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STUDENT LOAN DISCHARGE THROUGH BANKRUPTCY

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Student loans have changed dramatically over the last several years, but the issue of student loans and bankruptcy has been largely ignored in higher education and in legal literature. As of 1991 there was $10.6 billion in cumulative defaulted loans, which represents 24 percent of the federal loan program. [*FN:* See L. G. Knapp and T. G. Seaks, An Analysis of the Probability of Default on Federally Guaranteed Student Loans , 74 Rev. Econ. & Stats. 404, 404−406 (1992) (analyzing individual borrower statistics affecting default rates or federally insured loans).] This has resulted in careful public and congressional scrutiny of both the individual default problem and institutional loan default rates. [*FN:* See id .] This article is a comprehensive review of the major issues raised in bankruptcy cases involving student loan discharge from 1980 to the present, emphasizing the lack of uniformity therein.

I. Background on Student Loans

A. Legislative History of Financial Aid

The current system of student financial aid is the result of decades of policy debate and federal legislation. Under the Constitution, education is within the purview of the states. [*FN:* See U.S. Const , art. X.] Since the first of the Morrill Acts (1862), however, there has been increasing federal involvement in higher education, [*FN:* See Act of July 2, 1862, ch. 130, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301−308 (1982)) providing for "perpetual fund" to be used for college education).] which escalated dramatically after World War II. [*FN:* See R. Paul Guerre, Financial Aid in Higher Education: What's Wrong, Who's Been Hurt, What's Being Done , 17 J.C. & U.L. 483, 512 (1991) (discussing increased federal involvement in student financial assistance beginning after World War II).]

The first student loans were created by the National Defense Education Act of 1958 (the "NDEA"), [*FN:* See Pub. L. No. 85−864, 72 Stat. 1580 (1958) (codified as 20 U.S.C. §§ 401−602, but subsequently repealed).] which provided fellowships for graduate study and long−term, low−interest loans to needy undergraduates. The NDEA was particularly significant

because it was the first broad−based financial aid program and represented a quantum leap in federal involvement in funding higher education. [*FN:* See Michael Heise, Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy , 63 Fordham L. Rev. 345, 352−53 (1994) (discussing circumstances surrounding enactment of NDEA).]

A cornerstone of Lyndon Johnson's Great Society was the Higher Education Act of 1965 (HEA). [*FN:* 20 U.S.C. § 1001 et. seq .] The HEA contained several key provisions that are the bases of current federal financial aid. [*FN:* See id .] Specifically, the HEA established educational opportunity grants for disadvantaged youths and also expanded the loan program. Aid was awarded to students in order to increase their access to a wide variety of post−secondary education programs. [*FN:* An alternate proposal would have given grants directly to the institution. See generally C.E. Finn, Jr., Dollars, Scholars, and Bureaucrats (Brookings Inst. ed. 1978) (discussing politics of student aid program); L.E. Gladieux and T.R. Wolanin , Congress and the Colleges: The National Politics of Education (National Center for Educational Statistics ed. 1976) (same).] Students could use the aid to

attend universities, colleges, community colleges, technical schools, and various occupational training programs. This latitude, however, would eventually lead to abuses. [*FN:* See Jane Dickinson, Financial Aid and Abetting , Washington Post , July 31, 1995, at 37 (discussing abuse by Inspector General of Department of Education); Anne Willette, Trade Schools' Use of Financial Aid Scored by Feds , Gannett News Ser. , Apr. 14, 1992, available in 1992 WL 9375056. The abuses are of two types. First, there are the schools that encourage students to assume a large loan burden and then provide inappropriate or useless career training. See infra notes 231−34 and accompanying text; see also, Evans v. Higher Educ. Assistance Found. (*In re* Evans), 131 B.R. 372 (Bankr. S.D. Ohio 1991); *In re* Correll, 105 B.R. 302 (Bankr. W.D. Pa. 1989). Some schools go into bankruptcy and leave students without any training. See, *e.g.* , Law v. The Educ. Resources Inst. Inc. (*In re* Law), 159 B.R. 287 (Bankr. D.S.D. 1993). Second, are the graduates with high paying jobs who filed for bankruptcy immediately after graduation. See H.R. Rep. Doc. No. 93−137, 93 Cong., pt. II 140 n. 14 (1973).]

B. Current Aid Programs

In 1993, students received $34.6 billion in student aid, up from $17.5 billion in 1983. [*FN:* See Pat Ordovensky , Financial Aid for College, Peterson 's 25 (1995).] While the federal share of aid decreased, the federal government still provided $3 out of every $4 in aid. [*FN:* See id . at 6.] In 1993, federal programs contributed $25.6 billion, state programs $2.1 billion, and colleges $7 billion in student aid. [*FN:* See id .]

Student financial aid is available in several forms. The first type is institutional aid, which is awarded by individual colleges and universities. These monies, in the form of university grants or scholarships, are usually raised from private funds or through the use of tuition discounting (discounting the tuition by the use of

institutional funds). Second are the scholarships and grants given by private sources directly to the students. These monies do not have to be repaid and, as such, are outside the scope of this article. Third, are state grant and scholarship programs which, of course, vary from state to state. Fourth, are the Federal Work Study and institutional (non−subsidized) work study programs. In 1994, about 713,000 students had Federal Work Study jobs subsidized in the amount of $583 million with the average award being $1,066. [*FN:* See id . at 28.]

The fifth type of aid is a complex system of federal grants and loans. Pell Grants and Supplemental Grants (SEOGs) are awarded to low−income undergraduate students based on their income and/or the income of their parents. [*FN:* See id . at 26.] Grants are generally "packaged" with other types of aid, particularly loans, to meet the student's financial need. In 1994, the average Pell Grant was $1,518 and the average SEOG was $583. [*FN:* See Ordovensky, supra note 12, at 26.] The practice of not completely funding the budgeted amount for Pell Grants has put pressure on low−income students to assume a larger loan burden.

There are several types of federal student loan programs. Low−interest loans for students are available through the Federal Direct Student Loan (FDL) Program and the Federal Family Education Loan (FFEL) Program. [*FN:* See id . at 29.] The difference between the FDL and FFEL program is the identity of the lender. [*FN:* See id .] Under the FDL, the federal government makes loans directly to students through the schools. [*FN:* See id.] Whereas with FFEL, private lenders such as banks, credit unions, and savings and loan associations, make the loans to the students. FDL and FFEL loans to students are collectively called Stafford Loans [*FN:* See id .] and can be subsidized (for low−income students) or unsubsidized (for others). [*FN:* See Ordovensky, supra note 12, at 29, 31.] Currently, the cap on total debt on loan programs is $23,000 as a dependent undergraduate student; $46,000 as an independent undergraduate student (no more than $23,000 of this amount from subsidized loans); $138,500 as a graduate or professional student (including undergraduate debt and no more than $65,500 in subsidized loans). [*FN:* See U.S. Dep't of Educ., The Student Guide 31 (1994−95).]

In addition to Stafford Loans, low−interest loans are available to students with exceptional financial need under the Federal Perkins Loan Program. Students can borrow up to $3,000 per year as an undergraduate, with a maximum of $15,000.

Graduate students can borrow $5,000 per year for each year of graduate or professional study. The total debt cap is $30,000, including undergraduate Perkins Loans. [*FN:* See id .] In 1994, 697,000 students received Perkins Loans totalling $600 million, with the average loan being $1,334. [*FN:* See id . at 29.]

In addition to student loan programs, Parent (PLUS) Loans are available through the FDL and FFEL programs. Both programs allow parents with good credit histories to borrow funds for the education of undergraduate, dependent students who are enrolled at least part−time. [*FN:* See Ordovensky , supra note 12, at 47.] The yearly limit on both PLUS loans is the cost of college attendance less other aid that the student is eligible to receive on his or her own. [*FN:* See id . at 33.]

C. Financial Aid for Health Care Students

Although the cost of higher education has increased greatly over the years, the cost of obtaining a medical education has become staggering. For example, four years of medical school can cost as much as $180,000. [*FN:* See America 's Best Graduate Schools , U.S. News & World Rep. , Mar. 20, 1995, at 77, 99.] In 1994, the average indebtedness for private medical school graduates was $78,000 and for public schools the average was $54,900. [*FN:* See Stanley H. Kaplan, The Road to Medical School 230 (1996).] For dentists, the average was $52,130. [*FN:* See id . at 15.] These amounts, however, exclude undergraduate debt, which can range up to $100,000 for private colleges; giving medical and dental school graduates a potential of nearly $300,000 in debt upon graduation. [*FN:* See Ordovensky , supra note 12, at 1.]

There are two main sources of aid for medical, dental, and other post−graduate health degrees. The first is Health Education Assistance Loans (HEAL). [*FN:* See Kaplan , supra note 29, at 263.] The second is the National Health Service Corps (NHSC), a federal agency that recruits primary care physicians to areas where there are shortages of doctors. [*FN:* See id . at 247.] Medical school graduates must serve at least two years for any NHSC support, and up to a maximum of four years. [*FN:* See id .]

II. Issues Arising from Bankruptcy and Student Loan Default Cases

A. Bankruptcy Plan Classification

1. The Issues

Prior to 1990, the Bankruptcy Code [*FN:* 11 U.S.C. §§ 101−1330 (1988), amended by 11 U.S.C. §§ 101−1330 (1994) (hereinafter the "Code").] contained an unusual dichotomy with respect to student loans. Student loans were nondischargeable in chapter 7 unless hardship could be demonstrated or the debt was older than five years from its due date. [*FN:* 11 U.S.C. § 523(a)(8) (1988), amended by 11 U.S.C. § 523(a)(8) (1990) (extending time within which discharge may be granted from 5 to 7 years).] Under chapter 13, however, student loans were dischargeable, regardless of whether there was hardship. [*FN:* See id. § 1328(a), (c), amended by 11 U.S.C. § 1328(a)(2) (1994) (allowing court to grant discharge of educational loans); 5 Collier on Bankruptcy ¶ 1328.01(c) (Lawrence P. King ed., 15th ed. 1990) (explaining certain debts not dischargeable under chapter 7 are dischargeable under chapter 13).] Because of a perceived abuse of the discharge provision in chapter 13, the Student Loan Default Prevention Initiative Act of 1990 was passed. [*FN:* Pub. L. No. 101−508, 104 Stat. 1388 (1990) (codified at 20 U.S.C. §1001 (1994)).] This legislation removed student loans from the superdischarge of chapter 13 and extended the time period for repayment to seven years beyond the due date before a student loan could be discharged. [*FN:* See id .] This change was the catalyst for a classification controversy over student loans.

chapter 13, like chapter 11, requires that all claims within a class be treated similarly. [*FN:* Compare 11 U.S.C. § 1322(a)(3) (1994) with § 1123(a)(4) (1994).] The Code allows the debtor−formulated chapter 13 plan to classify debt claims. [*FN:* See id. § 1322(b)(1).] While the chapter 13 debtor's plan may designate a class or classes of unsecured claims, it may not discriminate unfairly against any designated class. [*FN:* See id .] If there is a co−debtor on a consumer debt with the chapter 13 debtor, however, then the debtor's chapter 13 plan may treat such consumer claim differently than other unsecured claims. [*FN:* See id .]

The Code does not define "unfair discrimination," leaving it to the courts to establish their own standard. [*FN:* See Mickelson v. Leser (*In re* Leser), 939 F.2d 669, 672 (8th Cir. 1991) (proposing four part test to determine whether a classification is fair); Collier , supra note 37 at ¶ 1322.05 (discussing unfair discrimination in classification of claims).] The chapter 13 classification scheme follows section 1122 of the Code, [*FN:* 11 U.S.C. §1122(a) (1994).] providing that a claim may be placed in a particular class only if such claim is substantially similar to the other claims of such class. [*FN:* See id.] So, while a chapter 13 plan classification tracks the chapter 11 classification scheme, chapter13 requires that there be no unfair discrimination. [*FN:* See id . §1322(b)(1) (1994).] Obviously, many chapter 13 debtors would be likely to classify student

loan indebtedness separately from other unsecured claims, primarily because of its nondischargeable nature. [*FN:* See *In re* Benner, 156 B.R. 631, 634 (Bankr. D. Minn. 1993) (stating act of Congress making student loans nondischargeable is clear indication that these loans should be paid in full).] The majority of cases addressing the issue of whether student loans may be classified separately strictly on the basis of their nondischargeabilty have held that such a classification scheme unfairly discriminates against other classes of unsecured claims. [*FN:* See, *e.g.* , Groves v. LaBarge (*In re* Groves), 39 F.3d 212, 215−16 (8th Cir. 1994) (noting that payoff of nondischargeable student loans would occur at expense of other unsecured creditors); McDonald v. Sperna (*In re* Sperna), 173 B.R. 654, 658−59 (B.A.P. 9th Cir. 1994) (stating that full payment of nondischargeable student loans to give debtor fresh start would reduce recovery of unsecured creditors); *In re* Smalberger, 157 B.R. 472, 475−76 (Bankr. D. Or. 1993) (noting unfairness of giving preference to nondischargeable claims over dischargeable claims that have no recourse after plan completion), aff'd , 170 B.R. 707 (D. Or. 1994); *In re* Eiland, 170 B.R. 370, 378 (Bankr. N.D. Ill. 1994) (holding that fairness in classification should be considered from the creditor's perspective); McCullough v. Brown (*In re* Brown), 162 B.R. 506, 516 (N.D. Ill. 1993) (same); *In re* Christophe, 151 B.R. 475, 480−81 (Bankr. N.D. Ill, 1993); *In re* Tucker, 150 B.R. 203, 204−205 (Bankr. N.D. Ohio 1992) (same); *In re* Chapman, 146 B.R. 411, 417 (Bankr. N.D. Ill. 1992); *In re* Liggins, 145 B.R. 227, 231 (Bankr. E.D. Va. 1992); *In re* Keel, 143 B.R. 915, 916−917 (Bankr. D. Neb. 1992); *In re* Taylor, 137 B.R. 60, 64 (Bankr. W.D. Okla. 1992); *In re* Tucker, 130 B.R. 71, 73−74 (Bankr. S.D. Iowa 1991); *In re* Dillon−Bader, 131 B.R. 463, 466−67 (Bankr. D. Kan. 1991); *In re* Saulter, 133 B.R. 148, 149 (Bankr. W.D. Mo. 1991); *In re* Scheiber, 129 B.R. 604, 606 (Bankr. D. Minn. 1991); *In re* Cronk, 131 B.R. 710, 712 (Bankr. S.D. Iowa 1990); *In re* Hamilton, 102 B.R. 498, 500−02 (Bankr. W.D. Va. 1989).]

2. A Viable Alternative

A limited number of chapter 13 cases have permitted student loans to be classified separately and treated more favorably than other unsecured claims. [*FN:* See *In re* Tucker, 159 B.R. 325, 329 (Bank. D. Mont. 1993); *In re* Foreman, 136 B.R. 532, 533−34 (Bankr. S.D. Iowa 1992); *In re* Boggan, 125 B.R. 533, 534 (Bankr. N.D. Ill. 1991).] In one case, the court was satisfied by the representations of the chapter 13 trustee that the plan met the best interest test. [*FN:* Boggan , 125 B.R. at 534.] In another instance, the unsecured creditors received a 100% dividend. [*FN:* Foreman , 136 B.R. at 534−35.] Under these facts, the court allowed separate classification. [*FN:* See id.]

Lastly, three bankruptcy courts have permitted a similar, novel approach to the classification issue. [*FN:* See *In re* Cox, 186 B.R. 744, 746 (Bankr. N.D. Fla. 1995) (allowing discrimination on these facts); *In re* Benner, 156 B.R. 631, 635 (Bankr. D. Minn. 1993) (finding discrimination to be fair); *In re* Dodds, 140 B.R. 542, 544 (Bankr. D. Mont. 1992) (stating separate classification of nondischargeable obligations should be decided on the facts of each case).] In *Benner*, [*FN:* 156 B.R. 631 (Bankr. D. Minn. 1993).] the court confirmed a chapter 13 plan that treated a student loan debt as a long−term debt similar to a home mortgage. This classification permitted treatment of the student loan differently from otherunsecured debt. [*FN:* See id. at 634 (holding debtor may treat student loan different from other unsecured debt).] Under the debtor's plan, a student loan balance was paid outside of the plan while the loan arrearages were cured within the plan. [*FN:* See id. at 633.] While section 1322(b)(5) is typically used for home mortgage loans or other long−term secured debt, the *Benner* court said that this section, by its express terms, also applies to long−term unsecured debt, [*FN:* See id .] which is rare in chapter 13 except for student loans and marital dissolution obligations. [*FN:* See id.] The *Benner* court used the Leser test to consider whether the separate classification of the student loan debt was fair. The court noted that the chapter 13 debtor's interest in receiving a fresh start [*FN:* See 156 B.R. at 634 (indicating fresh start necessarily involves that debtor emerge from chapter 13 unencumbered by substantial nondischargeable debt).] met all four Leser elements. In essence, the court found that the different treatment complied with the relevant code section [*FN:* 11 U.S.C. § 1322(b)(5) (1994).] such that there was no unfair discrimination in classification. [*FN:* Benner , 156 B.R. at 634.]

The court's holding in *Benner* is not contrary to the later finding of the 8th Circuit in *Groves*. [*FN:* Groves v. LaBarge (*In re* Groves), 39 F.3d 212 (8th Cir. 1994) (giving student loan priority classification for preferential purpose of repaying nondischargeable debt to prejudice of other unsecured debt).] In *Groves*, the 8th Circuit held that the nondischargeability of a student loan, without more, was an insufficient basis for discriminatory treatment of a student loan as compared to other unsecured claims. [*FN:* See id. at 216.] Treatment of a student loan pursuant to section 1322(b)(5) as long−term debt, however, is a method of classification that will allow a chapter 13 debtor to defeat a contention of unfair discrimination. [*FN:* See id. at 215 (agreeing with bankruptcy court that debtor may treat student loan obligation as long term indebtedness under § 1322(b)(5), curing arrearages within reasonable time and thereafter maintaining regular payment).] Moreover, compliance with an express code provision, such as section 1322(b)(5), is an acceptable way to avoid the issue of unfair discrimination regarding plan classification of student loans. [*FN:* See id. (discussing compliance with 11 U.S.C. § 1322(b)(5)); see also Benner 156 B.R. at 634.]

3. Implications

Counsel for lending institutions should informally attempt to persuade the chapter 13 debtor's attorney to have the plan treat a student loan obligation, whose last payment falls beyond the time frame of the chapter 13 plan, as long−term debt pursuant to section 1322(b)(5). [*FN:* 11 U.S.C. §1322(b)(5).] This suggestion is likely to be met with ready acceptance by the debtor and the creditor since both parties benefit. It is difficultto imagine that the debtor would not go along with such a proposal. If such informal persuasion fails, however, a formal plan objection may be filed which is readily settled by a plan modification provision treating a qualifying student loan obligation as long−term debt under section 1322(b)(5). [*FN:* See id.]

For loans failing to qualify as long−term debt, the lender should urge that after the student loan is paid on a pro rata basis with other unsecured debt for thirty−six months, the plan should pay all disposable income to the satisfaction of the student loan after payment of any unsecured priority debt. The benefits of such treatment for the lender are obvious. The debtor also benefits, however, because the debtor's "fresh start" is greatly enhanced by the substantial reduction or elimination of nondischargeable debt after completion of the plan. In addition, these proposals will eliminate or reduce the amount of interest that would accrue during a plan with pro rated payments for which the debtor would be liable after consummation of the plan.

B. Educational Loans (Except Health Loans)

1. Semantic Challenges

Section 523(a)(8) of the Code excepts from discharge debts for an educational benefit that were made, insured or guaranteed by a governmental unit unless such debt became due over seven years prior to the filing of the bankruptcy petition [*FN:* See Crime Control Act of 1990, Pub. L. No. 101−647, § 3621(2), 104 Stat. 4964 (1990) (amending 11 U.S.C. § 523(a)(8) (1984)) (increasing time frame from five to seven years); see also 11 U.S.C. § 523(a)(8)(A) (1994) (noting time period is exclusive of any payment suspension period).] or the debt will impose undue hardship on the debtor and its dependents. [*FN:* 11 U.S.C. § 523(a)(8) (1994).] Three issues related to this section have been litigated: what are covered institutions, [*FN:* See Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992) (affirming lower court decision finding nonprofit educational institution that guaranteed student loan made by commercial lender had partially funded loan); see also Hemar Serv. Corp. v. Pilcher (*In re* Pilcher), 139 B.R. 948, 950 (Bankr. D. Ariz. 1992) (refusing to recognize for−profit organizations that "boot strapped" onto nonprofit institution), rev'd , 149 B.R. 595 (B.A.P. 9th Cir. 1993) (holding profit organizations are included under § 523(a)(8) if they are participants in loan program in which non−profit organization plays meaningful role in funding).] what is an educational benefit, [*FN:* See Barth v. Wisconsin Higher Educ. Corp. (*In re* Barth), 86 B.R. 146, 148 (W.D. Wis. 1988) (finding proceeds from guaranteed student loan fall within scope of § 523(a)(8) regardless of being spent on item deriving no educational benefit); Northwestern Univ. Student Loan Office v. Behr (*In re* Behr), 80 B.R. 124, 127 (Bankr. N.D. Iowa 1987) (discussing whether parent's use of student loan program to contribute to child's post−secondary education received benefit); Bartsh v. Wisconsin Higher Educ. Corp. (*In re* Meier), 85 B.R. 805, 806 (Bankr. W.D. Wis. 1986) (stating party that derives no benefit from educational loan proceeds is not expressly excepted from discharge).] and when does the seven−year clock toll. [*FN:* See Nunn v. Washington (*In re* Nunn), 788 F.2d 617, 618−19 (9th Cir. 1986) (noting that majority of courts hold that clock tolls on due date of first installment); Gremler v. Great Lakes Higher Educ. Corp. (*In re* Gremler), 127 B.R. 202, 204 (Bankr. E.D. Wis. 1991) (same); Avila College v. Bunger (*In re* Bunger), 99 B.R. 453, 454 (Bankr. D. Kan. 1989) (stating 5 year period runs from date first payment was due); Connecticut Student Loan Found. v. Keenan (*In re* Keenan), 53 B.R. 913, 917 (Bankr. D. Conn. 1985) (discussing effects of unemployment deferments).]

Several cases have challenged the type of institution making the student loan. For example, in *Navy Federal Credit Union v. Simmons (In re Simmons)* [*FN:* 175 B.R. 624 (Bankr. E.D. Va. 1994).] the chapter 7 debtors' loans were discharged due to the credit union's failure to establish that the loan was made for educational instruction and as part of an educational lending program which would trigger the Code's exception to discharge. [*FN:* See id. at 626; see also *In re* Pilcher, 149 B.R. at 598 (discussing broad definition of "program").] Moreover, the credit union did not fall within the definition of a nonprofit institution since it competed directly with commercial banks, had shareholders, and paid dividends. [*FN:* Simmons , 175 B.R. at 626. See Lincoln Park Community Credit Union v. Sinclair−Ganos (*In re* Sinclair− Ganos), 133 B.R. 382, 384 (Bankr. W.D. Mich. 1991) (holding credit union not a nonprofit institution).] Similarly, in *Lincoln Park Community Credit Union v. Sinclair−Ganos (In re Sinclair−Ganos)* [*FN:* 133 B.R. 382 (Bankr. W.D. Mich. 1991).] the court noted that since the credit union competed directly with banks it did not qualify as a covered institution. [*FN:* See id. at 384 (stating that mere fact credit union competes with banks does not warrant more favorable treatment in dischargeability proceedings for student loans).] In *Construction Equipment Federal Credit Union v. Roberts (In re Roberts),* [*FN:* 149 B.R. 547 (Bankr. C.D. Ill. 1993).] however, the court disagreed with the reasoning in *Sinclair−Ganos* [*FN:* 133 B.R. 382.] and found that the credit union fell within the

protection of section 523(a)(8) by virtue of the nature and character of the loan, not the type of institution. [*FN:* See Roberts , 149 B.R. at 551 (noting that similarities between banks and credit unions are not enough to warrant interpretation of § 523(a)(8) contrary to plain language of statute).]

A recent 1st Circuit case, [*FN:* T I Fed. Credit Union v. Delbonis, 72 F.3d 921 (1st Cir. 1995).] however, held that federal credit unions are federal instrumentalities, [*FN:* The credit union in Delbonis was appealing a bankruptcy court's decision that the credit union's loans were not entitled to dischargeability under § 523 because it did not qualify as a nonprofit institution. See id. at 925−26. On appeal, a motion was made by the credit union to amend the Agreed Statement of Facts in order to assert its status as a governmental unit. See id. at 921. The District Court reversed the Bankruptcy Court on the issue of credit unions as nonprofit institutions. See id. at 926. The 1st Circuit, however, affirmed the District Court's decision, not on the nonprofit issue but rather upon the finding that the credit union qualified as a governmental unit. See id.] qualifying them as "governmental units" [*FN:* 11 U.S.C. § 101(27) states that: "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government; *Id.*] within the meaning of section 523(a)(8), which makes student loans issued by credit unions nondischargeable. [*FN:* See Delbonis , 72 F.3d at 938 (holding debt obtained from credit union, a governmental unit, was nondischargeable).] The court reasoned that considering credit unions governmentalunits would further congressional intent on nondischargeability, [*FN:* See id. at 936 (noting that 1973 Commission on Bankruptcy Laws of the United States described "incidence of debtors attempting to discharge educational loan debts in bankruptcy as `reprehensible` and a `threat to the continuance of educational loan programs.`") (quoting H.R. Doc. No. 93−137, 93rd Cong., 1st Sess., pts. I and II (1973)).] whereas excluding federal credit unions from the definition of governmental units would create a "perverse incentive" for student debtors to take out loans through credit unions, have them discharged, and decimate the educational loan program. [*FN:* See id . at 937. But see Peter B. Barlow, Note, Nondischargeability of Educational Debts Under Section 523(a)(8) of the Bankruptcy Code: Equitable Treatment of Cosigners and Guarantors? , 11 Bankr. Dev. J. 481, 497−98 (1994−1995) (stating that lenders are insured, so money is available for next borrower).]

In cases that have challenged whether a university's extended payment plan for tuition is an "educational loan," the debtors have typically lost. [*FN:* See University of New Hampshire v. Hill (*In re* Hill), 44 B.R. 645, 647 (Bankr. D. Mass. 1984) (holding an extension of credit while awaiting loan to be nondischargeable); Najafi v. Cabrini College (*In re* Najafi), 154 B.R. 185, 187 (Bankr. E.D. Pa. 1994) (holding debtor who attended two weeks of classes without paying tuition liable for extended credit); Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992) (refusing to give debtor discharge where credit extension by university to student was for purpose of acquiring loan).] In *Stevens Institute of Technology v. Joyner* (*In re Joyner*), [*FN:* 171 B.R. 762 (Bankr. E.D. Pa. 1994).] the court found that even though the student had used the loan for room and board, the use still fell within the definition of "educational benefit." [*FN:* See id. at 763; Santa Fe Med. Servs. Inc. v. Segal (*In re* Segal) 57 F.3d 342, 349 (3d Cir. 1995) (stating that loan to repay obligation resulting from education does not qualify as "educational purposes"); Construction Equip. Fed. Credit Union v. Roberts (*In re* Roberts), 149 B.R. 547, 551 (C.D. Ill. 1993) (rejecting debtor's request to remand to determine how educational loan money was spent).] Furthermore, an advance on work study wages was not considered an "educational loan" and was thus discharged. [*FN:* See Department of Mental Health v. Shipman (*In re* Shipman), 33 B.R. 80 (Bankr. W.D. Mo. 1983).]

Many cases have considered whether a cosigner's obligation on a student loan is dischargeable. The fountainhead case finding dischargeability is *Boylen v. First National Bank of Akron* (*In re Boylen*). [*FN:* 29 B.R. 924 (Bankr. N.D. Ohio 1983).] In *Boylen*, the court noted that section 523(c)(8) was expected to combat "a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans. . . and well paying jobs, who file [for] Bankruptcy shortly after leaving school." [*FN:* See id. at 926 (citations omitted).] The court then went on to note that the cosigner debtor had received no "educational benefit" from the loans and thus allowed the discharge. [*FN:* See id. at 926−927.] Other cases finding dischargeability for cosigners have noted that Congress wanted "students" to be treated differently; thus, a student loan is not an "educational loan" to the cosigner. [*FN:* See Northwestern Univ. Student Loan Office v. Behr (*In re* Behr), 80 B.R. 124, 127 (Bankr. N.D. Iowa 1987) (finding cosigner's obligation dischargeable); Bawden v. First S. Fed. Sav. and Loan Ass'n (*In re* Bawden), 55 B.R. 459, 460−462 (Bankr. M.D. Ala. 1985) (finding debtor/parent received no educational benefit from cosigning child's student loan, thus debt was dischargeable as to parent); Washington v. Virginia State Educ. Assistance Agency (*In re* Washington), 41 B.R. 211, 214 (Bankr. E.D. Va. 1984) (noting no direct benefit to cosigner, congressional emphasis that "students" be treated differently, and adopting rationale in Boylen).]

Most cases, however, have rejected these arguments and do not allow discharge for a lack of "educational benefit" where a cosigner is involved. [*FN:* See*In re* Pelkowski, 990 F.2d 737, 745 (3d Cir. 1993); Education Resources Inst. Inc. v. Garelli (*In re* Garelli), 162 B.R. 552, 554 (Bankr. D. Or. 1994) (finding loan nondischargeable as to parent/cosigner since student loan program is similarly affected whether parent or student discharges loan) (citations omitted); Palmer v. Student Loan Fin. Corp. (*In re* Palmer), 153 B.R.

888, 895 (Bankr. D.S.D. 1993) (denying discharge to cosigner of former spouse's student loan since focus is on "type of debt, not type of debtor"); Education Resources Inst. Inc. v. Wilcon (*In re* Wilcon), 143 B.R. 4 (D. Mass 1992) (holding any debt incurred under program funded in part by non−profit institution as nondischargeable regardless of who received educational benefit); Hawkins v. Chase Manhattan Bank (*In re* Hawkins), 139 B.R. 651 (Bankr. N.D. Ohio 1991) (finding "educational loan" includes loan made by nonstudent for educational benefit of another); Education Resources Inst. Inc. v. Martin (*In re* Martin), 119 B.R. 259 (Bankr. E.D. Okla. 1990) (same); Taylor v. Tennessee Student Assistance Corp. (*In re* Taylor), 95 B.R. 550 (Bankr. S.D. Tenn. 1989) (same).] These cases typically look to the legislative history of section 523(a)(8) and point out that "[a] loan program is affected just as much when a parent discharges a loan as when a student discharges a loan." [*FN:* Education Resources Inst. Inc. v. Hammarstrom (*In re* Hammarstrom), 95 B.R. 160, 164 (Bankr. N.D. Cal. 1989); see also supra note 96 and accompanying text.] Indeed, the lack of an "educational benefit" argument has been rejected and discharge denied where a parent *alone* was found liable on a student loan. [*FN:* See Uterhark v. Great Lakes Higher Educ. Corp. (*In re* Uterhark), 185 B.R. 39, 39−42 (Bankr. N.D. Ohio 1995).]

The third area of debate over the definitions in section 523(a)(8) has been about the phrase "due more than seven years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition." [*FN:* See 11 U.S.C. § 523(a)(8)(A) (1994).] In cases under both the old and new definition of time period, [*FN:* Despite changing the time frame from five to seven years, the 1990 amendment of § 523 did not alter the debate on the meaning of subsection (a)(8)(A), and pre−1990 decisions continue to be persuasive authority on the subject.] there has been considerable debate about when a debt becomes "due," as well as what constitutes the suspension or repayment period. [*FN:* See Connecticut Student Loan Foundation v. Williams (*In re* Williams), 9 B.R. 1004, 1012 (Bankr. E.D. Va. 1981) (holding forbearance to constitute suspension of the repayment period). But see Connecticut Student Loan Foundation v. Keenan (*In re* Keenan), 53 B.R. 913, 917 (Bankr. D. Conn. 1985) (holding an improper deferment of debtor's student loans did not suspend repayment due date).] Two cases [*FN:* See*In re* Menendez, 151 B.R. 972, 974 (Bankr. M.D. Fla. 1993) (stating that the seven year period "restarted" upon consolidation); U.S. v. McGrath, 143 B.R. 820, 824 (Bankr. D. Md. 1992) (holding "such loan" to refer to debt of consolidated loan), aff'd , 8 F.3d 821 (4th Cir. 1993).] started the clock at the time of consolidation of all of the debtor's student loans. In *Garrison v. Southwest Baptist University (In re Garrison)*, [*FN:* Garrison v. Southwest Baptist Univ. (*In re* Garrison), 153 B.R. 879 (Bankr. W.D. Mo. 1993).] however, the court ruled that if the entire loan was due more thanseven years ago, it was dischargeable. [*FN:* See id. at 880. Garrison is among the majority of courts who view the loan in its entirety (as opposed to installments which begin the clock ticking when the first loan installment payment becomes due). *Id.* See also Nunn v. State of Washington (*In re* Nunn), 788 F.2d 617, 619 (9th Cir. 1986) (noting that an obligation to repay a loan does not become due on several occasions; it comes due only once); Barciz v. Farmers Citizens Bank (*In re* Barciz), 123 B.R. 771, 772 (Bankr. N.D. Ohio 1990) (stating in dicta that a loan first becomes due when first payment is due).] In yet another approach, the *Georgina v. Higher Education Assistance Foundation (In re Georgina)* [*FN:* 124 B.R. 562 (Bankr. W.D. Mo. 1991).] court ruled that the loan was not due until the nine forbearances in this case had passed. [*FN:* See id. at 563. In its opinion the court stated the issue to be: [W]hether the student loans of the debtor were "due and owing" during the periods that he requested and was granted forbearance. So stated, it is self−evident that while the loans were in the forbearance periods agreed to by both parties, they, while arguably still "owed" by the debtor, were not "due." *Id.* at 564; see also Eckles v. Wisconsin Higher Education Corporation (*In re* Eckles), 52 B.R. 433, 435 (E.D. Wis. 1985) (holding that forbearances in nature of reduction of due payment amount constituted suspension of repayment period).] Similarly, in *Rahlf v. Illinois State Scholarship Commission (In re Rahlf)*, [*FN:* 95 B.R. 572 (Bankr. N.D. Ill. 1988).] the court stated that the 5−year period (a pre−1990 Amendment case) did not commence until after any grace periods. [*FN:* See Rahlf , 95 B.R. at 574. The debtor requested a six month postdeferment grace period due to unemployment, as per the Code of Federal Regulations 682.210(a)(2) and 682.2000(b), which entitled deferment for a six month grace period for loans disbursed prior to October 1, 1981. See id. The debtor claimed that despite requesting the deferment, the grace period provided her by the lender was not authorized because she had not been notified of it. See id. In dicta the court found that the language of the Code of Federal Regulation provision implied that the deferment automatically arose upon the lenders authorization despite the lack of notification of the debtor. See id. The court, however, held that the nature of the deferment or grace period would not be determined by the debtor's request, and "since the issue of when a note first becomes due and payable is a factual question to be determined by the terms of the contract itself the Debtor's argument would still fail." *Id.* at 574−75 (citations omitted). "The request form itself provides for an additional six−month suspension of payments." Rahlf , 95 B.R. at 575. As a result the debt was less than five years overdue and nondischargeable. See id. at 575.] In a 1985 case, [*FN:* Elmira College v. Savercool (*In re* Savercool), 51 B.R. 180 (Bankr. W.D.N.Y. 1985).] the court indicated that the longer the elapsed time between the debtor's graduation and bankruptcy, the weaker the policy interest in preventing a discharge of the loans. [*FN:* See id. at 181; see also Love v. Department of Health, Educ. and Welfare (*In re* Love), 28 B.R. 475, 479 (Bankr. S.D. Ind. 1983) (noting that time elapsed since graduation is factor to be considered).] In *Gibson v. Commonwealth of Virginia, State Education Assistance Authority (In re Gibson)*, [*FN:* 177 B.R. 837 (Bankr. E.D. Va. 1995).] the court determined that the words "applicable suspensions of the repayment period" in section 523(a)(8)(A) [*FN:* 11 U.S.C. § 523(a)(8)(A) (1994).] meant suspensions in the ordinary course of business, not suspensions outside of those granted by the lender. [*FN:* See Gibson , 177 B.R. at 839 (finding "applicable" in § 523(a)(8)(A) to be word of restriction). The court further stated that "[t]he history of collecting student loans is resplendent with suspension of payments the lender grants . In the ordinary course of business, it is frequently done.

We feel this is what the statute covers the ordinary course of business." See id. As such, a suspension by virtue of operation of the automatic stay in a prior bankruptcy does not count. See id.]

The most recent case on when the seven−year clock begins takes a new approach. [*FN:* Schirmer v. Minnesota Higher Educ. Coordinating Bd. (*In re* Schirmer), 191 B.R. 155 (Bankr. D. Minn. 1996).] It held that the loan became due when the first payment of the principal became due, which is less likely to be while the debtor is still attending school. [*FN:* See id. at 159. In the application of a plain meaning test to § 523(a)(8) the court concentrated on Congress's undefined use of "loan" as opposed to the term "debt." See id. at 158−59. The court found that a loan was "something lent, usually money, on condition that it is returned, with or without interest . . . " *Id.* (citing New World Dictionary and Thesaurus of the English Language 580 (1992) (emphasis in original)). Upon this finding that a loan did not include interest, the court held that the repayment period did not commence until repayment of the principle (or "the thing lent") had begun. See id. As such, payments of interest do not constitute the repayment period. See id.] This definition, according to the court, furthers the legislative purpose of section 523(a)(8)(A), which is to discourage borrowers from filing for bankruptcy shortly after graduation without attempting to pay back their loans. [*FN:* See Schirmer , 191 B.R. at 159. The court appeared to be striving to prevent the student loan repayment period from being exhausted while the student was still in school. See id. The court felt that the commencement of the seven year period during education was contrary to the intent of Congress in providing the exception, and that the dischargeability provision was meant to establish a fixed period after the student had terminated studies. See id. ; see also State of Washington (*In re* Nunn), 788 F.2d 617, 619 (9th Cir. 1986) (stating that § 523(a)(8) was designed to prevent discharge of student loan debt for sufficient time period after debtor's studies had terminated).]

2. Dischargeability

Two issues recur repeatedly in bankruptcy cases with educational loans covered by the Code. [*FN:* All educational loans except HEAL and NHSC.] They are the definition of hardship and dischargeability.

a. What is "Undue Hardship?"

The first issue, and one of the most widely litigated, is hardship. The Code prohibits discharge of student loans except where it will "impose an undue hardship on the debtor and the debtor's dependents." [*FN:* 11 U.S.C. § 523(a)(8)(B) (1994).] However, the definition of hardship is not codified, leaving the interpretation of hardship to the discretion of the courts. [*FN:* See, *e.g.* , Pennsylvania Higher Educ. Assistance Agency v. Birden (*In re* Birden), 17 B.R. 891, 893 (Bankr. E.D. Pa. 1982) (discussing undue hardship); Clay v. Westmar College (*In re* Clay), 12 B.R. 251, 254−55 (Bankr. D. Iowa 1981) (same).]

With no statutory definition of hardship, three key cases have shaped judicial thinking: *Pennsylvania Higher Education Assistance Authority v. Johnson (In re Johnson),* [*FN:* 5 B.C.D. 532 (Bankr. E.D. Pa. 1979).] *Bryant v. Pennsylvania Higher Education Assistance Agency (In reBryant),* [*FN:* 72 B.R. 913 (Bankr. E.D. Pa. 1987).] and *Brunner v. New York State Higher Education Services Corporation.* [*FN:* 831 F.2d 395 (2d Cir. 1987).] The earliest of the cases, *Johnson*, established a tripartite test which evaluated the facts of six prior cases. [*FN:* Johnson , 5. B.C.D. at 537 (citing *In re* Townsend No. 77−1921EG, Mem. Op. (E.D. Pa. Dec. 18, 1978));*In re* Glover, No. 78260EG, 4 B.C.D. 786 (E.D. Pa. Sept. 12, 1978);*In re* Moore, No. B−77−3357, 4 B.C.D. 791 (W.D.N.Y. August 17, 1978);*In re* Kirch, No. B2−77−2162, 4 B.C.D. 680 (S.D. Ohio Aug. 7, 1978);*In re* Hayman, No. 77−1473−BK−JE−B, 4 B.C.D. 932 (S.D. Fla. Apr. 25, 1978);*In re* Kablack, No. BK−77− 1121, Mem. Op. (E.D. Pa. 1978).] The three prongs of this "hardship" test were the "mechanical," the "good faith," and the "policy" prongs. [*FN:* Johnson , 5 B.C.D. at 514. The first or "mechanical" test was designed to determine the feasibility of loan repayment. This test considers the future financial resources of a debtor, other sources of wealth or income, and the debtor's future expenses. See id. at 539−40. The second stage is the "good faith" test, which was meant to ensure that the debtor made a bona fide attempt to repay the debt prior to filing bankruptcy. Good faith was determined by analyzing the debtors efforts to minimize expenses, maximize resources, and obtain employment. See id. at 540−42. The last aspect, the "policy test," is concerned with preventing abuse of the bankruptcy law by recently graduated students. This is accomplished by looking at the amount of the student loan, the percentage of total indebtedness it accounts for, and the educational benefit received by the debtor by virtue of the loan. See id. at 542−44. The Johnson court's decision came at the time (1979) when the original § 439A of the Higher Education Act of 1965 had been repealed (1978), but had not been replaced (later in 1979) by Bankruptcy Code § 523(a)(8). See id. at 533−35.]

In defining the mechanical prong, *Johnson* focused on two circumstances. [*FN:* The concern of the court in the mechanical prong is to ascertain what income is likely to be available to the debtor and whether this income will be sufficient to support the debtor and his dependents at a "minimal standard of living" while funding repayment of the student loan. See Johnson , 5 B.C.D. at 536.] First the court concentrated on the debtor's future resources. [*FN:* See id . at 537−38.] Factors that comprised the future forecast of resources included rate of pay, wages and salaries earned, sex, [*FN:* See id. at 537 (providing that sex should be factor until women are compensated equally).] ability to obtain and retain employment, current employment status, employment record,

skills and education, health, access to transportation, number of dependents, and other possible sources of income such as unemployment compensation, welfare, and child support. [*FN:* See id. at 537−38.]

The second part of the mechanical prong was the debtor's future expenses, of which there were two components. [*FN:* See id. at 538−39.] First was the amount of reasonable expenses for a "similarly situated hypothetical debtor," [*FN:* See Johnson , 5 B.C.D. at 538.] using criteria such as marital status and number of dependents. The second component was "extraordinary expenses," such as nondischarged debts. [*FN:* See id. at 538−39.]

The *Johnson* court summarized the mechanical prong:

The court must ask: Will the debtor's future financial resources for the longest foreseeable [sic] period of time allowed for repayment of the loan, be sufficient to support the debtor and his dependent at a subsistence or poverty standard of living, as well as to fund repayment of the student loan? If this question is answered affirmatively, discharge of the student loan must be denied. If answered negatively, then the court must apply the good faith test . . . [*FN:* See id. at 544.]

The second part of the *Johnson* test was the "good faith" prong. [*FN:* See id. at 540.] The court ruled that the debtor must have made a good faith effort to repay the debt and the factors which led to bankruptcy must have been outside the debtor's reasonable control. [*FN:* See id. at 540−42.] A debtor meeting the mechanical test could still be denied discharge if the good faith test was not met. [*FN:* See Johnson , 5 B.C.D. at 541.] In applying the good faith test, the court should consider the debtor's minimization of expenditures, maximization of resources, and attempts to obtain employment. [*FN:* See id.]

The court suggested two questions in determining if the good faith test was satisfied: (a) Was the debtor negligent or irresponsible in his efforts to minimize expenses, maximize resources, or secure employment?; and (b) If "yes," then would the lack of such negligence or irresponsibility have altered the answer to the mechanical test? [*FN:* See id. at 544.] If the answer to the first question was "no," then *Johnson* allowed the discharge of the debt. [*FN:* See id.] If the answer to the first question was "yes" and the answer to the second question was "yes," a presumption against dischargeability arose, which could be defeated by the third prong. [*FN:* See id.]

The final prong of *Johnson* examined public policy considerations − Do the circumstances − *i.e.*, the amount and percentage of total indebtedness of the student loan and the employment prospects of the petitioner, indicate: (a) that the dominant purpose of the bankruptcy petition was to discharge the student debt, or (b) that the debtor has definitely benefitted financially from the education which the loan helped finance? [*FN:* See Johnson , 5 B.C.D. at 544.] If the answer to both questions was a "no," then the debt was dischargeable. However, if the answer to either was "yes," the debt was nondischargeable. [*FN:* See id.]

In developing this third prong, the *Johnson* court relied heavily on Congressional intent and the possibility of abusing the Bankruptcy Code. [*FN:* See id. at 542−43.] Factors that could be included in this prong were the amount of student loan debt, percentage of indebtedness, and benefits to the debtor from the education. [*FN:* See id. at 543.]

The second key case was *Bryant v. Pennsylvania Higher Education Assistance Agency (In re Bryant).* [*FN:* 72 B.R. 913 (Bankr. E.D. Pa. 1987).] The same jurisdiction that decided *Johnson* ignored the tripartite test and instead developed a "poverty−level test." [*FN:* In an attempt to add "the element of objectivity" into the court's undue hardship analysis, the Bryant test begins its analysis by comparing the debtor's situation, in terms of income and resources, with the federal poverty guidelines established by the United States Bureau of the Census. *Id.* at 914−16.] In rejecting the complicated nature of the *Johnson* test, and especially criticizing the first prong of the policy test, [*FN:* Referring to the Johnson test as a "comprehensive and thoughtful, but unfortunately complicated three part progressive test," the court voiced disapproval for filing for bankruptcy and "the fact that the debtor seeks to discharge almost exclusively student loan obligations in his bankruptcy should be irrelevant." Bryant , 72 B.R. 913, 915 n. 2; see also *In re* Gathwright, 67 B.R. 384, 391 (Bankr. E.D. Pa. 1986), appeal dismissed , 71 B.R. 343 (E.D. Pa. 1987).] the court chose to consult the federal poverty guidelines, [*FN:* See Bryant , 72 B.R. at 916. The Court examined the preliminary estimate of poverty thresholds in 1986, published by Bureau of the Census Jan. 27, 1987, and the Federal Poverty Guidelines. 52 Fed. Reg. 5340 (1987) (codified at 45 C.F.R. § 1060.2−2(d)(1) (1986)).] then determine:

Whether the debtor's income is substantially over the amounts set forth in those guidelines or not. If not, a discharge will result only if the debtor can establish the "unique" and "extraordinary" circumstances which should nevertheless render the debt dischargeable. If the debtor's income is below or close to the guideline, the lender can prevail only by establishing that circumstances exist which render these guidelines unrealistic, such as the debtor's failure to maximize his resources or clear prospects of the debtor for future income increases. [*FN:* See Bryant , 72 B.R. at 915.]

The court suggested that unique or extraordinary circumstances could include physical or mental illness or unusual responsibilities arising from the needs of the dependents. [*FN:* See id. at 918 (citing Binder v. United States Dep't of Educ. (*In re* Binder), 54 B.R. 736 (Bankr. D.N.D. 1985)); Connecticut Student Loan Found. v. Keenan (*In re* Keenan), 53 B.R. 913, 918 (Bankr. D. Conn. 1985) (discussing physical and mental disabilities); Bennett v. Commerce Bank of Independence (*In re* Bennett), 38 B.R. 392, 394 (Bankr. W.D. Mo. 1984) (noting difficulties arising when there are dependents); Powelson v. Stewart Sch. of Hairstyling Inc. (*In re* Powelson), 25 B.R. 274, 276 (Bankr. D. Neb. 1982).]

In calculating the debtor's income, the court ruled that net income rather than gross income is to be used. [*FN:* See Bryant , 72 B.R. at 916 (noting the poverty guideline figures use of after taxes gross income was "extremely grim;" the court bestowed a "very slight dispensation" upon debtor and held that for purposes of the undue hardship test only debtor's net income would be pertinent); see also id . (stating use of net income rather than gross income relieves the unfair discrimination against the working poor in favor of the poor subsisting on government benefit programs such as welfare).] The Bryant test finds that undue hardship exists when a debtor's net income is below, at, or not substantially greater than the annual federal poverty guidelines. [*FN:* See id. at 915.] If the debtor, however, can prove "unique" or "extraordinary" circumstances, discharge of the student loans can still be granted despite the debtor's income being substantially greater than the federal poverty guidelines. [*FN:* See id . (noting that "unique" or "extraordinary" circumstances may include physical or mental illness or unusual needs of debtor's dependents).] Moreover, if a creditor proves these circumstances, the loan may be declared nondischargeable even if the debtor's income is near, at, or below the poverty level. [*FN:* See id . at 915 (stating that loan may be deemed nondischargeable where creditor proves "unique" or "extraordinary" circumstances such as debtor's failure to maximize income).]

In *Brunner v. New York State Higher Education Services Corporation*, [*FN:* 831 F.2d 395 (2d Cir. 1987).] a more streamlined version of the tripartite test was presented. This test requires the court to determine:

(1)that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself or] herself and [his or] her dependents if forced to repay the loans; [and]

(2)that 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)that the debtor has made good faith efforts to repay the loans. [*FN:* *Id.* at 396.]

Many recent cases used the tripartite tests. *Ammirati v. Nellie Mae Inc. (In re Ammirati)* [*FN:* 187 B.R. 902 (D.S.C. 1995), aff'd , 85 F.3d 615 (4th Cir. 1996).] explained that the minimal standard of living expressed in the first prong of *Brunner* was not co−extensive with a level of poverty. [*FN:* See id. at 906.] *Mathews v. Higher Education Assistance Foundation (In re Mathews)* [*FN:* 166 B.R. 940 (Bankr. D. Kan. 1994).] stated that the second prong of *Brunner* required a "certainty of hopelessness." [*FN:* See id. at 945.] *Gammoh v. Ohio Student Loan Commission (In re Gammoh)* [*FN:* 174 B.R. 707 (Bankr. N.D. Ohio 1994).] followed *Johnson* and emphasized the percentage of student loan debt present in the debtor's total liability when determining the policytest of *Johnson*. [*FN:* See id. at 711.] *Mae v. Plotkin (In re Plotkin)* [*FN:* 164 B.R. 623 (Bankr. W.D. Ark. 1994).] also followed *Johnson* and looked to debtor's foreseeable financial status, her good faith attempts to repay the debt and whether the primary purpose of filing for bankruptcy was to discharge the loan. [*FN:* See id. at 624.] *Sands v. United Student Aid Funds Inc. (In re Sands)* [*FN:* 166 B.R. 299 (Bankr. W.D. Mich. 1994).] adopted the tripartite test of *Brunner* completely. [*FN:* See id. at 306.] *Stebbins−Hopf v. Texas Guaranteed Student Loan Corp. (In re Stebbins−Hopf)* [*FN:* 176 B.R. 784 (Bankr. W.D. Tex. 1994).] adopted the *Brunner* test, yet rejected the policy component that requires an evaluation of whether an educational benefit was derived from the loan. [*FN:* See id. at 787.] *Law v. Educational Resources Institute Inc. (In re Law)* [*FN:* 159 B.R. 287 (Bankr. D.S.D. 1993).] accepted both *Brunner* and *Johnson* but on a case−by−case analysis. [*FN:* See id. at 292.] *Fox v. Pennsylvania Higher Education Assistance Agency (In re Fox)* [*FN:* 163 B.R. 975 (Bankr. M.D. Pa. 1993).] found that the debtor's intentions in filing the bankruptcy petition and educational gain from the loan were irrelevant. [*FN:* See id. at 979.] Lastly, *In re Roberson*, [*FN:* 999 F.2d 1132 (7th Cir. 1993).] adopted the *Brunner* test of undue hardship for the 7th Circuit. [*FN:* See id . at 1135 (adopting three prong

Brunner test which permits dischargeability of student loans where debtor's standard of living would fall if required to repay loan, extreme financial condition would be likely to continue during repayment period and debtor has made good faith effort to repay).]

With its decision in *Pennsylvania Higher Education Assistance Agency v. Faish (In re Faish)*, [*FN:* 72 F.3d 298 (3d Cir. 1995).] the 3rd Circuit Court of Appeals expressly overruled *Johnson* and *Bryant*, and ruled that the undue hardship test found in *Brunner* must be followed by bankruptcy courts in that circuit. [*FN:* See id. at 305−06.]

The 3rd Circuit found that the *Johnson* test was "unnecessarily complicated and unduly cumbersome," [*FN: Id.* at 303.] thus, it did not provide the required clear statement of the law. [*FN:* See id. at 305.] The court also found that the *Bryant* test was "inconsistent with Congress's dual legislative goals of `eliminat[ing] debtor abuse of the educational loan program' and `preserv[ing] the fiscal integrity of the student loan program.'" [*FN: Id.* at 304 (quoting*In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993)).] The court concluded that of the three tests considered, *Brunner* was the most consistent with the nondischargeability scheme established by Congress in 1978, theyear section 523(a)(8) was enacted. [*FN:* See Faish , 72 F.3d at 305.] Moreover, the court held that the *Brunner* test was the most "logical and workable." [*FN: Id.* at 306.]

In applying the *Brunner* test in *Faish*, the 3rd Circuit first determined that the debtor earned $27,000 annually. [*FN:* See id.] While her loan payment of $300 per month impacted significantly upon her disposable income and expenses, it did not place her, or her son, below the subsistence level. [*FN:* See id. (stating first prong of Brunner required more than showing of tight finances).] Thus, the debtor failed to establish, "based upon her current income and expenses, [that] she could not maintain a minimal standard of living if forced to repay her loans." [*FN:* See id.] This failure meant, since the debtor did not pass the first element of the *Brunner* test, that there was no need for the court to consider the second and third elements of the test. [*FN:* See Faish , 72 F.3d at 306 (stating that if any one element of the Brunner test is not met, court's inquiry must end there finding debt nondischargeable).] Accordingly, the debtor was denied discharge of her student loan obligations. [*FN:* See id.]

Other cases have considered poverty−level income as a factor in dischargeability. In *Correll v. Union National Bank of Pittsburgh (In re Correll)*, [*FN:* 105 B.R. 302 (Bankr. W.D. Pa. 1989).] the court established that different criteria should be used for poverty−level and high−income debtors. [*FN:* See id. at 304.] The court stated:

It is apparent that judicially developed rules defining circumstances which indicate "abuse" of the bankruptcy system were developed to apply to high income professionals, but have come in recent years to be applied to poverty line wage earners. We conclude that the key word in the legislative history is "abuse" and that [it] is inappropriate to apply the same standards to poverty line wage earners as is applied to high income professionals and other college graduates. [*FN: Id.*]

The court in *Plotkin* stated that the analysis turns on whether the debtor's future resources for the "longest foreseeable period" will support the debtor at a subsistence or poverty level. [*FN:* See Mae v. Plotkin (*In re* Plotkin), 164 B.R. 623, 624 (Bankr. W.D. Ark. 1994); see also supra note 162 and accompanying text (discussing importance of debtor's foreseeable financial status).] In *Reyes v. Oklahoma State Regents for Higher Education (In re Reyes)*, [*FN:* 154 B.R. 320 (Bankr. E.D. Okla. 1993).] the court followed *Bryant* which stated that when the debtor was very close to the poverty level, discharge may be allowed, whereas if the debtor was not

at or near the poverty level, a showing of "unique" or "extraordinary" circumstances may be required. [*FN:* See id. at 323−24 (quoting Bryant , 72 B.R. 913, 915−16 (Bankr. E.D. Pa. 1987).]

There are distinctions and similarities among these three tests for undue hardship. Under Johnson and Brunner, the debtor always has the burden of proof of undue hardship. Under Bryant, the burden of proof may be placed on the lender to show the existence of circumstances which render the federal poverty guidelines unrealistic. [*FN:* See Bryant , 79 B.R. at 915.] Under Johnson's tripartite scheme, if the mechanical prong fails, the analysis is over and the loan is deemed nondischargeable. If, however, either of the other two Johnson prongs fail, resort may be made to other criteria. [*FN:* Johnson , 532 B.C.D. at 544 (noting if good faith test is failed, only a presumption against discharge is established, which is rebuttable by negative response to third and final test).] Under Bryant, the only factor is the debtor's financial position as measured against the federal poverty guidelines. This pass/fail formula may be, however, conditioned by proof of "unique" or "extraordinary" circumstances. Under Brunner if any one of the three prongs fails, the test is over without reference to any other factors. [*FN:* See Faish , 72 F.3d at 306;*In re* Roberson, 99 F.2d 432 at 435.]

The undue hardship test espoused in Brunner is actually a modified version of the Johnson test. [*FN: In re* Elebrashy , 189 B.R. 922 at 925 (Bankr. N.D. Ohio, 1995).] Both Johnson and Brunner examine the debtor's present circumstances, prospects for the future, and good faith. [*FN:* See id . at 925.] However, while Brunner's first prong includes the first part of the Johnson policy test, it does not include the second part of Johnson's policy test, *i.e.* whether the debtor benefited from the education financed by the loan. [*FN: In re* Roberson, 999 F.2d at 1136 (adopting Brunner test for 7th Cir., however, salient distinction was 7th Circuit's deferment of loan repayment for two years after finding loan nondischargeable).] This consideration is improper, since it conflicts with the basic concept of government−backed student loans. [*FN:* See id . at 1136 (citing Brunner , "consideration of the 'value' of the education in making a decision to discharge turns the government into an insurer of educational value"), 46 B.R. 752, 756 n.3.]

Johnson's tripartite methodology for undue hardship is too complicated and cumbersome. [*FN:* See Faish , 72 F.3d 298 at 303; see also Bryant , 72 B.R. at 915.] The Bryant test has no allowance for "good faith" considerations such as the justification of the expenses of the debtor or whether the debtor's situation arose from circumstances beyond the debtor's control. [*FN:* See id . at 304 (Bryant also avoids debtor's motive for seeking bankruptcy relief).] The Brunner test best safeguards the congressional intent regarding dischargeability of student loans, and is the most logical and workable of the three tests. [*FN:* See id . at 305−306.] Moreover, Brunner's test is easier to apply and follow. [*FN:* See id .]

b. Medical Hardship

While the vast majority of the cases reviewed did not allow the debtor to discharge its student loan debt, [*FN:* See, *e.g.* , *In re* Roberson 999 F.2d 1132 (7th Cir. 1993) (refusing to discharge student loan debt absent showing of undue hardship); Raymond v. Northwest Educ. Loan Ass'n (*In re* Raymond), 169 B.R. 67, 71 (Bankr. W.D. Wash. 1994) (same); O'Brien v. Household Bank FSB (*In re* O'Brien), 165 B.R. 456, 460 (Bankr. W.D. Mo. 1994) (same); Bethune v. Student Loan Guarantee Found. of Arkansas (*In re* Bethune), 165 B.R. 258, 261 (Bankr. E.D. Ark. 1994) (same); Philips v. Great Lakes Higher Educ. Corp. (*In re* Philips), 161 B.R. 945, 949 (Bankr. N.D. Ohio 1993) (same); Myers v. Pennsylvania Higher Educ. Assistance Agency (*In re* Myers), 150 B.R. 139, 145 (Bankr. W.D. Pa. 1993) (same); Kraft v. New York State Higher Educ. Servs. Corp. (*In re* Kraft), 161 B.R. 82, 87 (Bankr. W.D.N.Y. 1993) (same); Healey v. Massachusetts Higher Educ. (*In re* Healey), 161 B.R. 389, 397 (E.D. Mich. 1993) (same); United States v. Davis (*In re* Davis), 142 B.R. 293, 296−97 (Bankr. S.D. Ind. 1992) (same); Silliman v. Nebraska Higher Educ. Loan Program (*In re* Silliman), 144 B.R. 748, 752 (Bankr. N.D. Ohio 1992) (same); Koch v. Pennsylvania Higher Educ. Assistance Agency (*In re* Koch), 144 B.R. 959, 966 (Bankr. W.D. Pa. 1992) (same); *In re* Smith, 130 B.R. 102, 105 (Bankr. D. Utah 1991) (refusing to discharge absent showing of hardships and good faith); The Cadle Co. v. Webb (*In re* Webb), 132 B.R. 199 (Bankr. M.D. Fla. 1991) (same); Burton v. Pennsylvania Higher Educ. Assistance Agency (*In re* Burton), 177 B.R. 167 (Bankr. W.D. Pa. 1990) (same); Garneau v. New York State Higher Educ. Servs. Corp. (*In re* Garneau), 122 B.R. 178 (Bankr. W.D.N.Y. 1990) (same); Harris v. Pennsylvania Higher Educ. Assistance Agency (*In re* Harris), 103 B.R. 79 (Bankr. W.D.N.Y. 1989) (same); D'Ettore v. Devry Inst. of Tech. (*In re* D'Ettore), 106 B.R. 715 (Bankr. M.D. Fla. 1989) (same); Perkins v. Vermont Student Assistance Corp. (*In re* Perkins), 11 B.R. 160 (Bankr. D. Vt. 1980) (same).] several of those that were discharged involved medical hardship.

In *In re Gammoh*, [*FN:* 174 B.R. 707 (Bankr. N.D. Ohio 1994).] the court granted a partial discharge of student loans where a spouse had temporary medical problems and a divorce was pending. [*FN:* See id. at 712.] In *O'Brien v. Household Bank FSB (In re O'Brien)*, [*FN:* 165 B.R. 456 (Bankr. W.D. Mo. 1994).] the debtor who was unemployed and suffered from chronic fatigue syndrome received a discharge. The court reasoned that refusing to discharge the loan would create an undue hardship on the debtor because of debtor's medical condition, which was likely to continue throughout the repayment period. [*FN:* See id. at 459.] A partial discharge of educational loans was provided in *Berthiaume v. Pennsylvania Higher Education Assistance Authority (In re Berthiaume)*. [*FN:* 138 B.R. 516 (Bankr. W.D. Ky. 1992).] In this case, the wife had serious medical problems and her loans were discharged while her husband's loans were not. [*FN:* See id. at 518, 521.] In *In re Plotkin*, [*FN:* 164 B.R. 623 (Bankr. W.D. Ark. 1994).] a debtor was given a discharge while still a student. She suffered from medical problems, including anorexia nervosa, and her current schooling was part of a state rehabilitation program. [*FN:* See id. at 624.]

Older debtors were provided more leeway in dischargeability in two cases. A 52−year−old woman who was disabled and whose spouse earned a low wage was given a discharge in *Wilcox v. United States (In re Wilcox)*. [*FN:* 57 B.R. 479, 480 (Bankr. M.D. Ga. 1985).] Furthermore, in *Connolly v. Florida Board of Regents (In re Connolly)*, [*FN:* 29 B.R. 978 (Bankr. Fla. 1983).] a 57−year−old debtor with medical and psychological problems was given a discharge. [*FN:* See id. at 979, 982.]

Diaz v. New York State Higher Education Services Corporation (In re Diaz) [*FN:* 5 B.R. 253 (Bankr. W.D.N.Y. 1980).] is cited as a "classic hardship case." [*FN:* See id . at 254.] In granting a discharge, the court considered factors such as the numerous health problems of the debtor and her family and the inability of Diaz to meet her weekly expenses. [*FN:* See id. at 253−54.]

c. Cases Where Undue Hardship was not Found

A divorced mother with no alimony or child support was denied discharge in *In re MacPherson.* [*FN: In re* MacPherson, 4 B.C.D. 950 (Bankr. W.D. Wisc. 1978).] She had two children, one of whom had undergone brain surgery and her monthly income exceeded her expenses by less than $15. [*FN:* See id.] Additionally, a single mother of four was denied a discharge in *Harris v. Pennsylvania Higher Education Assistance Agency (In re Harris).* [*FN:* 103 B.R. 79 (Bankr. W.D.N.Y. 1989).] The court found that she had not made a good faith effort to repay her loans, in part because, while the debtor owed $19,117, her income was $31,000 per year. [*FN:* See id. at 82.]

In contrast, a parochial school teacher was denied a discharge in *Healey v. Massachusetts Higher Education (In re Healey).* [*FN:* 161 B.R. 389 (E.D. Mich. 1993).] The court reasoned that she could earn more than her salary of $10,600 per year by obtaining a public school teaching position, thus she had not maximized her income. [*FN:* See id. at 394−95.] Moreover, she had filed for bankruptcy one year after graduation with no effort to repay her loans. [*FN:* See id. at 396.]

In *Lawson v. Hemer Service Corporation of America (In re Lawson),* [*FN:* 190 B.R. 955 (Bankr. M.D. Fla. 1995).] a law school graduate with $43,197 in outstanding loans was denied discharge despite her various medical problems, physical disabilities, and learning disabilities, even though it was unlikely that she would ever practice law. [*FN:* See id. at 957−58.] The debtor suffered dyslexia, allergies, asthma, scoliosis, psoriasis, kidney problems, urinary tract infections,cervical cancer, and reproductive problems. [*FN:* See id. at 957.] Despite these difficulties, she was employed by the state of Florida in a law−related position that paid $9.69 per hour. [*FN:* See id.] Further, she had made no effort to negotiate a reduction in her obligations. [*FN:* See id. at 958.]

Several cases have addressed squarely the issue of career choice and educational preparation, usually ruling against discharge. [*FN:* See, *e.g.* , Kraft v. New York State Higher Educ. Servs. Corp. (*In re* Kraft), 161 B.R. 82 (Bankr. W.D.N.Y. 1993); Koch v. Pennsylvania Higher Education Assistance Agency (*In re* Koch), 144 B.R. 959 (Bankr. W.D. Pa. 1992); Evans v. Higher Educ. Assistance Fund (*In re* Evans), 131 B.R. 372 (Bankr. S.D. Ohio 1991).] In *Kraft v. New York State Higher Education Services Corp.* [*FN:* 161 B.R. 82 (Bankr. W.D.N.Y. 1993).] a debtor only eighteen months out of school filed for bankruptcy. [*FN:* See id. at 83.] The court ruled the debt nondischargeable because she had not expanded her job search beyond her chosen field of tourism. [*FN:* See id. at 86−87.] An abuse of the bankruptcy law was suggested in *Koch v. Pennsylvania Higher Education Assistance Agency (In re Koch),* [*FN:* 144 B.R. 959 (Bankr. W.D. Pa. 1992).] where 98% of the debt was from educational loans. [*FN:* See id. at 966.]

Courts have strictly enforced the code's nondischargeability provisions when they detected an overstatement or fabrication of medical problems on the part of the debtor. In *Burton v. Pennsylvania Higher Education Assistance Agency,* [*FN:* 117 B.R. 167, 170 (Bankr. W.D. Pa. 1990).] the debtor claimed Epstein−Barr syndrome and bowel problems. [*FN:* See id. at 170.] The court ruled that the loan was nondischargeable, noting that although debtor claimed that he could not hold a job because of, at least, hourly trips to the bathroom, he had sat through a hearing lasting the entire afternoon without requesting to use bathroom facilities. [*FN:* See id at 171.] Likewise, the debtor in *Gearhart v Clearfield Bank and Trust Co. (In re Gearhart)* [*FN:* 94 B.R. 392 (Bankr. W.D. Pa. 1989).] was denied a discharge in part because the court noted that alleged nerve problems were not evident. [*FN:* See id. at 393 (stating that "[d]ebtor also complained that her nerves were `shot' and that she couldn't react favorably to a pressure situation. This deficiency was not evident to the Court wherein at the very least she handled, if not enjoyed this Court appearance").]

d. Cases Decided at Discretion of the Court

Bankruptcy courts have repeatedly rejected attempts to implement standard tests in student loan cases, relying instead, on the individual facts of each case and applying the discretion of the courts. In *In re Bryant,* [*FN:* 72 B.R. 913 (Bankr. E.D. Pa. 1987).] the court discussed thepoverty test developed in *Johnson*, and applied a test where a debtor could be above the poverty line and receive a discharge or below this level and not receive a discharge for hardship based on

the facts of the case. [*FN:* See id. at 915 (allowing discharge for debtor over poverty line in "unique circumstances," and declining discharge when under poverty line when lender proves guidelines are unrealistic).]

Evans v. Higher Education Assistance Foundation (In re Evans) [*FN:* 131 B.R. 372 (Bankr. S.D. Ohio 1991).] allowed discharge in part because of the inappropriate career training that the debtor received. [*FN:* See id at 376.] The trade school training of the debtor did not prepare her for a job and although not at the poverty level, she did not have sufficient income to support herself. [*FN:* See id.] In another trade school case, discharge was allowed because the training only prepared the debtor for employment in areas requiring unskilled workers. [*FN:* Correll v. Union Nat'l Bank of Pittsburgh (*In re* Correll), 105 B.R. 302, 307 (Bankr. W.D. Pa. 1989).] In allowing a discharge, *Law v. The Educational Resources Institute, Inc (In re Law)* [*FN:* 159 B.R. 287, 293 (Bankr. D.S.D. 1993).] cited the low quality of flight training and the fact that the school closed after several months, leaving the student with $20,000 of debt. [*FN:* See id. at 294 (stating that to "require a $20,000 student loan to be repaid over twenty years in exchange for the equivalent of two−and−a−half weeks of useless training would . . . create an 'undue hardship' for debtor.").] The court rejected a discharge in *Perkins v. Vermont Student Assistance Corporation (In re Perkins),* [*FN:* 11 B.R. 160 (Bankr. D. Vt. 1980).] noting that the debtor was without dependents and would only be put on a tight budget. [*FN:* See id. at 161.] Bankruptcy courts have repeatedly used their equity powers to allow for a partial discharge of educational loans dependent on the facts of individual cases. [*FN:* See Ammirati v. Nellie Mae Inc. (*In re* Ammirati), 187 B.R. 902, 907 (D.S.C. 1995) (discharging based on health setbacks of debtor and dependents); Fox v. Student Loan Marketing Assoc. (In re Fox), 189 B.R. 115, 119−20 (Bankr. N.D. Ohio 1995) (discharging only portion of loan by finding that debtor was unable to meet current expenses but noted lack of good faith in attempt to reduce expenses); Raimondo v. New York State Higher Educ. Servs. Corp. (*In re* Raimondo), 183 B.R. 677, 682 (Bankr. W.D.N.Y 1995) (discharging seven students loans on a pro−rata basis); Gammoh v. Ohio Student Loan Commission (*In re* Gammoh), 174 B.R. 707, 711−712 (Bankr. N.D. Ohio 1994) (permitting discharge based on percentage of total debt); Woyame v. Career Educ. and Management (*In re* Woyame), 161 B.R. 198, 203 (Bankr. N.D. Ohio 1993) (reducing debt to level that would not inflict undue hardship); Bakkum v. Great Lakes Higher Educ. Corp. (*In re* Bakkum), 139 B.R. 680, 684 (Bankr. N.D. Ohio 1992) (allowing discharge of wife's but not husband's debt); Mathews v. United States (*In re* Mathews), 150 B.R. 11, 14 (Bankr. W.D. Pa 1992) (allowing partial discharge); Hawkins v. Chase Manhattan Bank (*In re* Hawkins), 139 B.R. 651, 654 (Bankr. N.D. Ohio 1991) (allowing partial discharge because entire repayment would be undue hardship).]

C. Health Education Assistance Loans and National Health Service Corps

The dischargeability of a loan obtained pursuant to the Health Assistance Education Act (HEAL), or the obligation to repay National Health Service Corps (NHSC) loans in lieu of performing public service is not governed by section 523(a)(8) of the Bankruptcy Code, but by 42 U.S.C. § 292f(g), which provides that a student loan may be discharged in bankruptcy only:

(1) after the expiration of the seven−year period beginning on the first date when repayment of such loan is required, exclusive of any period after such date in which the obligation to pay installments on the loan suspended;

(2) upon a finding by the Bankruptcy Court that the nondischarge of such debt would be unconscionable; and

(3) upon the condition that the Secretary shall not have waived the Secretary's rights to apply subsection (f) of this section to the borrower and the discharged debt. [*FN:* 42 U.S.C.A. § 292f(g) (West Supp. 1996).]

HEAL and NHSC cases have turned on the application of "unconscionable" to the specific debtor, [*FN:* See Kline v. United States, 155 B.R. 762, 766 (Bankr. W.D. Mo. 1993) (noting "only issue herein is whether nondischarge of debtor's loans would be unconscionable."); Mathews v. Pineo, 19 F.3d 121, 123−24 (3d Cir. 1994), *cert. denied* , 115 S. Ct. 82 (1994); Lawrence v. United States (*In re* Lawrence), No. 94−3092− 13902−BKC−AJC, WL 75910, at *3 (Bankr. S.D. Fla. Jan. 30, 1995); Emnett v. United States (*In re* Emnett), 127 B.R. 599, 600, 602 (Bankr. E.D. Ky. 1991); Hines v. United States (*In re* Hines), 63 B.R. 731, 735 (Bankr. D.S.D. 1986).] which is a much stricter standard than the "undue hardship" standard of section 523(a)(8). [*FN:* See Hines , 63 B.R. at 736 (stating that "unconscionable under § 294f (g)(2) requires a higher standard than a finding of undue hardship."); Kline , 155 B.R. at 766; *I*n re Malloy, 155 B.R. 940, 945 (E.D. Va. 1993), aff'd , 23 F.3d 402 (4th Cir. 1994); United States v. Quinn (*In re* Quinn), 102 B.R. 865, 867 (Bankr. M.D. Fla. 1989); United States v. Green (*In re* Green), 82 B.R. 955, 959 (Bankr. N.D. Ill. 1988).] One court has defined unconscionability for discharge of HEAL debt under 42 U.S.C. § 294f(g) as that which is neither "reasonable or acceptable", nor "shockingly unfair, harsh or unjust." [*FN:* Lawrence v. United States (*In re* Lawrence), No. 94−13092−BKC−AJC, 1995 WL 75910, at *3 (Bankr. S.D. Fla. Jan. 30, 1995) (citing United States v. Quinn (*In re* Quinn), 102 B.R. 865, 867 (Bankr. M.D. Fla. 1989)).]

As a result, few debtors have had their obligations discharged. Two cases denying discharge of HEAL loans involved students who failed to complete medical school. [*FN: In re* Malloy, 155 B.R. 940 (E.D. Va. 1993), aff'd , 23 F.3d 402 (4th Cir. 1994); Hines , 63 B.R. at 731 (Bankr. D.S.D. 1986).] In *Malloy*, the debtor was unsuccessful in obtaining his medical degree but was nonetheless steadily employed at an increasing wage; as such, the court failed to find unconscionability and refused to discharge the loan. [*FN:* See Malloy , 155 B.R. at 944, 948.] The facts were slightlydifferent in *Hines*, [*FN:* 63 B.R. 731 (Bankr. D. S.D. 1986).] where the student had been academically dismissed from medical school and had unsuccessfully sued for reinstatement. [*FN: Id.* at 733.] The bankruptcy court refused to discharge the loans because it found that nondischarge would not be unconscionable, as required by the statute. [*FN:* See id. at 735, 737.]

In Emnett v. United States (*In re* Emnett), [*FN:* 127 B.R. 599 (Bankr. E.D. Ky. 1991).] discharge was also denied. Emnett had graduated from dental school but could not continue to practice dentistry due to arthritis. [*FN:* See id. at 600−01.] He had participated in several unsuccessful business ventures, but had secured employment as a realtor; his wife was employed as well. [*FN:* See id. at 601.] The court held that even after a thorough review of the facts, it would not be unconscionable to deny discharge of the loan. [*FN:* See id . at 603−04.] This case demonstrates the more stringent standard of unconscionability than the "undue hardship" requirement of section 523(a)(8).

In *Joyner v. United States (In re Joyner)*, [*FN:* 146 B.R. 232 (Bankr. W.D. Mo. 1992).] the court denied discharge of a $9,000 loan which had compounded to $33,000 with penalties to an optometrist with an annual income of nearly $60,000. The court reasoned that the situation was "his own fault" because of his conscious decision not to repay the loans. [*FN:* See id . at 234.] *Joyner* also questioned whether the revisions to the Bankruptcy Code (and the more lenient standard of undue hardship) controlled HEAL discharges. [*FN:* See id . at 233.] The court found that section 294f(g) of title 42 was still controlling. [*FN:* See id. at 233−34. 42 U.S.C. § 294f(g) (1988) (amended to extend 5 year time frame for dischargeability of student loans to 7 years). See 42 U.S.C. § 294f(g) (1994).] In *United States v. Dillingham (In re Dillingham)*, [*FN:* 104 B.R. 505, 510, 512 (Bankr. N.D. Ga. 1989).] the court denied discharge of the HEAL debt based on the fact that the petitioner had $100,000 in loans, practiced at a freestanding medical clinic with a salary of $80,000 per year and had no medical problems. [*FN:* See id. at 510, 513.] Finally, in *United States v. Cleveland (In re Cleveland)*, [*FN:* 89 B.R. 69 (B.A.P. 9th Cir. 1988).] the debtor was ordered to pay off health loans at the same rate as other unsecured chapter 13 creditors. [*FN:* See id. at 73.]

Under the NHSC scholarship program, medical students received payment of tuition, fees, and a stipend. [*FN:* 42 U.S.C. § 254l(g) (1994).] Upon their completion of medical school, the doctors were required to relocate to an area of the country suffering from a health professional shortage for a minimum term of two years (or one year for everyschool year a scholarship was provided, whichever was greater). [*FN:* See id. § 254l(f)(1)(B)(iv).] Several cases concerning the NHSC program involved women physicians who, after completing training, were not able to relocate their families to the area designated by the Corps. In *United States v. Kephart (In re Kephart)*, [*FN:* 167 B.R. 767 (Bankr. W.D.N.Y.), rev'd , 170 B.R. 787 (W.D.N.Y. 1994).] the debtor had not relocated as required, but the bankruptcy court found that she was providing a valuable service and granted a partial discharge. [*FN:* See Kephart v. United States (*In re* Kephart), 167 B.R. at 771−73.] The district court reversed even though it agreed with the bankruptcy court's finding that the debtor's service was valuable and commendable. [*FN:* Kephart , 170 B.R. at 793 (failing to find that it would be unconscionable to deny discharge).] The district court reasoned that it is not the province of the court to determine where there is a need for medical personnel. [*FN:* See id.] In *Matthews v. Pineo*, [*FN:* 19 F.3d 121 (3d Cir. 1994).] the court ruled that it was not unconscionable to require the physician to leave her home and uproot her children for Corps service. [*FN:* See id . at 124 (stating "an option is not 'unconscionable' simply because it may be disruptive, unpleasant, undesirable, or painful.").] In order to discharge the $400,000 loan (including treble damages), the situation had to be "outrageous" or "shockingly unfair, harsh, or unjust." [*FN:* See id. at 124−25.]

As with the HEAL program, debtors who have received NHSC loans have argued that the more lenient Bankruptcy Code discharge provisions were applicable and permitted discharge of their loans. [*FN:* United States v. Dillingham (*In re* Dillingham), 104 B.R. 505, 512 (Bankr. N.D. Ga. 1989) (arguing unconscionability standard of undue hardship under 11 U.S.C. § 523(a)(8) should be applied instead of more rigid standard of 42 U.S.C. § 294f(g)); United States v. Hampton (*In re* Hampton), 47 B.R. 47, 50 (Bankr. N.D. Ill. 1985) (stating that Code should be applied because it provides for discharge within 5 year period upon showing of undue hardship whereas 42 U.S.C. § 294f(g) applies higher standard).] Largely, their claims have been denied. [*FN:* Dillingham , 104 B.R. at 505 (holding that nondischargeable debts not unconscionable); Hampton , 47 B.R. at 50.] However, one chapter 7 debtor, who had her NHSC student loan debt paid by her employer, was allowed to have the debt to the employer discharged under the

Code provisions. [*FN:* Santa Fe Med. Serv's. Inc. v. Segal (*In re* Segal), 57 F.3d 342, 344−45, 349 (3d Cir. 1995).] The indebtedness to the student was not considered a "student loan." [*FN:* See id . at 349 (finding that loan's purpose was to facilitate debtor's education but to induce her employment).] Thus, the court ruled that the loan from the employer to the physician was not for "educational purposes." [*FN:* See id.]

III. Conclusion and Recommendations

We make several recommendations affecting practice, policy, and future decisions. [*FN:* The recommendations contained here are solely personal views of the authors.] Our first recommendation is the extension of the time period for repaying the student loan to ten years. [*FN:* Some courts favor such an extension. Consider*In re* Roberson, 999 F.2d 1132, 1137−38 (7th Cir. 1993) (holding student loan debt nondischargeable but deferring repayment of loan for two years).] If this is done, the dischargeability period should also be lengthened, for seven to ten years.

Second, the "tolling" of the clock for repayment should begin after all deferments and forebearances. Using the date that the principal first becomes due, as some cases have provided, unfairly discriminates against the loan programs that have the first payment of principal begin while the student is still enrolled.

Third, if federally subsidized loans are decreased as was proposed by Congress, [*FN:* See HR 2491, Balanced Budget Act of 1995 (would have cut $5 billion from federal student aid system over seven year period; vetoed by president).] upper− and middle−income students will seek out private loans. This shift to private, unsubsidized loans (which often carry charges for default insurance) and the use of credit card payment for educational expenses [*FN:* The use of credit cards to pay for educational expenses in lieu of or in addition to student loans is documented in P.A. Somers and M. Bateman, Mortgaging their Future? How Debt Load Influences Academic, Personal, and Career Decisions . Paper presented at the National Association of State Grant and Aid Programs/National Council of Higher Education Loan Programs Conference, April, 1996.] may change the contours of student loan default cases in bankruptcy. For instance, credit card charges for educational benefits might become nondischargeable just as Congress changed section 523(a) to prohibit discharge of taxes paid by credit card. These issues must be addressed.

The fourth recommendation concerns the definition of educational benefit, lender, and educational loan. We believe that congressional intent is properly interpreted in those cases where parents, spouses, and other cosigners are not allowed to discharge student loans except in cases of undue hardship. Likewise, the type of financial institution should not be considered in cases where the loan is federally insured and college tuition payment plans are clearly "educational loans."

Fifth, we urge common acceptance of the *Faish−Brunner* [*FN:* See supra notes 179−83 and accompanying text (discussing test).] test for undue hardship. However, we call for discretion and compassion in cases involving low−income students, students who are victims of unscrupulous training programs, single parents with heavy family financial burdens, and students with serious medical problems (including emotional illnesses).

Sixth, colleges and universities must review their policies for compliance with bankruptcy laws and student loan regulations. Clearly, some institutions create costly problems because their staff members are uninformed about their legal responsibilities.

Seventh, our suggestion for a viable alternative for plan classification of student loans that qualify as long−term debt, should be met with ready acceptance by the debtor and the lending creditor. Since such a scheme benefits both parties and is in agreement with chapter 13 provisions, we believe that more courts should adopt this method of treatment.

These seven issues have been raised in cases and literature on student loans and we expect that they will continue to be important in the future. Policy makers, educators, lenders, judges, and the bankruptcy bar should carefully consider these issues. We hope that this Article will further consideration of public policy on student loan discharge in bankruptcy.