270,000 may discharge any amounts in excess of $214,200, based on *Brunner* criteria).

280 *Jorgensen v. Educ. Credit Mgmt. Corp. (In re Jorgensen)*, 2012 Bankr. LEXIS 254 *17 (Bankr. D. Haw. Jan. 20, 2012), *aff'd*, 479 B.R. 79 (B.A.P. 9th Cir. 2012).

281 *Id.* at *5.

282 *See Saxman v. Educ. Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1173 (9th Cir. 2003) ("[B]ankruptcy courts may exercise their equitable authority under 11 U.S.C. § 105(a) to partially discharge student loans."); *McDowell v. Educ. Credit Mgmt. Corp*., 549 B.R. 744 (D. Idaho 2016) (debtor granted discharge of $83,000 on $93,000 debt to account for sums she might have paid on student loan by exercising better financial restraint). In a somewhat inexplicable case, a bankruptcy court determined that a 51-year-old debtor with 20 years remaining on his student loan payments had satisfied each prong of the *Brunner* test. Because the debtor planned to retire at age 67, the court granted a partial discharge equal to the current value of principal that would be paid over 16 years ($72,000), rather than the full amount that would be paid over 20 years ($97,000). *Morrison v. Sallie Mae Inc. (In re Morrison)*, Adv. Pro. No. 13-80034-FPC, 2014 WL 739838 *8 (Bankr. E.D. Wash. 2014).

283 *See Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200, 1205 (10th Cir. 2005).

284 *See Hemar Ins. Corp. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003) ("Because the specific language of § 523(a)(8) does not allow for relief to a debtor who has failed to show 'undue hardship,' the statute cannot be overruled by the general principles of equity contained in § 105(a).").

pects were dubious given her advanced age and history of poor health.[285] The court held that if the debtor participated in an income-based repayment program, she would receive a bankruptcy discharge for the portion of the debt that remained at the expiration of the 25-year repayment period.[286]

There is nothing in the Code that expressly permits partial discharge of student loan debt. Section 523(a)(8) provides for discharge of "an educational benefit overpayment or loan."[287] This appears to mean discharge of a loan in its entirety, not just part of the loan. In contrast, other sections of the Bankruptcy Code specifically provide for adjustment of a portion of a debt. For example, § 506(a)(1) allows secured debts to be bifurcated into secured and unsecured components "to the extent of the value of such creditor's interest in [the collateral]."[288] In consumer chapter 7 cases, the debtor may avoid a judgment lien against property of the debtor "to the extent that such lien impairs an exemption to which the debtor would have been entitled."[289] In these provisions, the words *to the extent* show that partial treatment of the claim is allowed. There is no such language in connection with education debt.

In the absence of specific language allowing for a partial discharge of education debt, some courts grant partial discharge pursuant to § 105(a), which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[290] Courts have even cited § 105(a) to grant a discharge of accrued interest or attorney's fees in connection with a student loan debt,[291] institute a repayment schedule, defer repayment, and allow a debtor to reopen bankruptcy proceedings to revisit the question of undue hardship. On the other hand, a number of courts have held that the Bankruptcy Code does not allow for partial discharge. These include the Third Circuit[292] and many bankruptcy courts.[293]

285 *Stevenson v. Educ. Credit Mgmt. Program (In re Stevenson)*, 463 B.R. 586, 598 (Bankr. D. Mass. 2011).
286 *Id.* at 599.
287 11 U.S.C. § 523(a)(8) (2016).
288 11 U.S.C. § 506(a)(1).
289 11 U.S.C. § 522(f)(1).
290 11 U.S.C. § 105(a).
291 *Griffin v. EDUSERV (In re Griffin)*, 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996) ("[I]t would be an 'undue hardship' for the Debtors to pay any of the accrued interest and attorneys' fees associated with ... student loans.").
292 *Faish*, 72 F.3d 298, 307 (3d Cir. 1995).
293 *See, e.g., Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 311 (Bankr. S.D.N.Y. 2002) ("The Bankruptcy Code clearly does not permit a court to discharge in part a single student loan obligation.").

In cases where a debtor has multiple education loans, a few courts have granted full discharge of some of the debtor's loans while leaving the others nondischargeable. In one case where the debtor had six student loans, the court found that the three loans that had been in repayment for the longest amount of time, totaling $18,143, were dischargeable, but that the debtor was able to pay the three remaining loans totaling $10,014.[294] More recently, the Eighth Circuit BAP ruled that it might be possible to discharge some of a debtor's 15 loans rather than all of them, but that a separate undue-hardship analysis was required for each loan.[295] Other courts use a similar loan-by-loan approach,[296] but there is nothing in the Bankruptcy Code that provides for this type of prioritization, and indeed several courts have held that loan-by-loan discharge is inappropriate.[297]

294 *Hinkle,* 200 B.R. at 694; *see also Gharavi v. U.S. Dep't of Educ. (In re Gharavi)*, 335 B.R. 492, 501 (Bankr. D. Mass. 2006) (debtor who suffered from fatigue due to MS established undue hardship in showing that she only had enough income to afford payments on the oldest of four loans).

295 *Conway v. Nat'l Collegiate Trust (In re Conway)*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013).

296 *See, e.g.*, *Gharavi*, 335 B.R. at 501 (discharging three out of four student loans, but debtor remained liable for one of them); *Hollister v. Univ. of N.D. (In re Hollister)*, 247 B.R. 485, 493 (Bankr. W.D. Okla. 2000); *Ledbetter v. U.S. Dep't of Educ. (In re Ledbetter)*, 254 B.R. 714, 717-18 (Bankr. S.D. Ohio 2000).

297 *See Pincus*, 280 B.R. at 313-14; *Young v. PHEAA (In re Young)*, 225 B.R. 312, 318 (Bankr. E.D. Pa. 1998).