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NOTE: STUDENT LOAN DISCHARGE IN BANKRUPTCY – IT IS TIME FOR A UNIFIED EQUITABLE APPROACH

Introduction

Student loan debt is interpreted uniquely within the Bankruptcy Code. This class of debt is not automatically discharged or automatically excepted [1] from discharge in a bankruptcy proceeding. Instead, student loan debt is afforded its own standard of dischargeability, namely, section 523(a)(8), which provides for discharge only when failure to do so would impose an undue hardship on the debtor and the debtor's dependents. [2]

The problem with the undue hardship standard lies in its inherent vagueness. There is little definition of this standard given by Congress. [3] Thus, judicial interpretation has been relied upon heavily, [4] and has yielded numerous undue hardship tests. [5] But, a shortcoming of section 523 is the exact ramification when an undue hardship is or is not found. [6] Specifically, should there be an "all or nothing" approach to discharging student loans contingent upon a finding of undue hardship? This is a question many courts recently addressed and the answers have varied considerably. [7] The goal of uniformity in the law dictates that there must be consistency in this area of bankruptcy.

This note demonstrates that section 523(a)(8) is not so explicit as to demand only an "all or nothing" approach to discharging student loan indebtedness in bankruptcy. Partial discharge is an appropriate alternative. After reviewing the totality of the circumstances, bankruptcy courts should exercise their equitable powers to design a remedy fair to both the debtor and the lender. Part I of this note reviews the legislative and judicial interpretations of the undue hardship burden. Part II compares, through an analysis of recent decisions, the equitable approach taken by the Sixth Circuit in discharging student loans to the Ninth Circuit's rather rigid "all or nothing" approach. Part III suggests that the bankruptcy courts may devise equitable remedies for student loan debtors. This assertion is supported first by considering the federal government's own student loan program, designed with flexible repayment terms. It is further maintained through a review of other supporting case law and an analysis of the bankruptcy courts' powers under section 105, which provides the courts with expansive latitude in executing the provisions of the Bankruptcy Code.

I. A Brief History of Legislative and Judicial Interpretations of Section 523(a)(8)

A. A Synopsis of the Legislative History Surrounding Section 523(a)(8)

When Congress revamped the Bankruptcy Code in 1978, [8] it effectively re−classified student loan debt as an obligation that could be discharged only upon proof of an "undue hardship" [9] (provided that a separate time requirement was not met). [10] The insertion of this undue hardship burden into the Code was the result of a compromise between the House and Senate. [11] However, the idea for the provision actually was rooted in the Report of the Bankruptcy Commission of 1973, which suggested that educational loans be dischargeable when a hardship exists. [12] The Commission included this suggestion in its draft statute, [13] and the rationale was to deter the "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payments of educational loan debt." [14] In 1978, amid much controversy as to the provision's necessity, [15] Congress included the Commission's draft provision in the Bankruptcy Reform Act. [16] Congress viewed student loans unlike the vast majority of other types of loans as they are made without concern for the debtor's

current financial position. Instead, the creditor relies on repayment based on the debtor's possible future income earned as a result of the education obtained with the loan. [17] Unfortunately, although Congress chose to adopt the Commission's standard and consciously created the undue hardship burden for discharge, there is little legislative history or commentary actually interpreting this burden. [18]

B. The Judicial Interpretation of the Undue Hardship Burden: What Does it Set Out To Prove?

Since the creation of the undue hardship burden, courts have devised tests seeking to discern its breadth. [19] Currently, many circuits use a three−pronged test created by the United States District Court for the Southern District of New York and subsequently affirmed by the Second Circuit Court of Appeals in *Brunner v. New York State Educational Services Corporation*. [20] This case held that in order to be discharged from student loan debt in bankruptcy, the following must be shown:

1. That the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents, if forced to repay the loan;
2. That this state of affairs is likely to persist for a significant portion of the student loan; and
3. That the debtor has made good faith efforts to repay the loan [21]

The Second Circuit affirmed the district court's conclusion that Brunner did not present an undue hardship based on the three−pronged test. [22] Brunner owed approximately $9,000 in student loans for her undergraduate and graduate education, which she completed in 1981. She filed for bankruptcy seven months after receiving her Master's degree and was granted relief from all debts apart from the student loans. [23] Following the expiration of the nine−month repayment grace period, the debtor sought a discharge of her educational loans. [24] The district court found that although she may not be able to maintain a minimal standard of living, there was no evidence that her situation was likely to extend far into the repayment term. [25] Additionally, she did not exercise good faith as she filed for discharge from the debt approximately one month after it came due. At the very least, she could have requested a deferment. [26] The court focused on the fact that Brunner appeared to be healthy, intelligent and well educated and even if she could not obtain a job in her chosen field, she should be able to obtain some other type of work to satisfy her obligation. [27]

The three−pronged test acknowledges the fact that "undue hardship" requires more than just an undesirable current earning situation to satisfy the Bankruptcy Commission's term of art. [28] But, the *Brunner* court appears to conclude hastily that when the three prongs are not met, the loan, in its entirety, is undischargeable. [29] There is no discussion as to the propriety or impropriety of a partial or equitable discharge.

Perhaps the facts in *Brunner* were so egregious against the debtor that a partial or equitable discharge was not contemplated and thus merited no further discussion. However, *Brunner* has become the benchmark case upon which numerous circuits rely. [30] Some courts have taken the position that because *Brunner* did not address equitable remedies, it has no place in determining the dischargeability of student loan indebtedness. [31]

II. The Sixth Circuit vs. the Ninth Circuit − Two Very Different Approaches to Section 523(a)(8)

While the issue of partial discharge of student loans remains controversial, [32] two circuits stand apart with vastly different views. The Sixth Circuit has recently promoted its approach of partial discharge of student loans in *Tennessee Student Assistance Corp. v. Hornsby*. [33] Alternatively, the Ninth Circuit leans toward an "all or nothing" approach as illustrated in *United Student Aid Funds, Inc. v. Taylor*. [34]

A. The Sixth Circuit's Equitable Rationale

The cases emerging from the Sixth Circuit generally hold that the bankruptcy court has the authority to design remedies both to provide the debtor with a fresh start and to protect the integrity of the student loan program. [35] This was the approach taken by the bankruptcy court and approved by the Sixth Circuit Court of Appeals in the 1994 decision, *Cheesman v. Tennessee Student Assistance Corporation*. [36] Although the court did not adopt the *Brunner* test explicitly, it determined that the debtors in question would meet the undue hardship

standard under any test. [37] However, the Court exercised its equitable powers and postponed its final decision for eighteen months in order to revisit the case and determine if the debtor's financial situation changed putting them in a better position to repay their debt. The Court of Appeals determined that the bankruptcy court acted within its section 105(a) discretion in granting the stay and affirmed its decision. [38]

The case that solidified the Sixth Circuit's belief that bankruptcy courts have the inherent power to structure equitable remedies when a debtor seeks to discharge student loan debt is *Tennessee Student Assistance Corp.* v. *Hornsby*. [39] The Hornsbys were burdened with over $30,000 in student loan debt. [40] They had three young children and filed a voluntary chapter 7 petition in 1993. They then commenced an adversary proceeding to obtain a discharge of their student loan debt due to an undue hardship. Although both husband and wife attended a number of colleges, neither graduated. [41] The bankruptcy court, after reviewing the debtors' income and expenses, concluded that they operated at a monthly surplus of between $192 and $280. [42] However, the bankruptcy court concluded that the Hornsbys could not maintain a minimal standard of living because of other unexpected expenses that were not included in their stated monthly expenses. The court also determined that the Hornsbys' situation was not likely to improve but that they had acted in good faith because even though they had not made a loan payment, they had exercised all forbearance and deferment options. [43] Thus, according to the bankruptcy court, the Hornsbys met all three prongs of the *Brunner* test. [44]

While the district court affirmed the bankruptcy court's decision, the court of appeals was not entirely convinced that the Hornsbys met the undue hardship standard set out in *Brunner*. The court felt the family operated at a surplus and did not truly fulfill the first prong. However, the court recognized this family's financial burden. [45] The court also questioned the bankruptcy court's reasoning in determining that the condition would persist since the Hornsbys were young and healthy. Finally, the court thought it was questionable that the Hornsbys exercised good faith as they failed to make even one loan payment. [46]

The court of appeals concluded that the bankruptcy court should not have discharged the Hornsbys' student loans because they did not meet the *Brunner* test. [47] However, the court also found that the bankruptcy court had the power to "take action short of total discharge" [48] under section 105(a). [49] The court noted that "where a debtor's circumstances do not constitute undue hardship as to part of the debt but repayment of the entire debt would be an undue hardship, some bankruptcy courts have partially discharged student loans even while finding the student loan nondischargeable." [50] The court of appeals reversed the lower court decision entirely discharging the loans, and remanded to the bankruptcy court for determination of the amount to be discharged. [51]

The *Hornsby* decision is a clear example of why the *Brunner* test, taken alone, is insufficient. The court of appeals, in utilizing the *Brunner* test determined that the Hornsbys did not meet the criteria of suffering an undue hardship. [52] However, the court also recognized the Hornsbys would not be financially able to repay the loan in full based on the loan's current terms. [53] Under the strict *Brunner* view, the court of appeals would either be compelled to maintain the entire loan, or to create a fiction and determine that the Hornsbys did suffer an undue burden. [54] The former alternative is unfair to the Hornsbys as they would be forced to maintain a sub−minimal standard of living, and the latter alternative is unfair to the creditor, who should expect at least a partial repayment, as the Hornsbys were able to operate at a modest surplus. [55] Thus, the Sixth Circuit strikes a balance between these two interests. It acknowledges the importance of the *Brunner* test in assessing each debtor's situation, but does not then jump to the "all or nothing" conclusion based solely on the results of the test.

B. The Ninth Circuit's Propensity for an "All or Nothing" Approach

Although a number of the Ninth Circuit's student loan discharge decisions during 1998 vary, these decisions reveal the circuit's inclination toward an "all or nothing" approach. [56] The Ninth Circuit expressly adopted the *Brunner* test. [57] This Circuit is a good example of how the *Brunner* test used alone, with no other guidance, can lead to a variety of inconsistent results. [58]

The Bankruptcy Appellate Panel for the Ninth Circuit admonished a bankruptcy court for exercising its powers in granting a partial discharge of a student loan. [59] The panel concluded, in *Taylor*, that the plain language of section 523(a)(8) must lead to the determination that only upon a finding of undue hardship may all of the student loan indebtedness be discharged. [60] In *Taylor*, the debtor borrowed over $85,000 in student loans and only repaid $75 between April 1991 and August 1996. [61] He successfully filed a chapter 13 petition in February 1996 and sought to discharge the student loans on the grounds of an undue hardship. [62] While the bankruptcy court determined that it had the authority to grant the debtor a partial discharge of between 67% and 70% of the debtor's loans, [63] the Bankruptcy Appellate Panel sharply disagreed with this approach and vacated the lower court's granting of the partial discharge. [64]

The Court of Appeals for the Ninth Circuit at times granted full discharge of student loans as illustrated in *United Student Aid Funds, Inc. v. Pena*. [65] However, this case displays how dire one's conditions must actually be to meet the three prongs of the *Brunner* test. In *Pena*, the debtor had over $9,000 in outstanding student loans. [66] However, after receiving his associate's degree, he was unable to obtain employment, though he did make a few payments on his loan. [67] Additionally, his wife was unable to work because of a serious mental disability, the couple had one son, and their expenses exceeded their income by between $300 to $500 each month. [68] The court of appeals thus concluded that Pena met the three prongs as he was currently living at a minimal standard, his situation was not likely to improve in the future due to his wife's permanent mental condition, and he acted in good faith by making payments on his loan whenever feasible. [69] However, under the Ninth Circuit's rationale, if one of the three prongs was not fully met, Pena would be forced to repay his entire debt. [70] If the facts were different, and Pena was financially unable to make even one loan payment, the Ninth Circuit may have determined that Pena acted without good faith and thus did not meet the undue hardship standard. [71] Herein lies one of the incongruities of the "all or nothing" approach.

At least one Bankruptcy Court within the Ninth Circuit has recognized the discrepancies caused by the "all or nothing" approach of granting discharges from student loan indebtedness. [72] In December of 1998, the United State Bankruptcy Court for the Southern District of California granted Jerimiah and Catherine Brown a full discharge from their student loan debt. [73] The facts of this case permitted the court to conclude that the Browns were able to devote their disposable monthly income to the repayment of the debt for a few years, [74] although this would fall far short of the total amount owed of over $96,000. [75] The bankruptcy court determined that the Browns met the undue hardship test in *Brunner*, [76] but allowing for a partial discharge would protect the Browns' interests as well as the lenders'. [77] However, in light of the *Taylor* decision, this court felt restricted from granting a partial discharge [78] and instead granted a full discharge because to do otherwise would place an undue hardship on the debtors. [79] The court left open the issue of partial discharge for appeal, suggesting the need for a determination by the Ninth Circuit Court of Appeals. [80]

The rationale in *Brown* is interesting because the bankruptcy court wanted to use equitable considerations and grant partial discharge primarily to protect the creditors. [81] The court determined that the Browns met the undue hardship standard prior to discussing the feasibility of partial discharge. [82] But for the "all or nothing" approach of the Ninth Circuit, the lending agency would have been awarded at least part of the loan proceeds. Thus, although the "all or nothing" approach is primarily viewed as harmful to the debtor, it can also be detrimental to the creditors. [83]

III. Does the Bankruptcy Court Have The Right to Exercise Equitable Powers When Discharging Student Loan Debt Pursuant to Section 523(a)(8)?

In the exercise of fairness and to maintain the Bankruptcy Code's theme of "fresh start," bankruptcy courts may exercise their equitable powers and grant partial discharges or other equitable remedies when they are warranted in student loan cases. [84] However, is there a strong enough case authorizing the bankruptcy courts to utilize such power?

A. The Federal Government, Through its Direct Lending Program, Has Initiated a Form of Equitable Relief for Student Loan Debtors

Student loans are distributed more liberally than other types of credit and therefore it is contended that they deserve added protection. [85] The majority of the cases analyzed in this Note fall into the category of Federal Family Education Loans ("FFEL"), which consist primarily of subsidized and unsubsidized Federal Stafford Loans, [86] Federal PLUS loans taken out by a student's parent, [87] and Federal Consolidation Loans. [88]

A student can obtain a FFEL through a number of different types of eligible lenders. [89] These loans are often sold to specialized student loan lenders, such as The Student Loan Marketing Association ("Sallie Mae") and these lenders will generally contract with a servicing agency to service the loan. [90] If the loan subsequently goes into default, it is turned over to a state guaranty agency for collection. Although the state runs most of these guaranty agencies, a few are private non−profit agencies. [91] The United States Government typically insures one hundred percent of a guaranty company's losses. [92] Therefore, the loan agencies have limited exposure in student loan discharge cases since their losses are ultimately borne by the Federal Government. Additionally, it is important to note that the student loan business is extremely profitable for both the lending agencies and the guaranty agencies, [93] and, as of 1995, student loan defaults were at a five−year low. [94]

The Federal Government, perhaps in an attempt to lower the profits of the lending agencies and instead allow borrowers to realize savings, [95] implemented the Direct Lending Program. The program, signed into law by President Clinton in 1993, allows loans to be made directly from the federal government to the student or to the student's choice of post−secondary institution. [96] In 1996, it was projected that Direct loans made up about 36% of Federal Student loans. [97] Under this program, a student has the opportunity to repay the loan as a percentage of his or her income, [98] making debt manageable and reducing defaults. Interestingly, after twenty−five years of making payments, any outstanding principle and interest will be forgiven. [99] Additionally, borrowers under FFEL may be able to consolidate their loans under the Direct Lending Program. [100]

In light of the foregoing information, it seems that the Federal Government, through its Direct Loan Program, chose to condone the concept of partial discharges under non−bankruptcy related circumstances. This is evident by the way the Federal Government structured its loan program so as to base repayment installments on a percentage of the debtor's income and to allow forgiveness of the unpaid principal and interest after a twenty−five year term. Logically, only a low number of Direct Loan borrowers should seek discharge of student loans in bankruptcy since the terms of the loan are flexible and can be relative to the borrower's earnings. The Bankruptcy Courts, in creating equitable remedies related to the discharge of FFEL loans, are acting like the Federal Government, for in many cases the courts will merely alter the repayment schedule to make it more manageable to the debtor.

B. A Number of Courts, in addition to the Sixth Circuit, have Interpreted Section 523(a)(8) to be subject to the Bankruptcy Court's Equitable Powers under Section 105(a)

Some courts have taken the position that while the debtor might not be suffering an undue hardship under section 523(a)(8), he or she, at the present time, is unable to commit to the terms of the student loan. In *Georgia Higher Education Assistance Corp. v. Bowen (In re Bowen)*, [101] the district court found that the debtor's medical condition presently precluded him from passing his medical licensing test and thus, earning a salary. [102] The court created a payment schedule that took into account the debtor's "temporary severe difficulties," as it determined it had such authority to do so. [103] The *In re Roberson* court took a similar approach. [104] The debtor here suffered some hard times as he was unable to maintain employment and was\convicted of two driving while intoxicated offenses. [105] The Court of Appeals for the Seventh Circuit affirmed the bankruptcy court's determination that a two−year deferment would be the proper remedy, allowing time for the debtor's financial position to improve. [106]

Other courts have taken an even more liberal view as to their equitable powers. Instead of merely deferring loan payments, these courts have ordered remedies consistent with the central assertion made in *Hornsby* −− that partial discharge is a viable alternative. For example, in *Ballard v. Virginia (In re Ballard)*, [107] the student loan debtor was not deemed to be technically suffering from an undue hardship, though his expenses in most months exceeded his income. [108] However, the court explained that it had the authority to revise the loan

repayment terms based on the debtor's current unfavorable financial situation, and did so by discharging the interest and attorney fees and reducing the debtor's monthly payments. [109]

The United States District Court for the District of South Carolina decided that it had the authority to determine how much of the debtor's student loans would be considered an undue hardship under the *Brunner* test. [110] The debtor's loans were for the benefit of his son. The court concluded that the debtor did meet the undue hardship burden for all but $9,200 of his $60,000 in outstanding loans and discharged the difference reasoning that not to do so would constitute an undue hardship. [111]

One of the most recent cases granting an equitable discharge of a student loan occurred in *Jones v. National Payment Center* (*In re Jones*). [112] The debtor owed $16,000 in student loans, but declared an undue hardship due to two medical conditions −− Chronic Fatigue Syndrome and Fibromyalgia. The debtor claimed that because of these conditions, she quit school and could not hold a full−time job. However, she does work part−time making $7.00 per hour and lives with her parents, incurring very little expense. [113] The court noted that the debtor did not provide substantial support for her claim of undue hardship. [114] Therefore, the court, with the limited information provided by the plaintiff, was unable to find that she met her undue hardship burden. [115] However, the court then discussed its authority to "split" the debt. [116] It determined that it had the authority to order a partial discharge of the portion of the loan that would cause an undue hardship to the debtor. [117] The court held that $6,000 of the entire $16,000 debt and all remaining interest was dischargeable. [118]

C. Is Section 523(a)(8) Flexible Enough to be Subject to the Equitable Powers Found in Section 105?

The *Taylor* court's primary argument as to why the undue hardship standard calls for an "all or nothing approach" was that the plain meaning of section 523(a)(8) requires the court to enforce the statute according to its unambiguous terms. [119] The court additionally explains that only when "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" should the plain language not be deemed conclusive. [120] The *Taylor* court therefore did not view the results of the "all or nothing" approach as contrary to the intent of the drafters.

There are limits to the powers given to bankruptcy courts under section 105(a). [121] In order to determine that bankruptcy courts have the equitable powers to modify section 523(a)(8), it must be determined that the statute does not plainly require an "all or nothing" approach, otherwise the bankruptcy courts would be precluded from utilizing their equitable powers. [122] As noted above, numerous courts are of the opinion that section 523(a)(8)'s terms are not so clear as to allow full discharge only when an undue hardship is present. [123] The statute's limited legislative history also supports the conclusion that if section 523(a)(8) was plainly and strictly read not to include partial discharges, the result would be contrary to its intent. The Bankruptcy Commission stated that this statute is only to provide for "limited" nondischargeability of student loan debt. [124] Under the "all or nothing" strict definition of section 523(a)(8), the Bankruptcy Commission's desire for "limited nondischargeability" is trumped because more often the student loan is found undischargeable when the "all or nothing" approach is taken. Recently, the Bankruptcy Commission issued a new statement, declaring that section 523(a)(8) should be repealed. [125] The Commission reasoned that the Congressional intent at the time the statute was passed was not being met through section 523(a)(8) and that the section may not even be necessary. [126] The Commission noted that guaranteed loans have been placed in a class with taxes, debts induced for fraud, and debts for compensation of injuries related to drunk drivers. But, "students are not criminals ... and debts owed to the United States [are] no more sacred than other personal obligations." [127]

Even though the majority of the Commission determined that the student loan exception should be repealed, two members dissented to this suggestion −− the Honorable Edith H. Jones and Commissioner James A. Shepard. [128] The dissenters concluded that while repeal of the provision would eliminate "confusion or nonuniformity of decisions in the area of dischargeability of student loans," [129] it would be at the expense of the taxpayers. [130] According to the dissenters, the majority of the Commission focused on the fact that many defaults are from "fly−by−night trade or technical schools" that often do not provide educational services. [131] Additionally, they asserted that the majority disregarded the effect the repeal of section 523(a)(8) would have

on the "continued viability of the guaranteed student loan program." [132] The dissenters concluded that the nondischargeability provision was intended to maintain the solvency of lending programs and to promote access to higher education. Furthermore, if the Commission felt the hardship discharge needed to be clarified in order to create uniformity, it could have proposed a solution. [133] Therefore, both the majority and the dissent agreed that the current statute was not suitable. Since the dissent finds fault with repealing the statute because of the potential negative effect on the loan industry, a reasonable solution is to allow bankruptcy courts to exercise equitable powers, because, contrary to the belief of the *Taylor* court, the plain meaning of the statute does lead to results "at odds with the intentions of the drafters." [134]

Thus, the bankruptcy court would not be utilizing its equitable powers granted in section 105(a) to contradict any strict instructions given in section 523(a)(8) as to only full discharges of student loans. This is because the plain language and the historical intentions of the drafters are ambiguous enough to allow section 105(a) to create equitable remedies.

Conclusion

Although there is still a great deal of controversy surrounding the issue of what is dischargeable under section 523(a)(8), there is substantial authority in support of the contention that student loan debtors should be afforded partial discharges of their student loans. The Sixth Circuit, in *Hornsby*, explained both the logic and fairness behind this assertion. The drafters of section 523(a)(8) likely never imagined that student loans would become nearly impossible to discharge in bankruptcy because of many courts' stringent interpretations of the legislation. Therefore, it is perfectly appropriate for bankruptcy courts to design equitable remedies in an attempt to balance the drafters' intentions with the "fresh start" policy of the Bankruptcy Code.

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FOOTNOTES:

[1] *See* 11 U.S.C. §§ 507, 523(b) (1994) (providing, respectively, priorities of governmental, secured and unsecured creditor claims in chapter 5 bankruptcies and exceptions to dischargeability of debt); s*ee also* Robert F. Salvin, *Student Loans, Bankruptcy and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?*, 71 Tul. L. Rev. 139, 171(1996) (stating, "the absence ... from section 507 demonstrates that the [student] loans are not considered to be among the most important types of debts in bankruptcy"); Raymond J. Woodcock, Burden of Proof, Undue Hardship, and Other Arguments for the Student Debtor Under 11 U.S.C. § 523(a)(8)(B), 24 J.C. & U.L. 377, 440 (1998) (explaining Congress gave student loans less than highest possible protection)Back To Text

[2] *See* 11 U.S.C. § 523(a)(8). Before October 1998, there were two methods of discharging student loan indebtedness: either by showing the indebtedness came due at least seven years prior to the filing of bankruptcy or by proving that repayment of the loan would cause the debtor an undue hardship. Until October 1998, § 523(a)(8) read as follows:

> § 523 Exceptions to discharge:
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt
>
> > (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or non profit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless
> >
> > > (A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment

period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

See § 523(a)(8)(A) (*repealed* 1998). The Higher Education Act of 1998 abolished the seven year rule for automatic discharge, leaving proof of an undue hardship as the only alternative. *See* The Higher Education Amendments of 1998, Pub. L. No. 105−244, 112 Stat. 1837 (1998) (stating "[s]ection 523(a)(8) of title 11, United States Code, is amended by striking 'unless−−'and all that follows through '(B) excepting such debt' and inserting 'unless excepting such debt.' "); see *also* Craig A. Gargotta, *Congress Amends § 523(A)(8) to Eliminate Seven−Year Discharge Provision for Student Loans*, Am. Bankr. Inst. J., Nov. 1998, at 8 (explaining that President Clinton signed Higher Education Amendments of 1998 on Oct. 7, 1998).Back To Text

[3] *See* United Student Aid Funds, Inc. v. Pena (In re Pena) 207 B.R. 919, 921 (9th Cir. 1997) (explaining that Bankruptcy Code, legislative history, and case law does not provide clear definition of "undue hardship"); Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 753 (S.D.N.Y 1985) (observing that Congress "had little to say on the subject" of undue hardship standard); s*ee also* Janice E. Kosel, *Running the Gauntlet of Student Loans in Bankruptcy*, 460 Golden Gate U. L. Rev. 457, 460 (1981) (stating legislative history of Bankruptcy Reform Act does not clearly refer to rationale underlying enactment of § 523(a)(8)).Back To Text

[4] *See* Conner v. Illinois Scholarship Comm'n (In re Conner), 89 B.R. 744, 747 (Bankr. N.D. Ill. 1988) (explaining that undue hardship is left to discretion of bankruptcy judge since not spelled out in Code); Briscoe v. Bank of New York (In re Briscoe), 16 B.R. 128, 130 (Bankr. S.D.N.Y. 1981) (stating undue hardship is "not defined by the Code, but are words of art and are left to the discretion and judgment of the court") (quoting *In re* Hemmen, 7 B.R. 63, 64 (Bankr. N.D. Ala. 1980)); *see also* Thad Collins, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an* Impetus to Amend 11 U.S.C. § 523(a)(8), 75 Iowa L. Rev. 733, 735 (1990) (remarking that Congress did not define undue hardship thus leaving it to court's discretion).Back To Text

[5] *See* Brunner v. New York Higher Educ. Serv. Corp. (In re Brunner) 831 F.2d 395, 396 (2d Cir. 1987) (establishing three−pronged test to determine undue hardship); Bryant v. Pennsylvania Higher Educ. Assistance Agency (In re Bryant), 72 B.R. 913, 915−18 (Bankr. E.D. Pa. 1987) (establishing poverty line test for determining undue hardship); Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. 532 (E.D. Pa. 1979) (articulating three−pronged test including: mechanical test, good faith test, and policy test).Back To Text

[6] *See* Collins, supra note 4, at 735−36 (remarking that once undue hardship is or is not established, courts vary on issue of full or partial discharge). *Compare* In re Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993) (finding no undue hardship but granting debtor two year deferment) *with* Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 307 (3d Cir. 1996) (holding no undue hardship and disallowing discharge or deferral of debtor's loans).Back To Text

[7] *See* Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (concluding debtors did not suffer undue hardship, but bankruptcy court may fashion equitable remedy); United States Aid Funds, Inc. v. Taylor (In re Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (stating bankruptcy court has no authority to grant partial discharge of student loans under § 523 (a)(8)); Brown v. Salliemae Servicing Corp. (In re Brown), 227 B.R. 540, 547−48 (Bankr. S.D. Cal. 1998) (finding partial discharge of student loans as best approach to protect debtor's and creditor's interests, but defering decision to Bankruptcy Appellate Panel and granting full discharge).Back To Text

[8] 11 U.S.C. §§ 101−1330 (1994).Back To Text

[9] *See* § 523(a)(8); s*ee also* Woodcock, supra note 1, at 382 (noting exception to discharge became part of 1978 Bankruptcy Code).Back To Text

[10] *See* § 523(a)(8)(A) (*repealed* 1998).Back To Text

[11] *See* 11 U.S.C. § 523 note (1994). The original Senate bill contained provisions for student loan discharges only if five years had passed since the loan first became due or if there would exist an undue hardship if the student debtor was forced to repay the loan. *See* S. 2266, 95th Cong. (1977). These conditions were identical to those found in the 1976 Education Amendments. See Education Amendments of 1976, Pub. L. No. 94−482, 90 Stat. 2081, 2041 (Codified at 20 U.S.C. § 1087−3 (1976) (*repealed* 1978). The original House bill did not address student loan discharge. *See* H.R. 8200, 95th Cong. (1977). "Hence, the House bill treated student loans as other unsecured loans, thereby allowing the loans to be discharged at the close of a chapter 7 case." Collins, supra note 4, at 743.Back To Text

[12] Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, at 140 (1973) [hereinafter Commission On Bankruptcy] (stating that limitation should be implemented whereby student debtor could receive discharge only if five year period had passed or undue hardship would otherwise result). *See also* Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 754 (S.D.N.Y 1985) (stating "the phrase 'undue hardship' was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States").

The Commission suggested that to determine whether the forced payment of the student loan would impose an undue hardship on the debtor, "the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain and continue employment and the rate of pay to be expected." Commission On Bankruptcy, *supra,* at 140−41. The Commission also stated that unearned income or other wealth the debtor expects to receive should be taken into account and that the total amount of income should be adequate to maintain the debtor's minimal standard of living and pay the student loan debt. *See* id. *Back To Text*

[13] *See* Commission On Bankruptcy, *supra* note 12, Pt. II at 136. The draft statute stated:

> (a) Exceptions from discharge: A discharge extinguishes all debts of an individual debtor, whether or not allowable, except the following . . .
>
> > (8) any educational debt if the first payment of any installment thereof was due on a date less than five years prior to the date of the petition and if its payment from future income or other wealth will not impose an undue hardship on the debtor and his dependents.Back To Text

[14] Commission On Bankruptcy, *supra* note 12, Pt. II at 140. *See* Brunner, 46 B.R. at 754 (quoting same passage); *see also* Woodcock, supra note 1, at 381 (citing same quotation from Commission On Bankruptcy report).Back To Text

[15] The congress members in favor of the provision cited to the Education and Labor Committee finding that while the total number of individual bankruptcies increased 8.4% from 1973 to 1974, the number of bankruptcies involving guaranteed student loans increased 29.2%. In addition, they cited to the Virginia State Education Assistance Authority determination that bankruptcies were increasing rapidly in their program. *See* H.R. Rep. No. 95−595, at 157 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6118 (setting forth persuasive data). The members of Congress against the provision highlighted the fact that the abuses of the student loan system were not widespread and that according to a General Accounting Office ("GAO") study, 70% to 80% of discharged student loans in bankruptcies were legitimately needed. Accordingly, these members argued that creating an exception to discharge of student loans as a general rule would be detrimental to the vast majority of honest debtors. *See* id. at 154 (introducing results of GAO report); *see also* Collins, supra note 4, at 743 (noting Congress passed bill after extended debate on issue in House).Back To Text

[16] *See* supra note 11 and accompanying text (noting House and Senate differed on views of student loans).Back To Text

[17] *See* H.R. Rep. No. 95−595, at 133 (1978), *reprinted in* U.S.C.C.A.N. 5963, 6094 (stating that educational loans "are made without business considerations, without security, without cosigners and relying for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future").Back To Text

[18] *See* supra note 3 and accompanying text (describing "undue hardship" burden's lack of legislative history or definition).Back To Text

[19] *See* Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 299 (3d Cir. 1995) (noting "undue hardship" as area "in a state of considerable confusion"); In re Roberson, 999 F.2d 1132, 1134 (7th Cir. 1993) (reviewing de novo to discern meaning of "undue hardship" as "little appellate court precedent interpreting the term exists"); Correll v. Union Nat'l Bank (In re Correll), 105 B.R. 302, 305 (Bankr. W.D. Pa. 1989) (revealing several tests applied by courts to determine "undue hardship"). Back To Text

[20] In re Brunner, 831 F.2d 395, 396 (2d Cir. 1987) (accepting test established by District Court). *See* 4 Collier on Bankruptcy ¶ 523.14[3], at 98 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing *Brunner* three−pronged test and describing it as most widely used for evaluating dischargeability of student loans); Woodcock, supra note 1, at 418 (noting *Brunner* is one of leading cases on undue hardship).Back To Text

[21] *See* Brunner, 831 F.2d at 396−97 (applying three part test); *see also* Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 359−60 (6th Cir. 1994) (implementing elements of *Brunner* test); United States Dep't of Educ. v. Rose (In re Rose), 227 B.R. 518, 524 (W.D. Mo. 1998) (adopting *Brunner* test).Back To Text

[22] *See* Brunner, 46 B.R. at 757−58 (holding pursuant to test application, bankruptcy court below erred in discharging loans as Brunner did not prove "a total incapacity now and in the future to pay her debts for reasons not within [her] control") (quoting Rappaport v. Orange Sav. Bank (In re Rappaport), 16 B.R. 615, 617 (Bankr. D. N.J. 1981)).Back To Text

[23] *See* id. at 753 (discussing results of plaintiff's personal bankruptcy proceeding).Back To Text

[24] *See* id. (discussing plaintiff's claim at issue).*Back To Text*

[25] *See* id. at 758 (concluding no "undue hardship" as debtor's inability to secure employment is temporary). *See generally* Rappaport, 16 B.R. at 617 (finding student loan debtor with future earning potential failed to satisfy "undue hardship" requirement); Warren v. University of Ill. (In re Warren), 6 B.R. 233, 234 (Bankr. S.D. Fla. 1980) (noting "mere unemployment of the debtor is insufficient to establish undue hardship"). Back To Text

[26] *See* Brunner, 46 B.R. at 758 (finding plaintiff neither tried to repay nor sought deferment of payment of loan and suggesting alternative payment mechanisms); *see also* 34 C.F.R. § 674.34 (1999) (setting forth repayment options of federal educational loans).Back To Text

[27] *See* Brunner, 46 B.R. at 757−58 (finding inability to meet minor expenses and loan payments not enough to satisfy "undue hardship" standard); *see also* Briscoe v. Bank of N.Y. (In re Briscoe), 16 B.R. 128, 131 (S.D.N.Y. 1981) (setting forth that acquiring a discharge from student loans requires hopelessness, not present inability to meet expenses); New York State Higher Educ. Serv. Corp. v. Henry (In re Henry), 4 B.R. 495,497 (Bankr. S.D.N.Y. 1980) (stating plaintiff failed to qualify for "undue hardship" because although unemployed, her "future [for] gainful employment is far from bleak").Back To Text

[28] *See* Brunner, 46 B.R. at 755 (explaining "the debtor has been required to demonstrate not only a current inability to pay but additional [financial hardship] circumstances"); s*ee also* Queen v. Pennsylvania Higher Educ. Assistance Agency, 210 B.R. 677, 682 (E.D. Pa. 1997) (finding additional circumstances to be where debtor has very young dependent whose cost of child care would be relatively higher than debtor's historical earning capacity); Healy v. Massachusetts Higher Educ. (In re Healy), 161 B.R. 389, 395−96 (E.D. Mich. 1993) (explaining that under second prong of *Brunner* test, debtor must show "by a fair preponderance of evidence, that additional circumstances exist" such that debtor's "state of affairs" will continue throughout large "portion of repayment period"). Back To Text

[29] *See* Brunner, 46 B.R. at 756 (concluding that unless debtor satisfies three part test, debtor will not be discharged).Back To Text

[30] *See* Pena v. United Student Aid Funds, Inc. (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998) (stating "we join the Second, Third and Seventh Circuits and adopt the *Brunner* test"); Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 307 (3d Cir. 1995) (adopting *Brunner* as most logical and workable of established tests); In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (declining to adopt *Johnson* test and instead adopting *Brunner*).Back To Text

[31] *See* Faish, 72 F.3d at 306 (explaining "[e]quitable concerns . . . not contemplated by the *Brunner* framework may not be imported into the court's analysis to support a finding of dischargeability"); *see also* Roberson, 999 F.2d at 1138 (finding that debtor's temporary hardship precludes discharge of his loans); Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in* Anglo−American Bankruptcy Proceedings, 131 U. Pa. L. Rev. 69, 70−71 (1982) (stating when courts enjoy discretionary authority to order discharge, courts are influenced by numerous factors including: perceived desirability of having each debtor's eligibility for discharge dependent on particular facts of case; value society places on activity of credit−extender; degree to which fresh−start policy is seen as desirable; and debtor's actual situation).Back To Text

[32] *See* Collins, supra note 4, at 757 (noting skepticism in student loan discharge proceedings that revise debt); Salvin, supra note 1, at 194−195 (describing as "controversial" courts that modified debtor's repayment commitments or ordered parties to negotiate new payment terms); *see also* Brown v. Salliemae Servicing Corp. (In re Brown), 227 B.R. 540, 547 (Bankr. S.D. Cal. 1998) (explaining that courts are on both sides of partial discharge debate and both sides are defensible and reasonable).Back To Text

[33] In re Hornsby, 144 F.3d 433, 439 (6th Cir. 1998) (suggesting alternative equitable intervention short of total discharge as "all or nothing treatment thwarts the purpose of the Bankruptcy Act").Back To Text

[34] In re Taylor, 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998) (holding that plain language of § 523(a)(8) does not permit partial discharge); *see also* Young v. Pheaa (In re Pheaa), 225 B.R. 312, 318 (Bankr. E.D. Pa. 1998) (describing holding of *In re* Taylor as providing for total discharge under § 523(a)(8)).Back To Text

[35] *See* Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 359 (6th Cir. 1994) (explaining how bankruptcy court attempted to balance Code's goal of providing fresh start with Congress' goal of preventing abuse to student loan program); *see also* Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 438 (6th Cir. 1998) (noting bankruptcy court discharged loans to provide debtors with fresh start); Collins, supra note 4, at 733 (noting that bankruptcy laws in United States generally are intended to help debtor obtain "financial fresh start"). Courts outside of this circuit also have addressed the "fresh start" policy. *See* Jones v. National Payment Center (*In re* Jones), No 97−352−S, 1998 Bankr. LEXIS 1522, at *13 (E.D. Va. Nov. 5, 1998) (agreeing that partial discharge or other modification to student loans accomplishes purpose of providing debtor with "fresh start").Back To Text

[36] 25 F.3d 356 (6th Cir. 1994).Back To Text

[37] *See* id. at 359 (stating "[w]e believe, however, that the loans were dischargeable under any undue hardship test.").Back To Text

[38] *See* id. at 360 (explaining that under § 105(a) bankruptcy court has authority to grant stay if exercising powers consistent with Bankruptcy Code).Back To Text

[39] In re Hornsby, 144 F.3d 433 (6th Cir. 1998).Back To Text

[40] *See* id. at 434.Back To Text

[41] *See* id. at 435. Back To Text

[42] *See* id. at 435−36 (noting difference due to Mr. Hornsby's overtime pay for particular months).Back To Text

[43] *See* id. at 436 (explaining bankruptcy court determined debtors' earning potential as not likely to improve and eventual money saved on day care will not be significant); *see also* infra, note 71 and accompanying text (detailing the good faith prong of *Brunner* test).Back To Text

[44] *See* Hornsby, 144 F.3d at 436.Back To Text

[45] *See* id. at 438 (noting that while debtor's family income is modest, they do operate with surplus and their income is above poverty guidelines, but explaining that family need not live in poverty to be granted discharge from student loan obligations).Back To Text

[46] *See* id. (stating bankruptcy court found good faith standard met "in a rather conclusory fashion"); *see also* infra note 71 and accompanying text (discussing *Brunner* good faith standard). *But see* Woodcock, supra note 1, at 449 (rejecting deferment negotiations as prerequisite to good faith finding).Back To Text

[47] *See* In re Hornsby, 144 F.3d at 438 (noting "Hornsbys' financial circumstances and management of their debts do not meet any test of undue hardship such to justify discharge of their student loan obligations"); *see also* supra note 21 and accompanying text (outlining *Brunner's* three−pronged test); Woodcock, supra note 1, at 459−60 (discussing *Brunner* test). Back To Text

[48] *See* Hornsby, 144 F.3d. at 438−39.Back To Text

[49] 11 U.S.C. § 105(a) (1994). See United Student Aid Funds, Inc. v. Taylor (In re Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (discussing bankruptcy court's equitable powers under § 105(a)); *see* infra Section III (B) (discussing bankruptcy courts' power under § 105(a)).Back To Text

[50] *See* Hornsby, 144 F.3d at 440; *see also* Griffen v. Eduserv (In re Griffin), 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996) (stating bankruptcy courts have authority to "modify repayment terms and/or amount owed"); Bakkum v. Great Lakes Higher Educ. Corp. (In re Bakkum), 139 B.R. 680, 684 (Bankr. N.D. Ohio 1992) (stating court has discretion to excuse portion of student loan which creates undue hardship). *But see* Taylor, 223 B.R. at 753−54 (stating that clear and unambiguous language of § 523(a) should not be circumvented through exercise of equitable powers of § 105(a)); Skaggs v. Great Lakes Higher Educ. Corp. (In re Skaggs), 196 B.R. 865, 866−67 (Bankr. W.D. Okla. 1996) (rejecting partial discharge based on plain meaning and overall scheme of Bankruptcy Code). Back To Text

[51] *See* Hornsby, 144 F.3d at 440 (concluding that courts may "fashion a remedy" that affords debtor ability to satisfy obligations while retaining some relief from "oppressive financial circumstances").Back To Text

[52] *See* id. at 438 (concluding that debtor's financial circumstances and debt management fail to justify discharge).Back To Text

[53] *See* id. at 440 (noting "[w]here a debtor's circumstances do not constitute undue hardship as to part of the debt but repayment of the entire debt would be an undue hardship" bankruptcy courts have allowed partial discharge); supra note 50 and accompanying text (noting several cases illustrating differing approaches); *see also* Jones v. National Payment Ctr. (*In re* Jones), No 97−352−S, 1998 Bankr. LEXIS 1522, at *13−*14 (E.D. Va. Nov. 5, 1998) (stating strict "all or nothing" approach leads to insufficient repayment in some cases and insufficient discharge in others, regardless of debtor's circumstances).Back To Text

[54] *See* Collins, supra note 4, at 748 (explaining as result of "rigid interpretation" of undue hardship standard, some courts have found undue hardship existed even where debtor had surplus, if surplus was not enough to cover repayment terms of loan).Back To Text

[55] *See* Hornsby, 144 F.3d at 438 (acknowledging that debtor operated at monthly budget surplus).Back To Text

[56] *See generally* United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (finding undue hardship and granting debtors full discharge from student loan obligation); United Student Aid Funds, Inc. v. Taylor (In re Taylor), 223 B.R. 747, 753 (B.A.P 9th Cir. 1998) (stating debt may only be discharged if undue hardship exists); Brown v. Salliemae Servicing Corp. (In re Brown), 227 B.R. 540, 547 (Bankr. S.D. Cal. 1998) (finding undue hardship and explaining that fairness dictates partial discharge, but due to *Taylor* decision, granting full discharge). *Back To Text*

[57] *See* Pena, 155 F.3d at 1112 (stating "[w]e join the Second, Third and Seventh Circuits and adopt the *Brunner* test.").Back To Text

[58] *See* supra note 56.Back To Text

[59] *See* Taylor, 223 B.R. at 752 (explaining that § 523(a)(8)'s plain meaning asserts that entire student loan is either dischargeable or undischargeable based on undue hardship); id. at 753 (noting that while other bankruptcy courts have partially discharged student loans, "we hold that § 523(a)(8) does not authorize a partial discharge of student loans"); id. at 754 (stating "the bankruptcy court erred when it exercised equitable principles to partially discharge the Student Loan").Back To Text

[60] *See* id. at 752. Back To Text

[61] *See* id. at 749.Back To Text

[62] *See* Taylor, 223 B.R. at 749−50.Back To Text

[63] *See id.* at 750.Back To Text

[64] *See id.* at 755 (stating "we vacate the bankruptcy court's holding that it had the authority to grant a partial discharge of the Student Loan"). However, since the Bankruptcy Appellate Panel also determined that the bankruptcy court did not consider the good faith prong of the *Brunner* test, the case was remanded to determine if the debtor was entitled to an undue hardship discharge. *See* id.Back To Text

[65] In re Pena, 155 F.3d 1108, 1114 (9th Cir. 1998) (affirming bankruptcy court's decision to discharge student loans based on undue hardship).Back To Text

[66] *See* id. at 1110. Back To Text

[67] *See* id. (noting that while debtor borrowed funds to attend ITT Technical Institute and was awarded "Associate of Specialized Technology," credential was useless to debtor as it did not help him obtain employment nor was it accepted for transfer credit at other colleges).Back To Text

[68] *See* id.Back To Text

[69] *See* id. at 1112−14; *see also* supra note 25 and accompanying text (describing three−pronged test).Back To Text

[70] *See* In re Pena, 155 F.3d. at 1114 (concluding that bankruptcy court did not err by discharging loans since debtors presented undue hardship situation based on three−pronged *Brunner* test).Back To Text

[71] *See, e.g.*, Healy v. Massachusetts Higher Educ. Resources Inst. (In re Healy), 161 B.R. 389, 397 (E.D. Mich. 1993) (finding debtor failed good faith test as he never made one payment on $35,000 undergraduate loan and only made payments totaling $174 toward $8,000 graduate loan); Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 757 (S.D.N.Y 1985) (indicating debtor's lack of good faith because she made no attempt to repay and did not request a deferment). *But see* Queen v. Pennsylvania Higher Educ. Assistance Agency, 210 B.R. 677, 682 (E.D. Pa. 1997) (noting that good faith requirement "measures not simply whether or not debtor has paid towards a student loan debt in the past, but emphasizes whether or not that debtor has maximized financial resources in order to prevent a default and has allowed sufficient time before declaring bankruptcy to obtain the job sought when the education was being obtained." (quoting In re Mayer, 198 B.R. 116, 127−28 (Bankr. E.D. Pa. 1996)).Back To Text

[72] *See* Brown v. Salliemae Servicing Corp. (In re Brown), 227 B.R. 540, 547 (Bankr. S.D. Cal. 1998) (stating facts of case present classic situation in which court should order partial discharge of indebtedness). For cases outside of the Ninth Circuit, see Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 438−39 (6th Cir. 1998) (holding that bankruptcy court, under § 105 equitable powers, had authority to fashion partial discharge remedy); Rivers v. United Student Aid Funds, Inc. (In re Rivers), 213 B.R. 616, 619 (Bankr. S.D. Ga. 1997) (stating that failure to allow partial discharge of student loans would sometimes produce "absurd results").Back To Text

[73] *See* Brown, 227 B.R. at 548.Back To Text

[74] *See* id. at 547 (explaining that facts present situation where debtors could repay approximately $330 for reasonable period of about five years).Back To Text

[75] *See* id. at 545 (stating "[p]laintiffs would never be able to pay off the obligation [$96,628] while making payments of $334.00 per month").Back To Text

[76] *See* id. at 547 (noting that all elements under *Brunner* have been met to support plaintiff's discharge of student loan obligations).Back To Text

[77] *See* id. at 548 (explaining that this is classic situation where court should order plaintiffs to repay portion of their debt as it "provides some return to the lenders yet relieves Plaintiffs of what would otherwise be a life−long financial burdens").Back To Text

[78] *See* Brown, 227 B.R. at 547−48 (noting that whether court is "bound" by Ninth Circuit Bankruptcy Appellate Panel is issue dividing courts but that this court declines opportunity to address such issue).Back To Text

[79] *See* id. at 548 (holding debtor's loans fully discharged because to "do otherwise would truly impose an undue hardship").Back To Text

[80] *See* id. at 547 (noting issue is "ripe for decision by Ninth Circuit Court of Appeals").Back To Text

[81] *See* id. at 547 (explaining that partial discharge protects interests of all involved and provides lender with some return).Back To Text

[82] *See* Brown, 227 B.R. at 547−48 (determining that plaintiffs met undue hardship burden in Section III and discussing partial discharge in Section IV).Back To Text

[83] *See* Collins, supra note 4, at 753 (explaining that with close−call cases, fairness increases debtor's chances of some relief and guards against full exoneration which unjustly deprives government of any payments debtor may be able to make). *But see* infra note 93 and accompanying text (explaining how profitable student loan business is for agencies involved). Back To Text

[84] *See* supra note 35 and accompanying text (noting several cases supporting fresh start policy); *see also* Eleanor N. Metzger, The Bankrupt Student Debtor v. The Educational Institution: The Struggle for Academic Transcripts Under Chapter 7 of the Bankruptcy Code, 45 Case W. Res. L. Rev. 957, 974 (1995) (noting that student debtors should seek protection of fresh start provision until loan is determined nondischargeable); *see also* Collins, supra note 4, at 743−44 (noting purpose behind limit on student loan discharge is to prevent abuse while allowing financially burdened debtor fresh start). Discharge under the undue hardship burden has been described as a conditional discharge, which authorizes the court to consider the amount paid by the debtor, the amount the debtor will be able to pay, and the creditors' positions. Conditional discharge rules authorize courts to exercise discretion. *See* Boshkoff, supra note 31, at 71−72. Back To Text

[85] *See* supra note 17 and accompanying text (discussing liberal distribution of student loans).Back To Text

[86] *See* 20 U.S.C. § 1071 (1994).Back To Text

[87] *See* id. at § 1078−2.Back To Text

[88] *See* id. at § 1078−3.Back To Text

[89] *See* Jonathan Sheldon, Unfair and Deceptive Acts and Practices 290 (3d ed. 1991) (explaining eligible lenders include banks, credit unions, and saving and loan institutions).Back To Text

[90] *See* id. at 291.Back To Text

[91] *See* id. (summarizing that state−run agencies have names such as "Pennsylvania Higher Education Assistance Agency" and that two largest non−profit agencies are "the Higher Education Assistance Foundation ("HEAF") and USA Funds").Back To Text

[92] *See* 20 U.S.C. § 1087(b) (stating "the Secretary shall pay to the holder of a loan . . . the amount of the unpaid balance of principal and interest owed on such loan").Back To Text

[93] In 1995 Sallie Mae realized a 34% return on equity. Banks, such as Chase Manhattan and J.P Morgan realized between 12% and 14% return on equity. Citicorp's student loan subsidiary, Student Loan Corporation, realized a 20% return on equity in 1995 as compared to the parent bank, which only recognized an 18% return on equity. *See Administration's Proposals for Higher Education Act Reauthorization: Hearing of the Committee on Labor and Human Resources of the United States Senate*, 105th Cong. 74 (1997) (questions from Senator Coats to Secretary Riley with Responses). These banks aggressively seek to increase their volume of loans, often by reducing student fees and interest rates or by sharing profits with the schools. Id. The guaranty agencies added to their federal reserves in fiscal year 1996 $248 million, which was based on $20.9 billion in new loan volume. Of the $248 million reserved, it was only projected that $48 million would be the cost of the defaulted loans. *See* id. at 74−75.Back To Text

[94] *See* Coalition for Student Loan Reform (CSLR), *Student Loan Default Rates: A Briefing* (visited Feb. 3, 1999) <http://www.cslr.org/defaultbasics.html> (explaining between 1990 and 1995 the default rate decreased from 22.4 percent to 10.4 percent, in spite of fact that total student loan volume more than doubled from $12.3 billion to $27.4 billion).Back To Text

[95] *See Administration's Proposals for Higher Education Act Reauthorization: Hearing of the Committee on Labor and Human Resources of the United States Senate*, 105th Cong. 34 (1997) (Prepared Statement of Sec. Riley) (explaining that Direct Loan program provides affordable loans to students and families which makes debt more manageable).Back To Text

[96] *See* 20 U.S.C. §§ 1087a−1087h. Back To Text

[97] *See Administration's Proposals for Higher Education Act Reauthorization: Hearing of the Committee on Labor and Human Resources of the United States Senate*, 105th Cong. 34 (1997) (Prepared Statement of Secretary Riley).Back To Text

[98] *See* 20 U.S.C. § 1087e(d)(1)(D) (1994) (explaining income contingent repayment plan varies annual repayment amounts based on income of borrower). The income contingent repayment plan is expressly made unavailable to the borrower of a Federal Direct PLUS loan. *See* id.Back To Text

[99] *See* id. (stating that under income contingent repayment plan, period of repayment is not to exceed 25 years); *see also Administration's Proposals for Higher Education Act Reauthorization: Hearing of the Committee on Labor and Human Resources of the United States Senate*, 105th Cong. 75−76 (1997) (questions from Senator Coats to Secretary Riley with Responses) (explaining that after making repayments for twenty−five years, debtor will be forgiven for any outstanding principle and interest).Back To Text

[100] *See* 20 U.S.C. § 1087e(g).Back To Text

[101] 37 B.R. 171 (Bankr. M.D. Fla. 1984).Back To Text

[102] *See* id. at 172 (noting that debtor's incapacity is expected to subside).Back To Text

[103] *See* id. at 173 (explaining "several bankruptcy courts … have concluded that the 'either/or' result suggested by the statute is unnecessarily harsh in many less−than−clearcut cases"). The court determined that it was within the policy of the statute to hold the debt non−dischargeable but restructure repayment terms. *See* id; *see also* Griffin v. Eduserv (In re Griffin) 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996) (stating that courts possess authority to modify repayment terms).Back To Text

[104] 999 F.2d 1132 (7th Cir. 1993).Back To Text

[105] *See* id. at 1137−38.Back To Text

[106] *See* id. at (noting bankruptcy court determined two year deferment appropriate as "he will be able to use the skills he learned with the loan proceeds, and that he simply needs to get through some tough times").Back To Text

[107] 60 B.R. 673 (Bankr. W.D. Va. 1986).Back To Text

[108] *See* id. at 674−75 (noting debtor's expenses did exceed his income by over $400 per month but that debtor also relies on large tax returns and is currently under−employed in his field).Back To Text

[109] *See* id. at 675 (reducing debtor's monthly loan payment from $62.49 to $50).Back To Text

[110] *See* Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 907 (D.S.C. 1995) (agreeing with bankruptcy court's determination of debtor's ability to make some repayment).Back To Text

[111] *See* id. at 907. The bankruptcy court's determination was based on the debtor selling his home to minimize his expenses. Id. Also, the non−discharged $9,200 carried the applicable interest under the original loan agreement. Id.Back To Text

[112] No. 97−35258−S, 1998 Bankr. LEXIS 1522 at *16 (E.D. Va. Nov. 5, 1998) (concluding that $10,000 of $16,000 debt is non−dischargeable while $6,000 plus interest is dischargeable and requiring debtor to increase payment schedule if her financial condition improves).Back To Text

[113] *See id.* at *1−*4.Back To Text

[114] *See id.* at *3 (stating "[t]he Plaintiff was generally unwilling to comply with Defendants' discovery requests, and when she did respond was not very forthcoming with information."). The court also noted that plaintiff took several months to respond to defendant's interrogatories and when she did, answered several requests with "information unavailable at this time" or "[u]nable to answer Requests for Admissions at this time." Id.Back To Text

[115] *See Jones*, 1998 Bankr. LEXIS 1522, at *11 (explaining "it is the Plaintiff's burden to show that the unique or extraordinary circumstances . . . created the hardship" and concluding "the plaintiff has not carried her burden and has not established grounds for a complete discharge of her student debt").Back To Text

[116] *See* Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 907 (D. S.C. 1995) (confirming that partial discharge is consistent with intent of § 523(a)(8)); *Jones*, 1998 Bankr. LEXIS 1522, at *12 (stating bankruptcy court has equitable power to order partial discharge); Rivers v. United Student Aid Funds, Inc. (In re Rivers), 213 B.R. 616, 619 (Bankr. S.D. Ga. 1997) (stating that total non−discharge versus total discharge for treatment of loans would be against Congress' intent).Back To Text

[117] *See* Ammirati, 187 B.R. at 904 (supporting that partial discharge was justified by relying on standards adopted by Second Circuit courts to determine undue hardship); .*Jones*, 1998 Bankr. LEXIS 1522, at *14 (stating, "the court can, at its discretion, excuse any portion of the plaintiff's student loan obligation which would create an undue hardship"); Rivers, 213 B.R. at 618 (finding bankruptcy courts have power to grant partial discharge).Back To Text

[118] *See Jones*, 1998 Bankr. LEXIS 1522, at *14 −*15. The defendant's counsel has already initiated an appeal and the plaintiff, acting pro se, has given cross notice of appeal. Telephone Interview with Rand. L. Gelber, Counsel for Defendant (Jan. 15, 1998).Back To Text

[119] *See* United States Aid Funds, Inc. v. Taylor (In re Taylor), 223 B.R. 747, 752−53 (B.A.P. 9th Cir. 1998) (finding plain language of § 523(a)(8) does not contemplate partial discharge as other Bankruptcy Code sections use similar terminology in unambiguous manner); *see also* Markovich v. Samson (In re Markovich), 207 B.R. 909, 912 (B.A.P. 9th Cir. 1997) (explaining "[w]here the statutory language is plain, the inquiry ends and the sole function of the court is to enforce the statute according to its terms.").Back To Text

[120] *See* In re Taylor, 223 B.R. at 752 (quoting United States v. Ron Pair Enters., Inc., 495 U.S. 235, 241 (1989)).Back To Text

[121] *See* 11 U.S.C. § 105(a) (1994). This statute states:

> § 105 Power of Court
>
> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

See also Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (stating "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); Noonan v. Secretary of Health & Human Servs. (In re Ludlow Hospital Society, Inc.), 124 F.3d 22, 27 (1st

Cir. 1997) (explaining that equitable discretion given to bankruptcy courts by § 105(a) is limited and not to be used in manner inconsistent with commands of Bankruptcy Code).Back To Text

[122] *See* supra note 121. *Compare* Taylor, 223 B.R. at 754 (stating "[s]ection 105(a) cannot be used to circumvent the clear and unambiguous language of [section] 523(a)(8).") *with* Rivers, 213 B.R. at 618 (stating that under equitable powers courts may partially discharge students from educational loans).Back To Text

[123] *See* Heckathorn v. United States (In re Heckathorn), 199 B.R. 188, 194−95 (Bankr. N.D. Okla. 1996) (stating § 523(a)(8) is to be interpreted broadly in order to prevent absurd results); *see also* Collins, supra note 4, at 749 (noting that some courts, dissatisfied with all or nothing approach, have practiced partial discharge and loan restructuring); supra Section III (B).Back To Text

[124] *See* Commission On Bankruptcy, supra note 12, Pt. II at 140 (stating "a separate clause to provide for a limited nondischargeability of educational loan debt is desirable").Back To Text

[125] *See* The Nat'l Bankr. Rev. Comm'n: The Next Twenty Years: Final report, 1.4.5 (1997) [hereinafter Commission Report] (stating "[s]ection 523(a)(8) should be repealed").Back To Text

[126] *See* id. The Commission notes that when educational loans were singled out by Congress, it was because many worried that borrowers would easily discard student debt. The 1973 Commission noted that these perceptions were small in reality. *See* id. *Back To Text*

[127] *See* id. Back To Text

[128] *See* id. at chapter 5 (explaining rationale for their dissent).Back To Text

[129] *See* Commission Report, supra note 125, at chapter 5.*Back To Text*

[130] *See id.* at 1.4.5 (explaining that Commission relied on statements from General Accounting Office that student loans were "instituted with default in mind" and taxpayers were intended to pick up tab for students' inability to repay loans).Back To Text

[131] *See* id. (concluding that "if shortfalls in the educational system are the problem, it should be addressed directly"). Back To Text

[132] *See* id.Back To Text

[133] *See* id.Back To Text

[134] *See* Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 439 (6th Cir. 1998) (stating that an all or nothing approach to discharging loans is in contravention with Bankruptcy Act); United States Aid Funds, Inc. v. Taylor (In re Taylor), 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998) (stating partial discharge is prohibited under § 523(a)(8)); *see also* Lawrence Kalevitch, *Educational Loans in* Bankruptcy, 2 N. Ill. U. L. Rev. 325, 357 (1982) (explaining "[t]hough Congress did not directly authorize such partial discharge, surely the trend properly rests on the concept Congress laid before the courts. If full payment would impose undue hardship, and yet full exoneration would not strike a fair adjustment, debtors are more likely to be denied any relief absent the availability of partial discharge. Such a result would offend the underlying principle of the undue hardship discharge and a contrary result would offend any principle of fairness.").Back To Text