Consumer Bankruptcy/Legislation

Recent and Pending Legislation Regarding Student Loans and CFPB Regulations for Mortgage Servicing

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Student Loan Debt in Bankruptcy: An Overview

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I. Section 523(a)(8): Treatment of Educational Debt Under the Bankruptcy Code

Section 523(a)(8) of the Bankruptcy Code excludes public and private student loans from discharge in bankruptcy unless "excepting such debt from discharge . . . would impose an undue hardship on the debtor or the debtor's dependents."[2] The present statute is the product of a series of amendments to the Bankruptcy Code that roughly parallels the development of the modern student loan industry.[3]

A. The Development of the Current Statute

Before 1976, educational loans were completely dischargeable in bankruptcy. The first statute restricting the discharge of educational loan debt appeared in 1976, when the former Bankruptcy Act was amended to make most government-backed student loans nondischargeable for a period of five years after the date the loan first became due.[4] During this five-year period, student loans continued to be dischargeable if disallowing the discharge would impose an undue hardship on the debtor or his dependents.

When the Bankruptcy Code was adopted in 1978, these provisions were carried forward, and the five-year provision was expanded in 1979 to apply to any educational loan funded, made, insured or guaranteed by a governmental unit or funded by a "nonprofit institution of higher education."[5] In 1984, the statute was amended to include private student loans funded or guaranteed by a governmental or non-profit entity.[6] Congress increased the five-year limit to seven years in 1990.[7] The seven-year rule was eliminated completely in 1998, leaving undue hardship as the only avenue for the discharge of most educational debt.[8] The most recent amendment to the statute came in 2005 when BAPCPA extended the application of § 523(a)(8) to "any qualified educational loan," making student loans originated by private lenders nondischargeable even when these loans are not backed by a governmental entity.[9]

B. The Current Statute

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[2] 11 U.S.C. § 523(a)(8).

[3] *See*, *e.g.*, Cox v. Hemar Ins. Corp. of Am. (*In re* Cox), 338 F.3d 1238, 1242-43 (11th Cir. 2003) (detailing the evolution of § 523(a)(8)).

[4] Education Act Amendments of 1976, Pub. L. 94-482, 90 Stat. 2081, *cited in* Alan M. Ahart, *Discharging Student Loans in Bankruptcy*, 52 AM. BANKR. L.J. 201, fn. 1 (1978).

[5] Act of Aug. 14, 1979, Pub. L. No. 96-56, 93 Stat. 387.

[6] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

[7] Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

[8] Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581.

[9] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

In its present form, § 523(a)(8) excludes both public and private student loans from discharge in bankruptcy, subject only to an "undue hardship" exception. In its entirety, the statute now reads:

> (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) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
> (A)
> (i) 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 nonprofit institution; or
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . . .

Section 523(a)(8) applies to all cases filed under chapters 7, 11, 12, or 13 of the Bankruptcy Code and prevents an individual debtor from discharging most types of education debt absent a showing of undue hardship.

The broad scope of the present statute places a heavy emphasis on the debtor's ability to prove undue hardship. However, several preliminary considerations may allow the debtor to exclude some obligations from the operation of the statute and discharge these debts without reference to undue hardship. First, not every obligation is considered a loan or an "educational benefit" for purposes of § 523(a)(8). Second, although § 523(a)(8) applies to educational loans from most sources, it does not apply to loans from every possible source. These initial questions of scope may excuse some debts from the operation of § 523(a)(8).

1. Obligations Within the Operation of § 523(a)(8)

Four broad categories of debts are made nondischargeable by the three subsections of § 523(a)(8)."[10] First, § 523(a)(8)(A)(i) applies to an "educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit." The same subsection also makes an overpayment or loan nondischargeable if "made under any program funded in whole or in part by a governmental unit or nonprofit institution." Third, § 523(a)(8)(A)(ii) excepts from discharge any "obligation to repay funds received as an educational benefit, scholarship, or stipend." Finally, § 523(a)(8)(B) excepts from discharge "any other educational loan that is a qualified educational loan" as defined in § 221(d)(1) of the Internal Revenue Code.

a. Section 523(a)(8)(A)

[10] These were outlined by the court in *In re Rumer* as: "(1) loans made, insured, or guaranteed by a governmental unit; (2) loans made under any program partially or fully funded by a government unit or nonprofit institution; (3) loans received as an educational benefit, scholarship, or stipend; and (4) any 'qualified educational loan' as that term is defined in the Internal Revenue Code." Rumer v. American Educ. Servs. (*In re* Rumer), 469 B.R. 553 561 (M.D. Pa. 2012).

Section 523(a)(8)(A)(i) makes all federal loans nondischargeable, including Stafford Loans, PLUS Loans (Parents Plus), and Consolidation Loans. The phrase "governmental unit" extends nondischargeability to any loan made, insured, guaranteed, or funded by a state agency or other non-federal governmental entity.[11] Section 523(a)(8)(A)(i) also applies to any loan funded by a nonprofit organization, a term that includes most educational institutions.[12] This subsection specifically applies to overpayments, in addition to loans.

Section 523(a)(8)(A)(ii) further extends nondischargeability to any obligation to repay funds received, from any source, as an educational benefit, scholarship, or stipend. Because § 523(a)(8)(A)(ii) applies to credit from *any* source and uses the expansive term "educational benefit," it has been used to extend nondischargeability in unexpected directions.[13] For example, a loan obtained by a law student to pay for a bar review course was held nondischargeable under § 523(a)(8)(A)(ii).[14] In addition, neither subsection of § 523(a)(8)(A) is limited to loans connected to post-secondary or higher education. This, combined with the expansive language of subsection (A)(ii), has supported the nondischargeability of the debtor's obligation to pay for tutoring services provided to her child,[15] as well as an unsecured line of credit used to pay for tuition and books for the debtor's children.[16]

Because of the broad language used in § 523(a)(8)(A), a long list of obligations is clearly included in its coverage. However, debtors have still found ample room to argue that particular obligations are outside the scope of this section. The cases in this area divide into two broad categories. First, debtors have questioned whether the debt at issue is properly categorized as a loan. Second, debtors have contended that particular debts are not properly categorized as "educational." If the obligation fails to meet either of these requirements, it falls outside the scope of § 523(a)(8)(A) and will be discharged without any need for the debtor to prove undue hardship.[17]

b. Section 523(a)(8)(B)

Section 523(a)(8)(B) was added in 2005 when the statute was amended by BAPCPA, and it dramatically expanded the scope of the statute. Subsection (B) acts as a dragnet, extending nondischargeability to any educational loan not covered in subsection (A), so long as that loan is a "qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code," and is

[11] 11 U.S.C. § 101(27) defines "governmental unit" to include the United States, States, municipalities, and any department, agency, or instrumentality thereof.

[12] *See*, *e.g.*, Busson-Sokolik v. Milwaukee School of Engineering (*In re* Busson-Sokolik), 635 F.3d 261 (7th Cir. 2011) (school was a § 501(c)(3) non-profit institution); Andrews Univ. v. Merchant, 958 F.2d 738 (6th Cir. 1992) (private university was nonprofit institution for purposes of this section).

[13] Because of the breadth of this language, § 523(a)(8)(A)(ii) has been used as a fallback provision when the facts of a particular case fail to satisfy the more precise language of the other parts of § 523(a)(8). For example, in Carow v. Chase Student Loan Serv. (*In re* Carow), 2011 WL 802847 (Bankr. D.N.D. 2011), loans were found nondischargeable under § 523(a)(8)(A)(ii) even though the court could not conclusively find they were "qualified educational loans" as required by § 523(a)(8)(B).

[14] Skipworth v. Citibank Student Loan Corp. (*In re* Skipworth), 2010 WL 1417964 (Bankr. N.D. Ala. 2010).

[15] Roy v. Sallie Mae (*In re* Roy), 2010 WL 1523996 (Bankr. D.N.J. 2010).

[16] Liberty Bay Credit Union v. Belforte (*In re* Belforte), 2012 WL 4620987 (Bankr. D. Mass. 2012).

[17] *See, e.g.,* Institute of Imaginal Studies v. Christoff (*In re* Christoff), 510 B.R. 876 (Bankr. N.D. Calif. 2014) (finding tuition credit at for-profit university was not an "educational benefit" under § 523(a)(8)(A)(ii) because debtor did not receive funds as required by that subsection); The Barstow School v. Shojayi (*In re* Shojayi), 515 B.R. 329 (Bankr. D. Kan. 2014) (contract obligating debtor to pay future tuition at a private elementary school was not a "loan" for purposes of § 523(a)(8)(A)(i)).

incurred by an individual. Section 523(a)(8)(B) makes most private student loans nondischargeable, even if not funded or backed by the government or a nonprofit institution, subject only to the debtor's ability to prove undue hardship. Unlike § 523(a)(8)(A), however, the operation of subsection (B) is limited to loans connected to the debtor's post-secondary education.

The key to § 523(a)(8)(B) is its expansion of nondischargeability to the specific subset of educational loans from any source that are also *qualified education loans* under the Internal Revenue Code. Practically speaking, for purposes of tax law, a qualified education loan is any student loan on which a taxpayer is allowed to claim a deduction for interest paid on the loan.[18] Thus, § 523(a)(8)(B) extends nondischargebility to any student loan, even a purely private loan, if the interest paid on the loan would be deductible by a taxpayer.

Section 523(a)(8)(B) references § 226(d)(1) of the Internal Revenue Code, which defines a qualified education loan as:

> Any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses –
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> (A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,
>
> (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and
>
> (C) which are attributable to education furnished during a period during which the recipient was an eligible student.[19]

The term "qualified education loan" specifically includes any debt incurred to refinance another debt that is a qualified education loan.[20]

Section 226(d)(1) includes the dependent term *qualified higher education expenses*, which is defined separately to encompass the cost of attendance at an institution that is an "eligible educational institution" for purposes of Title IV of the Higher Education Act of 1965.[21] Thus, a nondischargeable qualified education loan is a loan obtained by a taxpayer or taxpayer's spouse or dependent solely to pay qualified higher education expenses, a category of expenses limited to (1) the cost of attendance, (2) at an eligible educational institution.

2. Creditors Within the Protection of § 523(a)(8)

With very few exceptions, nearly all student loan creditors will be protected by one or more subsections of § 523(a)(8). Subsection 523(a)(8)(A)(i) shields governmental units and nonprofit institutions that engage in the specified transactions. Subsection 523(a)(8)(B) protects any creditor that makes a qualified education loan. And, subsection 523(a)(8)(A)(ii) is catchall provision that applies to the obligation to repay funds received as a scholarship, stipend, or "educational benefit" from any source.

Because of the breadth of the statute, a creditor will typically be excluded from the statute only if the debt it holds is not an educational loan or qualified education loan. These debts may be

[18] 26 U.S.C. § 221(a) (2013).
[19] *Id*. at § 221(d)(1).
[20] *Id*.
[21] *Id*. at § 221(d)(2).

bills for tuition with no accompanying promissory note, post-education "buyout" loans, or loans that fail the statutory definitions in some other way.[22]

One final line of cases involves family members or friends who offer financial assistance to the student loan debtor, and then seek to have the assistance declared a nondischargeable debt.[23] The creditor in *In re Posner* was a family friend who co-signed several student loans for the debtor. After the debtor defaulted on the loans, the creditor paid the lenders and obtained a judgment of $112,322 against the debtor. This balance had increased to $170,799 by the time the debtor filed chapter 7 in 2009. The judgment creditor later filed an adversary proceeding seeking to have the state court judgment declared nondischargeable under § 523(a)(8).

The court in *Posner* began with an examination of the policy considerations underlying the statute and found that these "necessarily limit the parties who may take advantage of the statute's protections."[24] The court concluded that the plaintiff co-signer did not qualify as a person whose claim was protected by § 523(a)(8). This conclusion was based on a "recognition of the Congressional purpose of § 523(a)(8), namely to insure the availability of educational financing." Here, the plaintiff was not a lender because she never loaned money to the defendant; instead, she co-signed a loan. Although she subsequently paid off the debtor's student loans, she remained a general unsecured creditor, not a lender protected by § 523(a)(8). Finally, the court found no support for the debtor's argument that she was equitably subordinated to the rights of the original lender.[25]

C. Policy Arguments Supporting the Nondischargeability of Student Loan Debt

The fundamental purpose of bankruptcy law is to provide a procedure that provides the debtor "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[26] Section 523(a)(8) is an exception to this general policy and is based on independent policy considerations that, in the view of Congress, are sufficiently strong to outweigh the benefits obtained by providing the debtor with a fresh start.

Section 523(a)(8) was added to the Bankruptcy Code in response to Congressional concern that students were abusing bankruptcy by attempting to discharge student loans immediately after graduation.[27] The perception of abuse was fueled by the fact that student loans are generally unsecured and frequently written with little regard to the debtor's current financial circumstances,

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[22] For example, in S.B.R. Investments, Ltd. v. Luxa-LeBlanc (*In re* LeBlanc,) 404 B.R. 793 (Bankr. M.D. Pa. 2009), the loan was not a "qualified education loan" for purposes § 523(a)(8)(B) because it was not made to a "taxpayer."

[23] Gorosh v. Posner (*In re* Posner), 434 B.R. 800 (Bankr. E.D. Mich. 2010); *In re* Reis, 274 B.R. 46 (Bankr. D. Mass 2002) (educational loan made by debtor's grandparents was dischargeable); *but cf.* Wills v. Sallie Mae Serv. (*In re* Wills), 2010 WL 1688221 (S.D. Ind. 2010). The bankruptcy debtor in *Wills* was a 68 year old grandfather who mistakenly became the sole obligor on private student loans taken to enable his grandson to attend Nashville Auto-Diesel College. The grandson was unable to complete the program, had not worked for the past 5 years, and suffered from mental illness. Despite these highly sympathetic facts, the court traced the requirements of the statute and concluded this was a nondischargeable qualified education loan under § 523(a)(8)(B). The debtor claimed his grandson as a dependent for tax purposes, and the College was an eligible educational institute.

[24] *Id*. at 803.

[25] *See also* Resurrection Medical Center v. Lakemaker (*In re* Lakemaker), 241 B.R. 577 (Bankr. N.D. Ill. 1999) (rejecting a similar equitable subordination argument brought by a former employer that obtained a judgment after advancing funds to pay off debtor's student loans).

[26] Grogan v. Garner, 111 S. Ct. 654, 659 (1991).

[27] Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992), *citing* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 466-75 *reprinted in* 1978 U.S. Code Cong. & Admin. New 5787.

instead looking to the debtor's future income for repayment.[28] Quelling this perceived abuse by debtors was certainly one of the original policies supporting the nondischargeability of student loans.[29]

A second original purpose of § 523(a)(8) was "rescuing the student loan program from fiscal doom"[30] by protecting the solvency of educational loan programs and ensuring these programs would be available for future students. At the most fundamental level, the nondischargeability of student loans is justified by the strong public interest in ensuring educational loans will be available to future students. Protecting the financial viability of the student loan system is, in turn, linked to a related policy interest in ensuring that education is equally available to students from all socio-economic backgrounds.

Finally, § 523(a)(8) has been justified by the policy that it is more appropriate to place the risk of default on the student/borrower, rather than on taxpayers.

> The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; . . . the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.[31]

This policy works well in the context of student loans that are made or backed by a governmental unit or non-profit. However, it loses its force when applied to private student loan debt that, for purposes of this policy argument, is indistinguishable from any other general unsecured debt.

II. Undue Hardship

Nine circuits follow the three-pronged test for undue hardship given by the Second Circuit Court of Appeals in Brunner v. New York State Higher Education Services Corp.[32] To establish undue hardship under the *Brunner* test, the debtor must prove:

> (1) She cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
> (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

[28] *In re* Roberson, 999 F.2d 1132, 1135-36 (7th Cir. 1993) ("the loan is viewed as a mortgage on the debtor's future").
[29] *In re* Pelkowski, 990 F.2d 738, 744 (3d Cir. 1993) (noting that "legislative history reveals a clear congressional intent to prevent debtor abuse of the program and depletion of the Program's resources").
[30] *Id.* at 743.
[31] *Roberson*, *supra* note 28, at 1137.
[32] 831 F.2d 395 (2d Cir. 1987). *Brunner* has been adopted in eight other circuits: the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1995); Ekenasi v. United Student Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541 (4th Cir. 2003); U.S. Dept. of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 297 F.3d 382 (6th Cir. 2005); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1103 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003).

(3) she has made good faith efforts to repay the loan.[33]

The *Brunner* test, which poses difficult proof issues for the debtor, remains the majority rule despite recent criticism suggesting that it should be revised to reflect changes in the statute and in educational lending practices since 1987.[34]

Only the First and Eighth Circuits have declined to adopt *Brunner*. The Eighth Circuit uses a "totality of the circumstances" test that considers (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the debtor and her dependents; and (3) "any other relevant facts and circumstances surrounding each particular bankruptcy case."[35] The First Circuit has not adopted either test, [36] although bankruptcy courts within the First Circuit have employed the totality of the circumstances test.[37]

Although they continue to follow *Brunner*, the Sixth, Ninth, Tenth, and Eleventh Circuits have softened its effect by adopting a doctrine of partial discharge.[38] Partial discharge allows the debtor to discharge part of his student loan debt while remaining obligated to repay the remainder. Analytically, partial discharge is justified by using the bankruptcy court's equitable powers under § 105(a) to apply the *Brunner* or totality of the circumstances test to only part of the student loan debt. Partial discharge, which is not within the literal language of § 523(a)(8), has been disallowed in the Third Circuit and many bankruptcy courts.

III. Issues in Student Loan Litigation

A. Burdens of Proof

In a § 523(a)(8) adversary proceeding, the debtor/plaintiff has the burden of proving that repayment of his student loans would impose an undue hardship on the debtor and his dependents.[39] It follows that the debtor/plaintiff has the burden of proving every element of the undue hardship test by a preponderance of the evidence.[40]

Conversely, the creditor has the initial burden of proving the validity of its claim against the debtor.[41] For purposes of § 523(a)(8) litigation, this means that the creditor has the burden of establishing the existence of the debt by a preponderance of the evidence. The creditor also has the

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[33] *Brunner,* at 396.
[34] *See, e.g*., Roth v. Educational Credit Management Corp. (*In re* Roth), 490 B.R. 908 (9th Cir. BAP 2013), Pappas, J., concurring.
[35] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549 (8th Cir. 2003); Walker v. Sallie Mae Servicing Corp. (*In re* Walker), 650 F.3d 1227 (8th Cir. 2011).
[36] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188 (1st Cir 2006).
[37] *See, e.g*., Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791 (1st Cir. BAP 2010).
[38] Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F3d 433 (6th Cir. 1998); Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616 (6th Cir. 2004); Saxman v. Educ. Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168 (9th Cir. 2003); Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200)10th Cir. 2005); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003).
[39] *In re* Pena, 155 F.3d 1108 (9th Cir. 1998); Penn. Higher Educ. Assis. Agency v. Faish (*In re* Faish), 72 F.3d 298, 301 (3d Cir. 1995).
[40] Brightful v. Penn. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324 (3d Cir. 2001); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393 (4th Cir. 2005); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559 (7th Cir. 2003); Walker v. Sallie Mae Serv. Corp. (*In re* Walker), 650 F.3d 1227, 1230 (8th Cir. 2011) ("The debtor has the burden of establishing undue hardship by a preponderance of the evidence.").
[41] *See*, *e.g*., *In re* Mehta, 310 F.3d 308 (3d Cir. 2002); *In re* Renshaw, 222 F.3d 82 (2d Cir. 2000); *In re* Nies, 334 B.R. 495 (Bankr. D. Mass. 2005).

burden of proving that its debt is based on an educational loan or qualified educational loan, so that the debt falls within one of the various categories of debt made nondischargeable by § 523(a)(8).[42]

B. When to File – Chapter 7 and Chapter 13

Bankruptcy Rule 4007 provides that a complaint under § 523(a)(8) may be filed "at any time" and also allows a case to be "reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule." Despite the clear language of this rule, issues may arise if a chapter 13 debtor files an adversary proceeding early in a chapter 13 case. Because § 1328 delays the debtor's discharge until she completes all payments under a three to five year plan, an early adversary proceeding gives the creditor an argument that the case should be dismissed on grounds of ripeness. This issue has been addressed by several circuit courts.[43]

C. Discovery

Because of the fact-intensive nature of the undue hardship question, the parties' ability to use discovery to marshal supporting evidence may ultimately prove one of the keys to success in a § 523(a)(8) action. At trial, the judicially developed tests for undue hardship may require the debtor to prove specific facts about his current income and expenses, employment history, family circumstances, and student loan payment history. The parties will also need predictive evidence relevant to the debtor's future financial condition, a category of information that potentially includes evidence of the debtor's employment prospects, mental health status, or physical condition. Much of this information will be in the debtor's possession, and the student loan creditor can use discovery to obtain documents, depose the debtor and the debtor's witnesses, and explore other potential evidence relative to these questions.[44] The creditor, on the other hand, may have superior or differing information about the debtor's payment history and outstanding loan balance. The debtor can use interrogatories and requests for production to uncover this information through discovery.[45]

D. Motions for Summary Judgment

The debtor/plaintiff has the burden of proof in actions seeking to discharge student loan debt under § 523(a)(8). Therefore, if the creditor files a motion for summary judgment, it is incumbent

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[42] Rumer v. American Educ. Servs. (*In re* Rumer), 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012); Raymond v. Northwest Educ. Loan Ass'n (*In re* Raymond), 169 B.R. 67 (Bankr. W.D. Wash. 1994); *In re* Stone, 199 B.R. 753 (Bankr. N.D. Ala. 1996).

[43] Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 41 (4th Cir. 2003) (declining to adopt a "hard and fast rule" forbidding an early adversary proceeding); Rubarts v. First Gibralter Bank (*In re* Rubarts), 896 F.2d 107 (5th Cir. 1990) (finding it preferable to delay the adversary proceeding until close to the discharge); Bender v. Educ. Credit Mgmt. Corp. (*In re* Bender), 368 F.3d 846 (8th Cir. 2004) (same); Educ. Credit Mgmt. Corp. v. Coleman (*In re* Coleman), 560 F.3d 1000 (9th Cir. 2009) (finding the doctrine of ripeness did not prevent the undue hardship determination in advance of the discharge).

[44] *In re* Williams, 492 B.R. 79 (Bankr. M.D. Ga. 2013) (debtor's expenses reported on Schedule J were supplemented by her responses to the defendant's discovery requests); Educ. Credit Mgmt. Corp. v. McLeroy (*In re* McLeroy), 250 B.R. 872 (N.D. Tex. 2000) (discovery requests sought documentation of debtor's church contributions and history of tithing); *cf.* Joyce v. Mountain Peaks Fin. Servs. (*In re* Joyce), 342 B.R. 385 (Table), 2005 WL 3946869 (1st Cir. B.A.P. 2005) (discovery issue not addressed because raised on appeal for first time).

[45] United Student Aid Funds, Inc. v. Roberts (*In re* Roberts), 376 Fed. Appx. 398 (5th Cir. 2010) (discovery request sought to substantiate the amount of the debt).

on the debtor to respond with specific evidentiary submissions creating a genuine issue of material fact as to each element of the undue hardship test. Undue hardship determinations are fact-dependent, and summary judgment offers the defendant a way to test the plaintiff's case and terminate insubstantial claims short of trial. The fact-intensive nature of undue hardship indicates that cases are likely to survive to trial, however, if the plaintiff can proffer credible submissions in support of his claim.[46]

Summary judgment is always a two-pronged inquiry, gauging (1) whether there is a genuine dispute as to any material fact, and (2) whether the moving party is entitled to judgment as a matter of law. In adversary proceedings filed under § 523(a)(8), both of these questions require the court to refer to the substantive law of undue hardship. Depending on the district, this means that the court must determine whether it appears that the plaintiff will be able to satisfy either the totality of the circumstances test used in the First and Eighth Circuits,[47] or the three elements of the *Brunner* test adopted in nine other circuits.[48]

In courts that apply the widely-used *Brunner* test, the debtor/plaintiff has the burden of substantiating the following at summary judgment:

> (1) she cannot maintain a minimal standard of living and repay the loans;
> (2) additional circumstances exist that illustrate she will not be able to repay the loans for a substantial part of the repayment period;
> (3) she attempted to repay the loans in good faith.[49]

The first *Brunner* factor looks to the debtor's current income and expenses, a straightforward set of facts that may be difficult to dispute. In *In re Wills*, for example, the court considered the debtor's bankruptcy schedules and discovery responses and found "no doubt" that the plaintiff had the current financial ability to repay his student loans and maintain his current standard of living.[50] The second and third *Brunner* factors require a more detailed and uncertain factual inquiry and are, accordingly, more likely to preclude the entry of summary judgment.

The second *Brunner* factor requires the debtor to prove additional circumstances indicating that his straitened circumstances are likely to persist into the future. These additional circumstances "may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents," or other circumstances beyond the debtor's control.[51] At summary judgment, evidence of the debtor's age, health, education, and employment history will likely be relevant to this factor.[52] And, because this factor is

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[46] Traversa v. Educ. Credit Mgmt. Corp., 386 B.R. 386 (D. Conn. 2008) (appellate court recounted that bankruptcy judge had denied summary judgment for plaintiff "because determinations of undue hardship under 11 U.S.C. § 523(a)(8) 'are highly fact sensitive'").

[47] *See* Lovell v. Iowa Student Loan Liquidity Corp. (*In re* Lovell), 2012 WL 1252594 (Bankr. N.D. Iowa 2012) (denying creditor's motion for summary judgment because genuine issues of material fact existed under the totality of the circumstances test).

[48] *See* note 33 and accompanying text, *supra*.

[49] Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 398 (4th Cir. 2005).

[50] Wills v. Sallie Mae Servicing (*In re* Wills), 2010 WL 1688221, at *4 (S.D. Ind. 2010) (granting defendant's motion for summary judgment).

[51] Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005).

[52] For example, in Geyer v. U.S. Dept. of Educ. (*In re* Geyer), 334 B.R. 129 (S.D. Cal. 2006), the court cited the second *Brunner* prong and granted the defendant's motion for summary judgment. The parties' submissions showed that the debtors were well-educated, in good health, and had no dependents. The female debtor spoke three languages and had published two books. Both debtors had an academic bent and "less than complete dedication to retaining employment,"

forward-looking, the debtor will be required to show that these conditions will not improve over the life of the loan. Not only will this be difficult for the debtor to show, courts have been willing to grant summary judgment for the creditor when the debtor's showing is weak.[53]

The third *Brunner* factor requires a debtor to show that she has made good faith efforts to repay her student loans. Good faith is typically determined by looking at the debtor's past payment history on the loans. At summary judgment, this may require the debtor to show that she has made payments during periods of employment.[54] In a number of recent cases, courts have also examined whether the debtor has applied for an income contingent or other alternative repayment plan.[55] Although most courts do not require a debtor to participate in an alternative payment plan, they have found the debtor's repayment choices relevant to good faith on summary judgment.[56]

E. Evidence Issues at Trial

If the case survives summary judgment and goes to trial, the plaintiff debtor will have the burden of proving every element of undue hardship by a preponderance of the evidence. The Federal Rules of Evidence apply in bankruptcy adversary proceedings, and many of the distinctive issues that arise in the trial of a § 523(a)(8) claim will involve evidentiary questions that arise as the debtor attempts to prove undue hardship. Typically, the debtor will offer his own testimony as evidence, but the outcome of the trial is likely to depend on the debtor's ability to support and corroborate his own testimony with other forms of evidence.

Fact issues about the debtor's current income and expenses, as well as the debtor's student loan payment history, can be addressed by the debtor's testimony and bolstered with documentary evidence. For example, in *Barrett*, the bankruptcy court heard testimony from the debtor and also admitted the following documents: the debtor's tax returns from three preceding years, Schedules I and J filed with his petition, a print-out of a search result from the Department of Education's Interactive Repayment Calculator, and a copy of the Poverty Guidelines published in the Federal Register.[57] This type of evidence is particularly well-suited to meet the debtor's burden under the first and third prongs of the *Brunner* test, as well as under the first and second components of the totality of the circumstances test.

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having voluntarily given up jobs to volunteer on an archeological dig in Israel. In addition, they had entered an Income Contingent Repayment Plan that required no payments at all.

[53] Marlow v. U.S. Dept. of Educ. (*In re* Marlow), 2013 WL 3515726 (E.D. Tenn. 2013). (Debtor was a healthy, 31-year old, law school graduate who had been barred from practice on character and fitness grounds. The court found him capable of future gainful employment and noted that the denial of his law license was the result of his own action). Duval v. IRS (*In re* Duval), 2012 WL 1123041 (Bankr. S.D.N.Y. 2012). (Dentist claimed that his income was lower than expected because his practice primarily accepted Medicaid patients. The court found it possible he could move to a high-paying practice in the future).

[54] *Wills*, *supra* note 50 (debtor's minimal payments on her student loans did not show good faith effort to repay).

[55] *See, e.g.,* Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353 (6th Cir. 2007) (declining to adopt a per se rule); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320 (11th Cir. 2007) (accord).

[56] Nightingale v. North Carolina State Educ. Assistance Auth. (*In re* Nightingale), 529 B.R. 641 (Bankr. M.D.N.C. 2015); Straub v. Sallie Mae (*In re* Straub), 435 B.R. 312, 317 (Bankr. D.S.C. 2010). "Evidence of good faith may be found where a debtor has sought consolidation offered a compromise payment, or otherwise offered to pay or settle the obligation in a meaningful manner." *See also Marlow*, *supra* note 53 (because debtor had declined to apply for an income contingent repayment plan, he had not used all available recourses to repay the loans).

[57] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358 (6th Cir. 2007).

More difficult evidentiary issues have arisen in conjunction with the second prong of the *Brunner* test, which requires the debtor to prove additional circumstances indicating that the inability to repay will persist for a significant portion of the repayment period. Although *Brunner* is not followed in the First and Eighth Circuits, debtors there have a similar burden of showing that the "current inability to maintain a minimal standard of living, if forced to repay the debt, will continue into the future."[58] Debtors typically try to satisfy the burden of proving the persistence of conditions into the future with evidence of physical illness or another medical condition, psychiatric disorder, or some other special situation that will continue to interfere with the debtor's ability to earn a living.[59]

When the debtor's future mental or physical condition is an issue, her case becomes much stronger when she is able to corroborate her own testimony with testimony from an expert witness. Although the debtor may be competent to testify to her present condition, expert testimony is helpful in establishing the debtor's future prognosis, a key to showing that her condition is likely continue during the repayment period.[60]

In re Reynolds, from the Eighth Circuit, illustrates the value of expert testimony.[61] In *Reynolds*, the debtor's psychiatric expert testified about her illness, and then gave additional testimony that her student loans "caused her stress," left her "overwhelmed by indebtedness," and "made it harder for her to sustain improvement in her depressive illness."[62] Based on this testimony, the bankruptcy court found that "the mere existence of this debt burden clearly is a significant block to the debtor's recovery from mental illness."[63] This judgment was affirmed on appeal.

Despite the desirability of expert testimony as a way to bolster the debtor's case, the cost of retaining an expert places this type of evidence beyond the means of many debtors. For this reason, most courts do not impose a per se requirement that debtors substantiate medical conditions with expert testimony in § 523(a)(8) actions. In *Barrett*, for example, the Sixth Circuit agreed with the Bankruptcy Appellate Panel that "a requirement of corroborating evidence 'when Plaintiff is unable to afford expert testimony or documentation imposes an unnecessary and undue burden on Plaintiff in establishing his burden of proof,' *if corroborating evidence is understood to be limited to expert medical testimony*."[64] Many courts have echoed this view.[65]

Although expert testimony may not be a requirement, most courts look for corroborating evidence beyond the debtor's own testimony. In *Barrett*, the bankruptcy court described Barrett as "credible" and found that he "testified informatively and cogently about his medical history," explaining in "great detail . . . how his condition affects his health and prevents him from working."[66] His testimony, however, had certain limits. Although he was competent to testify

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[58] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 192 (1st Cir. 2006).
[59] Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878 (9th Cir. 2006) (debtor cited learning disability as "additional circumstances").
[60] *Nash, supra* note 58, at 194. The court noted that the debtor had submitted no expert evidence to support her own prognosis that her bipolar illness was unlikely to abate. The First Circuit affirmed the bankruptcy judge's finding that the debtor's evidentiary showing was insufficient. *See also* Kelsey v. Great Lakes Higher Educ. Corp. (*In re* Kelsey), 287 B.R. 132 (Bankr. D. Vt. 2001).
[61] Reynolds v. Penn. Higher Educ. Assistance Agency (*In re* Reynolds), 425 F.3d. 526, 528-29 (8th Cir. 2005).
[62] *Id*. at 528.
[63] Reynolds v. Penn. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823, 837 (Bankr. D. Minn. 2004).
[64] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 360 (6th Cir. 2007) (emphasis added).
[65] Educ. Credit Mgmt. Corp. v. Mosley *(In re* Mosley), 494 F.3d 1320 (11th Cir. 2007); Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856 (Bankr. E.D. Va. 2006); Swinney v. Academic Fin. Servs. (*In re* Swinney), 266 B.R. 800 (Bankr. N.D. Ohio 2001).
[66] *Barrett*, *supra* note 64, at 361.

about his diagnosis and how his condition impacted his life and work, he was not competent to testify about medical issues like his prognosis and the cause of his illness.

To prevail, it was necessary for Barrett and his counsel to provide the court with additional evidence to corroborate his testimony. In the absence of an expert witness, the court accepted a properly authenticated letter from his treating physician. The debtor also proffered tax returns that substantiated his persistent inability to earn income because of his health problems, as well as evidence of economic hardship deferments on his student loans for four consecutive years. This evidence was not contradicted by the creditor, prompting the Sixth Circuit to hold: "[w]here, as here, the debtor testifies credibly and without rebuttal about his medical history, his current health, his employment history, and his ability to perform work functions – and that testimony is corroborated in part by a letter from the debtor's treating physician and tax records – the debtor has offered proof sufficient to support a finding of undue hardship."[67]

The Eleventh Circuit adopted and arguably expanded *Barrett*'s holding in *In re Mosley*.[68] Mosley had incurred $45,000 in student loans while in college. As a student, he had joined the Reserve Officers' Training Corps and was injured when he fell from a tank. He was forced to resign his commission and failed to complete college. He testified that the physical limitations from his injury led to depression and heavy drinking. He had been hospitalized for depression and Veteran's Affairs had placed him on medication that left him "unable to function." His monthly income was $210 in VA disability, he had been homeless for years, and he had no car.

Mosley, who was not represented by counsel, was the only witness at his § 523(a)(8) trial. In addition to his own testimony, he offered a letter from an Emory University professor stating Mosley's medical diagnosis. The bankruptcy judge excluded several other doctors' letters that Mosley attempted to introduce because they had not been properly authenticated. The court found little probative value in the one letter admitted and, instead, primarily relied on the debtor's testimony to conclude that his illnesses were likely to impair his future ability to repay the loans.

On appeal, the creditor argued that corroborating medical evidence beyond the debtor's testimony is required when medical conditions are used as "additional circumstances" under the second prong of *Brunner*. The Eleventh Circuit held that additional evidence was not necessary, and declined "to adopt a rule requiring Mosley to submit independent medical evidence to corroborate his testimony that his depression and back problems were additional circumstances likely to render him unable to repay his student loans."[69] The court noted that the debtor did not testify about his medical prognosis, but instead testified from personal knowledge about how his condition and medications have made it difficult for him to work.

The evidentiary record in *Mosley* is slender, consisting only of the debtor's testimony, one supporting letter, and Social Security earnings statements that corroborated that he had not held a job. Despite this, the Eleventh Circuit found
"the bankruptcy court had before it sufficient evidence to support a finding that there is no reason to believe that Mosley's condition will improve in the future. Mosley's evidence of medical problems, lack of skills and dire living conditions support the bankruptcy court's finding that it is highly unlikely he will become unable to repay his loans."[70]

The opinions in *Mosley* and *Barrett* are attributable in part to the "clear error" standard of review that appellate courts must apply to the bankruptcy judge's findings of fact in these cases. Under this standard, the appellate court is likely to defer to the lower court's findings of fact unless

[67] *Id*. at 363.
[68] *Mosley*, *supra* note 65.
[69] *Id*. at 1325.
[70] *Id*. at 1327.

the appellate court is willing to announce a new, and stricter, evidentiary rule that will apply to all future cases. In declining the invitation to adopt a per se evidentiary requirement in § 523(a)(8) cases, the appellate courts may be reflecting the fact that bankruptcy courts are, in fact, already quite demanding in their assessment of the debtor's evidentiary submissions.[71]

F. Standard of Appellate Review

A bankruptcy judge's findings of law in a § 523(a)(8) adversary proceeding are subject to *de novo* review on appeal.[72] However, the judge's findings of fact are subject to more lenient clear error review and "must stand if reasonably supported."[73] A majority of the circuit courts of appeal have held that the undue hardship determination under § 523(a)(8) is a question of law subject to de novo review.[74] Two other circuits, the Fourth and Eleventh, have found that this determination is a mixed question of law and fact.[75]

IV. Adjusting Student Loan Debt Outside of Section 523(a)(8)

As discussed above, student loans - both public and private - are presently nondischargeable under § 523(a)(8) unless the debtor can prove undue hardship. The current law is the product of a series of amendments to the Bankruptcy Code that roughly parallels the development of the modern student loan industry.[76] These amendments have made § 523(a)(8) increasingly creditor-friendly, culminating with a 2005 amendment added by BAPCPA extending nondischargeability to student loans made by private lenders. The enormous expansion in the amount of student loan debt has, at the same time, presented bankruptcy lawyers and judges with individual debtors who are genuinely

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[71] In a majority of reported cases, the debtor's evidentiary submissions are found insufficient. *See*, *e.g.*, Traversa v. Educ. Credit Mgmt. Corp. (*In re* Traversa), 2010 WL 4683920 (D. Conn. 2010); Joyce v. Mountain Peaks Fin. Servs. (*In re* Joyce), 2005 WL 3946869 (1st Cir. B.A.P. 2005); Pobiner v. Educ. Credit Mgmt. Corp. (*In re* Pobiner), 309 B.R. 405 (Bankr. E.D.N.Y. 2004); Burkhead v. U.S. (*In re* Burkhead), 304 B.R. 560 (Bankr. D. Mass. 2004); Pace v. Educ. Credit Mgmt. Corp. (*In re* Pace), 288 B.R. 788 (Bankr. S.D. Ohio 2003); Daugherty v. First Tenn. Bank (*In re* Daugherty), 175 B.R. 953 (Bankr. E.D. Tenn. 1994).

[72] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188 (1st Cir. 2006); Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 425 F.3d 526 (8th Cir. 2005).

[73] *Id*.

[74] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d. Cir. 1987); Brightful v. PHEAA (*In re* Brightful), 267 F.3d 324 (3d Cir. 2001); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353 (6th Cir. 2007); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993); Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 553 (8th Cir. 2003); Rifino v. U.S. (*In re* Rifino), 245 F.3d 1083 (9th Cir. 2001); Woodcock v. Chemical Bank (*In re* Woodcock), 45 F.3d 363 (10th Cir. 1995).

[75] Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393 (4th Cir. 2005); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320 (11th Cir. 2007).

[76] The first provision limiting the discharge of student loan debt did not appear until 1976, when certain government-backed student loans were made nondischargeable under the former Bankruptcy Act for a period of 5 years after the date the loan first became due. During this 5-year period, student loans continued to be dischargeable if disallowing the discharge would impose an undue hardship on the debtor or his dependents. These provisions were carried forward into the Bankruptcy Code of 1978, and the 5-year provision was expanded to include a wider array of educational loans (any educational loan funded, made, insured, or guaranteed by a governmental unit or funded by a nonprofit educational institution). The 5-year limit was increased to 7 years in 1990. The 7-year rule was eliminated in 1998, leaving undue hardship as the only avenue for the discharge of most educational debt. *See*, *e.g.*, Cox v. Hemar Ins. Corp. of Am. (*In re* Cox), 338 F.3d 1238, 1242-43 (11th Cir. 2003) (detailing the evolution of § 523(a)(8)). Student loans made by private lenders, as opposed to governmental units or nonprofit institutions, were made nondischargeable by BAPCPA in 2005.

unable to repay the full amount of their educational debt.[77] The tension between the restrictive language of the Code and the reality of their caseload has created pressure on both judges and lawyers to push the law in new directions to allow relief to overburdened debtors. This section examines the resulting cases, dividing them into the following categories: (1) partial discharge of educational debt, (2) separate classification of student loan debt in chapter 13 plans, and (3) the possibility of using plan confirmation to obtain a discharge "by declaration."

A. Partial Discharge

A number of courts have been willing to discharge part of a debtor's student loan obligations when the facts do not support a finding that the entire obligation poses an undue hardship on the debtor. These cases are fact-driven. As the Sixth Circuit explained in *Hornsby v. Tennessee Student Assistance Corp. (In re Hornsby)*, a partial discharge of student loan debt may be appropriate "where facts and circumstances require intervention in the financial burden on the debtor, [and] an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act."[78]

Hornsby was the first circuit court decision upholding the bankruptcy courts' equitable power to grant a partial discharge of student loan debt under § 105(a)'s authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[79] *Hornsby*, however, did not squarely address the relationship between § 105(a) and § 523(a)(8). The Sixth Circuit revisited this issue in *Miller v. Pennsylvania Higher Education Assistance Agency (In re Miller)*, clarifying that § 105(a) provides no "independent rubric" and must be read in conjunction with § 523(a)(8) to evaluate when a partial discharge is appropriate.[80]

A similar approach has been adopted in the Ninth, Tenth, and Eleventh Circuit Courts of Appeal.[81] While recognizing that the bankruptcy court's equitable powers do not allow it to ignore the specific statutory language found in § 523(a)(8), these four circuits hold that "§ 105(a) authorizes a bankruptcy court to grant a partial discharge where the undue hardship requirement of § 523(a)(8) is met as to part but not all of a student loan."[82]

Under these decisions, the bankruptcy court may not use its equitable powers to grant a partial discharge unless § 523(a)(8) has been satisfied as to some portion of the obligation. "To allow the bankruptcy court, through principles of equity, to grant any more or less than what the

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[77] *See*, *e.g.*, Carnduff v. United States Dept. of Educ. (*In re* Carnduff), 367 B.R. 120 (9th Cir. B.A.P. 2007). After discharging $215,000 in private student loan debt, the debtors, a married couple, brought a second action to discharge an additional $350,000 in student loans owed to the government, for a stunning total of $565,000 in educational debt. The court allowed a partial discharge, finding it impossible for them to repay their loans in full "unless one or both of the debtors wins the lottery, receives a substantial inheritance, [or] finds a gold mine or a treasure trove in the backyard." 367 B.R. at 130.

[78] 144 F.3d 433, 439 (6th Cir. 1998).

[79] 11 U.S.C. § 105(a). A number of bankruptcy courts had previously used § 105(a) to grant a partial discharge of student loan debt – sometimes with no reference to § 523(a)(8). *See*, *e.g.*, Griffin v. Eduserv (*In re* Griffin), 197 B.R. 144 (Bankr. E.D. Okla. 1996) (relying on § 523(a)(8)); *In re* Brown, 18 B.R. 219 (Bankr. D. Kan. 1982) (no reference to § 523(a)(8)); *In re* Albert, 25 B.R. 98 (Bankr. D. Ohio 1982) (no reference to § 523(a)(8)).

[80] 377 F.3d 616, 622 (6th Cir. 2004).

[81] Saxman v. Educational Credit Management Corp. (*In re* Saxman), 325 F.3d 1168 (9th Cir. 2003); Alderete v. Educational Credit Management Corp. (*In re* Alderete), 412 F.3d 1200 (10th Cir. 2005); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003). The Third Circuit reversed the bankruptcy court's grant of a partial discharge in Faish v. Penn. Higher Educ. Assistance Agency (*In re* Faish), 72 F.3d 298 (3d Cir. 1995), however, it did so on factual grounds without discussion of the related law in an opinion devoted to the adoption of the *Brunner* test.

[82] *Miller*, 377 F.3d at 621, *quoting* Nary v. Complete Source (*In re* Nary), 253 B.R. 752, 767 (N.D. Tex. 2000).

clear language of § 523(a)(8) mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts."[83]

Lower courts outside these four circuits have been less uniform in their approach, with a number finding that the Code does not permit a partial discharge of student loan debt.[84] These decisions apply a strict approach and find that § 105(a) does not authorize the bankruptcy court "to use its equitable powers to achieve a result not contemplated by the Code, particularly where a specific section of the Code squarely addresses the issue before the court."[85] Courts that have allowed partial discharge without circuit authority have generally followed the approach of the circuits, looking to § 105(a) as a source of equitable authority to soften the application of § 523(a)(8).[86] A small minority of courts, however, has been willing to draw the power for partial discharge solely from the language of § 523(a)(8).[87]

In courts that allow partial discharge, a final issue is the form that the partial discharge will take. When, as is typical, debtors owe more than one student loan, some decisions frame the partial discharge as a complete release from liability on some loans, while leaving the debtor entirely liable on the remaining loans.[88] Some courts have followed this "loan by loan" pattern without regarding this as a partial discharge, holding instead that each loan can be treated as a singular entity.[89] Still others reject this approach entirely, holding that student loans must be treated in the aggregate.[90]

Another set of courts has been willing to grant a partial discharge that is effectively a loan modification. These decisions either reduce the principal balance on the loans to a more manageable amount,[91] relieve the debtor from liability on interest and fees while leaving the debtor liable on the principal,[92] impose a deferral,[93] or fashion another appropriate equitable remedy.[94] The

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[83] *Cox*, 338 F.3d at 1207.

[84] Pincus v. Graduate Loan Center (*In re* Pincus), 280 B.R. 303 (Bankr. S.D.N.Y. 2002); Young v. PHEAA (*In re* Young), 225 B.R. 312 (Bankr. E.D. Penn. 1998) (partial discharge sought by creditor to avoid discharge *in toto);* Skaggs v. Great Lakes Higher Educ. Corp. (*In re* Skaggs), 196 B.R. 865 (Bankr. W.D. Okla. 1996); Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294 (Bankr. N.D. Iowa 1995). *And see* Andreson v. Nebraska Student Loan Program, Inc. (*In re* Andreson), 232 B.R. 127 (8th Cir. B.A.P. 1999) (finding no authority in the Code for partial discharge, but declining to decide the issue).

[85] *Pincus*, *supra* note 84, at 312.

[86] Stevenson v. Educational Credit Management Corp. (*In re* Stevenson), 463 B.R. 586 (Bankr. D. Mass. 2011) (looking to § 105(a)); Fraley v. U.S. Dept. of Ed., 247 B.R. 417 (Bankr. N.D. Ohio 2000); Fox v. Student Loan Mktg. Ass'n (*In re* Fox), 189 B.R. 115 (Bankr. N.D. Ohio 1995).

[87] *See*, *e.g.*, Rivers v. United Student Aid Funds, Inc. (*In re* Rivers), 213 B.R. 616 (Bankr. S.D. Ga. 1997).

[88] Hinkle v. Wheaton College (*In re* Hinkle), 200 B.R. 690 (Bankr. W.D. Wash. 1996); Coutts v. Mass. Higher Educ. Corp. (*In re* Coutts), 263 B.R. 394 (Bankr. D. Mass. 2001); Gharavi v. U.S. Dept. of Educ. (*In re* Gharavi), 335 B.R. 492 (Bankr. D. Mass. 2006); Ledbetter v. U.S. Dept. of Ed. (*In re* Ledbetter), 254 B.R. 714 (Bankr. S.D. Ohio 2000) (following *Andreson*, *supra* note 84). *Cf. Young*, *supra* note 84, at 318 ("If a holder of student loans is prepared to stipulate that certain student loans are unconditionally dischargeable, leaving only a limited number of loans remaining as particularly nondischargeable, there would seem to be no way of stopping it from doing so."

[89] *See Andreson*, *supra* note 84 (although 2 of 3 student loans were discharged, the B.A.P held that this was not a partial discharge because each loan could be treated separately); Hollister v. University of N.D., 247 B.R. 485 (Bankr. W.D. Okla. 2000) (adopting the reasoning of *Andreson*); Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866 (Bankr. D.N.H. 2000).

[90] *Pincus*, *supra* note 84 (rejecting the "loan by loan" approach); *Young*, *supra* note 84; Raimondo v. New York State Higher Educ. Serv. Corp. (*In re* Raimondo), 183 B.R. 677 (Bankr. W.D.N.Y. 1995) (holding that equity requires equal treatment among student lenders).

[91] Hedlund v. Educational Resources Inst., Inc. (*In re* Hedlund), 468 B.R. 901 (D. Or. 2012). The bankruptcy court discharged all amounts owed in excess of $32,080. The district court reversed on the ground that debtor had failed to establish good faith as required by Brunner and *In re* Pena, 155 F.3d 1108 (9th Cir. 1998).

[92] *Alderete*, *supra* note 81; Griffin v. Eduserv, 197 B.R. 144 (Bankr. E.D. Okla. 1996).

variability of the remedy in partial discharge cases illustrates the difficulty that arises when courts fashion equitable amendments to the Code.

B. Separate Classification in Chapter 13

As in chapter 7, student loan debt is generally nondischargeable in chapter 13 cases and does not have priority status.[95] Despite this, debtors have sometimes used chapter 13 to treat student loan debts more advantageously than other unsecured debts. This is typically accomplished by classifying the student loan claims separately from other unsecured claims, then making an enhanced or even full contract payment to the student loan creditor while making a reduced pro rata payment to other unsecured creditors through the plan.[96]

The relevant provisions of the Code for this purpose are §§ 1322(b)(1) and (5).[97] Section 1322(b)(1) allows a chapter 13 plan to "designate a class or classes of unsecured claims, as provided in section 1122 of this title," with the proviso that classification "may not discriminate unfairly" against any class. Section 1322(b)(5) permits a chapter 13 plan to "provide for the curing of any default . . . and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

Because most student loans are long-term debts with payments extending beyond the life of the plan, they fall within the subset of obligations governed by § 1322(b)(5). Read in isolation, this subsection permits the debtor to maintain contract payments on her student loans, while relegating other unsecured debts to a lower pro rata payment as a separate class. Because this provides preferential treatment to student loan creditors, however, the issue then becomes whether § 1322(b)(5) controls over the conflicting "unfair discrimination" provision found in § 1322(b)(1).

This problem has been addressed by a number of courts, with a minority of reported decisions finding that subsection (b)(5) trumps (b)(1), thereby completely excepting long-term debt payments from the unfair discrimination analysis of subsection (b)(1).[98] Courts that accept this position allow the plan to cure defaults and maintain payments on student loans without regard for the position of other unsecured creditors. Under the majority view, however, subsection (b)(5) must be read in conjunction with (b)(1), with the result that a plan that provides for full payment of student loan obligations under (b)(5) must then be analyzed for unfair discrimination as required by (b)(1).[99]

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[93] Cheesman v. Tennessee Student Assistance Corp. (*In re* Cheesman), 25 F.3d 356 (6th Cir. 1994) (student loans nondischargeable, but order stayed for 18 months); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993) (bankruptcy court's order deferring student loan payments for 2 years affirmed without discussion); Dennehy v. Sallie Mae (*In re* Dennehy), 201 B.R. 1008 (Bankr. N.D. Fla. 1996).

[94] In *Stevenson*, *supra* note 86, the court granted the debtor a prospective discharge of whatever debt remained at the conclusion of her participation in the Ford Program's Income Based Repayment Plan.

[95] 11 U.S.C. §§ 507 and 1328(a)(2).

[96] For example, the debtors in *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007), proposed to maintain their regular monthly payments to student loan creditors, while making only a 1% payout to other unsecured creditors.

[97] 11 U.S.C. § 1322(b)(10), a provision added by BAPCPA that limits the payment of interest on nondischargeable unsecured claims in chapter 13, is also a factor in some cases.

[98] *See*, *e.g.*, *In re* Johnson, 446 B.R. 921 (Bankr. E.D. Wisc. 2011); *In re* Truss, 404 B.R. 329, 333 (Bankr. E.D. Wisc. 2009). ("If the plan provides for the cure of a default and maintenance of payments on a debt, the terms of which extend beyond the term of the plan, it is not for the court to determine whether this is fair to the other creditors or not.")

[99] *See*, *e.g.*, *In re* Jordahl, 516 B.R. 573 (Bankr. D. Minn. 2014) (collecting relevant decisions); *In re* Dyer, 2015 WL 430288 (Bankr. W.D. La. 2015); *In re* Zeigafuse, 2012 WL 1155680 (Bankr. W.D. Wyo. 2012); *In re* Pracht, 464 B.R.

The Code does not define "unfair discrimination," and courts have developed several multi-factor tests to enable this analysis. The most widely used test, stated by the Eighth Circuit in *In re Leser*,[100] has four components: "(1) whether the discrimination has a reasonable basis, (2) whether the debtor can carry out a plan without the discrimination, (3) whether the discrimination is proposed in good faith, and (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination."[101] A variation of the *Leser* test was adopted in *In re Husted*, which added a fifth factor: an examination of "the difference between what the creditors discriminated against will receive as the plan is proposed, and the amount they would receive if there were no separate classification."[102]

The *Leser* test has been criticized as offering "no real direction for determining the fairness of discrimination in any given instance,"[103] and other courts have attempted to develop more concrete alternatives.[104] The most prominent of these alternatives is the "baseline" test enunciated by the First Circuit BAP in *In re Bentley*.[105] *Bentley* looks to the "principles and structure of Chapter 13" as the "baseline against which to evaluate discriminatory provisions for unfairness."[106] The decision then enunciates four core principles: (1) absent an express grant of priority, unsecured creditors should share equally, (2) student loan obligations are not priority debts, (3) unless unsecured creditors are paid in full, the chapter 13 debtor must devote all disposable income to the plan, and (4) do the facts indicate that the debtor's interest in a "fresh start" trump the creditors' claim to a pro rata share.

Regardless of the test that is applied, most courts have concluded that discrimination based on nothing more than nondischargeability is unfair.[107] However, "if the discrimination in question benefits the very creditors who are being discriminated against," for example, by enabling the debtor to work, it may be considered fair.[108] Some courts have also found discrimination justifiable when, absent direct payments, the debtor would emerge from chapter 13 owing more on their student loans than they did before the case was filed.[109]

BAPCPA added a new wrinkle to this analysis by requiring that the projected disposable income of above-median income chapter 13 debtors be calculated with reference to the "means test" of § 707(b)(2), as opposed to the real numbers reflected on the debtor's schedules I and J. Section 707(b)(2) requires the debtor to use hypothetical amounts specified in National and Local Standards issued by the IRS, creating the possibility that a debtor's projected disposable income under § 707(b)(2) might be less than his actual discretionary income. When this occurs, it is possible for the

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486 (Bankr. M.D. Ga. 2012); *In re* Harding, 423 B.R. 568 (Bankr. S.D. Fla. 2010); *In re* Simmons, 288 B.R. 737 (Bankr. N.D. Tex. 2003).

[100] Mickelson v. Leser (*In re* Leser), 939 F.2d 669 (8th Cir. 1991).

[101] *In re* Webb, 370 B.R. 418, 423 (Bankr. N.D. Ga. 2007).

[102] 142 B.R. 72, 74 (Bankr. W.D.N.Y. 1992).

[103] Bentley v. Boyajian (*In re* Bentley), 266 B.R. 229 (1st Cir. B.A.P. 2001).

[104] *See*, *e.g.*, *In re* Brown, 152 B.R. 232 (Bankr. N.D. Ill.), *rev'd*, 162 B.R. 506 (N.D. Ill. 1993); *In re* Colfer, 159 B.R. 602 (Bankr. D. Me. 1993). The issue was approached by the Seventh Circuit in *In re* Crawford, 324 F.3d 539, 542 (7th Cir. 2003), which opined: "We haven't been able to think of a good test ourselves. We conclude, at least provisionally, that this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decision maker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of the relevant law, which in this case is Chapter 13 of the Bankruptcy Code."

[105] *Supra* note 103.

[106] *Id*. at 240.

[107] Groves v. LaBarge (*In re* Groves), 39 F.3d 212 (8th Cir. 1994); *In re* Gonzalez, 206 B.R. 239 (Bankr. S.D. Fla. 1997).

[108] *In re* Kalfayan, 415 B.R. 907, 910 (Bankr. S.D. Fla. 2009) (debtor's license to practice optometry was contingent on remaining current on her student loans).

[109] *Webb*, *supra* note 101.

above-median debtor to devote 100% of his projected disposable income to unsecured creditors in the plan and still retain sufficient excess "discretionary" income to make contract payments on his student loans.[110] This strategy has withstood challenge, even when student loans are paid in full and the dividend to other unsecured creditors is as low as 0.86%.[111]

C. *United Student Aid Funds, Inc. v. Espinosa*: Discharge by Declaration

Espinosa presents one final (albeit improper) strategy for dealing with student loan debt.[112] The debtor in *Espinosa* discharged the interest on his student loan debt in a chapter 13 plan without filing an adversary proceeding. Although the creditor had notice of the plan treatment, it did not file an objection to confirmation. The creditor then attempted to collect the interest three years after the debtor's discharge, and the debtor filed a motion asking the bankruptcy court to enforce its discharge order. The creditor responded with a cross-motion under Rule 60(b)(4) asking that the court to set aside the confirmation order as void.

In a unanimous opinion, the Supreme Court held that the confirmation order was a final judgment that was not rendered void by the bankruptcy court's "legal error" in discharging a student loan obligation without a finding of undue hardship. The bankruptcy court's error was not jurisdictional and did not violate the creditor's due process rights.[113] In reaching this holding, the Court stated that the bankruptcy court had an obligation to avoid this type of error by independently determining undue hardship, even without objection or appearance by the creditor.[114] The Court also stressed that the specter of sanctions should deter "bad faith" practices by debtors and their counsel.

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[110] It is also possible for a below-median debtor to make preferential payments to separately classified creditors after the applicable commitment period ends. *See In re* Osorio, 522 B.R. 70 (Bankr. D.N.J. 2014). In *Osorio*, the debtor separately classified non-dischargeable municipal fines, proposing to pay those fines in full while offering a 0% distribution to other unsecured creditors. The court found this treatment was unfair discrimination during the 36-month applicable commitment period. After the applicable commitment period, however, payment in full to one class of creditors with no payments to other unsecured claims would not unfairly discriminate.

[111] *In re* Abaunza, 452 B.R. 866 (Bankr. S.D. Fla. 2011) (plan did not unfairly discriminate when projected disposable income resulted in dividend of only 0.86%); *In re* King, 460 B.R. 708 (Bankr. N.D. Tex. 2011); *In re* Sharp, 415 B.R. 803 (Bankr. D. Colo. 2009); *In re* Orawsky, 387 B.R. 128 (Bankr. E.D. Penn. 2008).

[112] 130 S. Ct. 1367 (2010).

[113] Section 523(a)(8)'s undue hardship requirement is a statutory precondition to discharge that does not limit the court's jurisdiction. And, despite the absence of a summons and complaint, due process was satisfied by the creditor's actual notice of the contents of the plan.

[114] ECMC v. Pulley, 532 B.R. 12 (E.D. Va. 2015) offers another angle on the interplay between chapter 13 plan confirmation and the § 523(a)(8) undue hardship determination. Pulley's confirmed chapter 13 plan provided that all unsecured creditors (including her private student loan lender) would be paid 71.81% over a 60-month period. During the administration of the plan, the student loan servicer – apparently without the debtor's knowledge – refused to accept payments from the trustee. After the debtor's discharge in 2012, the servicer attempted to collect the ful amount due on the student loan. The debtor then filed a post-discharge adversary proceeding, contending that the servicer was equitably estopped from collecting the amount tendered through the plan, and that the lender and guarantor were bound by the servicer's decision to refuse the payments. On appeal, the district court held that the bankruptcy court could not "equitably discharge" the amount tendered through the chapter 13 plan without a separate finding of undue hardship.

Appendix A

Pending Legislation on Student Loans – 114th Congress

Senate Bills

S.729, the "Fairness for Struggling Students Act of 2015"

March 12, 2015. Description: To amend title 11, United States Code, with respect to certain exceptions to discharge in bankruptcy. Sponsors: Durbin, Whitehouse, Franken, Blumenthal, Murray, Reed, Warren, Wyden, Boxer, Kaine, Shatz, Gillibrand, and Hirono.

House Bills

H.R. 3451, the "Student Loan Bankruptcy Parity Act of 2015"

September 8, 2015. Description: To amend title 11 of the United States Code to make student loans dischargeable. Sponsor: Kildee

H.R. 2267, the "PACT (Protecting All College Tuition) Act of 2015."

May 12, 2015. Description: To amend title 11, United States Code, to provide an exception to the avoidance of transactions by bankruptcy trustee under section 548 where the transaction was a good faith payment by a parent of post secondary education tuition for that parent's child. Sponsors: Collins and Fahenthold

H.R. 1674, the "Private Student Loan Bankruptcy Fairness Act of 2015"

April 29, 2015. Description: To amend title 11 of the United States Code to modify the dischargeability of debts for certain educational payments and loans.
Sponsors: Cohen, Davis, Swalwell

H.R. 1352, the "Student Loan Borrowers' Bill of Rights Act of 2015"

March 10, 2015. Description: To establish student loan borrowers' rights to basic consumer protections, reasonable and flexible repayment options, access to earned credentials, and effective loan cancellation in exchange for public service, and for other purposes. Sponsor: Wilson

Appendix B

Buchanan Provisions

- The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part, of her student loan obligations.
- The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment ("IDR") plan with the U. S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), without disqualification due to her bankruptcy.
- Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.
- The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
- Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.
- In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.
- The Debtor's attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR.

APPENDIX C
Mortgage Servicing for ABI Winter Leadership

CHANGES IN OFFICIAL BANKRUPTCY FORMS- effective December 1, 2015

Proof of Claim- Official Form 410

If the claim is for a residential mortgage- creditor must attach:

- Proof of perfection
- Documents on which the claim is based
- A copy of an escrow account (RESPA) analysis as of the date of the petition
- Official Form 410A

Mortgage Proof of Claim Attachment – Official Form 410A

Requires additional itemized information about the principal, interest and fees
Requires a loan history that reveals payments, how they were applied, when fees and charges were incurred and escrow amounts paid from the First date of default that remains unpaid as of the date of the petition.

Notice of Mortgage Payment Change- Official Form 410S1

Filed as a supplement to the Proof of Claim pursuant to FRBP §3002.1 at least 21 days prior to the new payment is due.

Notice of Post-petition Mortgage Fees, Expenses and Charges- Official Form 410S2

Filed as a supplement to the proof of claim to give notice of any fees, expenses and charges incurred after the bankruptcy filing that are asserted as recoverable against the Debtor or the Debtor's principal residence.

CHANGES IN REGULATIONS- Consumer Financial Protection Bureau (CFPB)

Periodic statements for residential mortgage loans

12 C.F.R. §1026.41 - effective July 18, 2015

Section 41(d)(3)	Requires disclosure of any partial payments that were sent to a suspense or unapplied funds account
Section 41(d)(4)	Requires all transaction activity including payments received and applied, payments received and held in suspense account, imposition of any fees or charges be disclosed in the statement
Section 41(e)(5)	Requirement to send periodic statement does not apply to consumers in bankruptcy. With respect to any portion of the mortgage debt that is not discharged, the servicer must resume sending periodic statements at the earliest of the case is dismissed, case is closed or consumer receives a discharge.

Requirements under Real Estate Settlement Procedures Act

12 CFR 1026.36(c)(1)	Servicer to credit the payment to the borrower's account as of the date the servicer receives it
12 CFR 1024.34(a)	Servicer required to pay taxes, insurance premiums and other charges by the due date.

12 CFR 1024.36	Request for Information (formerly QWR)- must include the borrower's name, information that allows the servicer to identify the borrower's account and the requested information relates to the borrower's mortgage loan. Request may be made by borrower or their agent. Servicer must acknowledge receipt within 5 business days. Servicer must respond in writing to the information request within 30 business days.
12 CFR 1024.37	Servicer must comply with the new restrictions on obtaining and assessing charges and fees for forced placed insurance. Requires an Initial written notice to the borrower at least 45 days before assessing a charge or fee related to forced place insurance. Requires a reminder notice at least 30 days after the initial notice is mailed and 15 days before a fee or charge is assessed.

Amendments to Regulation X- RESPA and Regulation Z Truth in Lending Act effective October 3, 2015- Loan origination and Mortgage Lender Licensing (changed from August 1, 2015 by CFPB)

12 CFR 1024.17(e) Transfer of Servicing requirements
12 CFR 1024.17(f)-(i) Escrow shortage, surplus and deficiency requirements

Proposed Amendments to Mortgage Servicing Rules under Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

Comment period ended March 2015. Proposed amendments include:

A general definition of delinquency- a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid.

Require servicers to meet the loss mitigation requirement more than once in a life of a loan for borrowers who become current after a delinquency

Require servicers to send modified periodic statements to consumers who have filed for bankruptcy with content varying depending on whether the borrower is in a Chapter 7 or 13

Consumer Bankruptcy

- CFPB Mortgage Servicing Regulations
- Student Loan Debt: New Developments

Debra L. Miller, Ch.13 Trustee, South Bend, Ind.

Prof. Susan E. Hauser, NCCU School of Law, Durham, NC

Edward C. Boltz, President, NACBA, Durham, NC

Debra L. Miller, Ch.13 Trustee, South Bend, Ind.

CFPB Mortgage Servicing Regulations

CFPB Regulation Changes

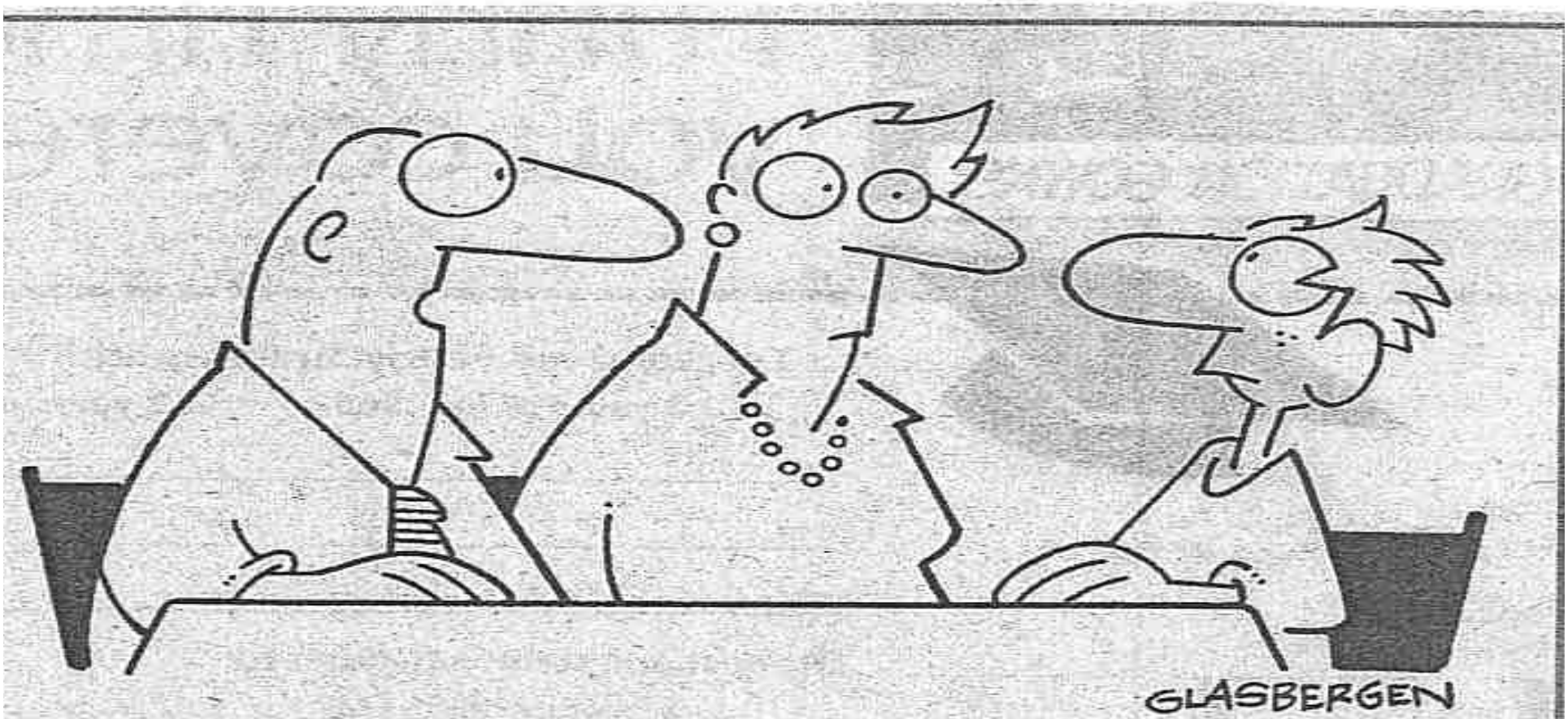
- Periodic Statements for Residential Mortgage Loans 12 C.F.R. §1026.41
- Requirements under Real Estate Settlement Procedures Act 12 C.F.R. §1024-1026
- Amendments to Reg. X (RESPA) and Reg. Z (TILA)

Changes in Bankruptcy Forms

- Effective December 1, 2015- Official Form changes
  - Proof of Claim - Form 410
  - Mortgage Attachment – Form 410A
  - Notice of Mortgage Payment Change – Form 410S1
  - Notice of Mortgage Fees, Expenses – Form 410 S2
- New Director's Forms
  - Notice of Final Cure
  - Response to Notice of Final Cure

Prof. Susan E. Hauser, NCCU School of Law, Durham, NC

523(a)(8) Developments



"We'll pay for your college, but only if you go to law school and handle our bankruptcy when you graduate."

Educational Debt Levels in 2015

- $1.18 Trillion outstanding in Q1 2015
  - Auto loans: $968 billion
  - Credit cards: $685 billion

- 43 million Americans owe educational debt

Average Debt Loads

- 2013 undergraduate: $27,300
  - 70% of 2013 graduates have student loan debt.

- 40% of student loans are borrowed for graduate or professional school.
  - 2013 law school: $141,000
  - 2013 medical school: $162,000

Average Debt at NC Law Schools: 2014 class

Charlotte	$140,528
Elon	$132,444
Duke	$125,406
Wake Forest	$107,532
UNC-CH	$92,475
Campbell	$90,065
NCCU	$58,061

Default and Delinquency Rates

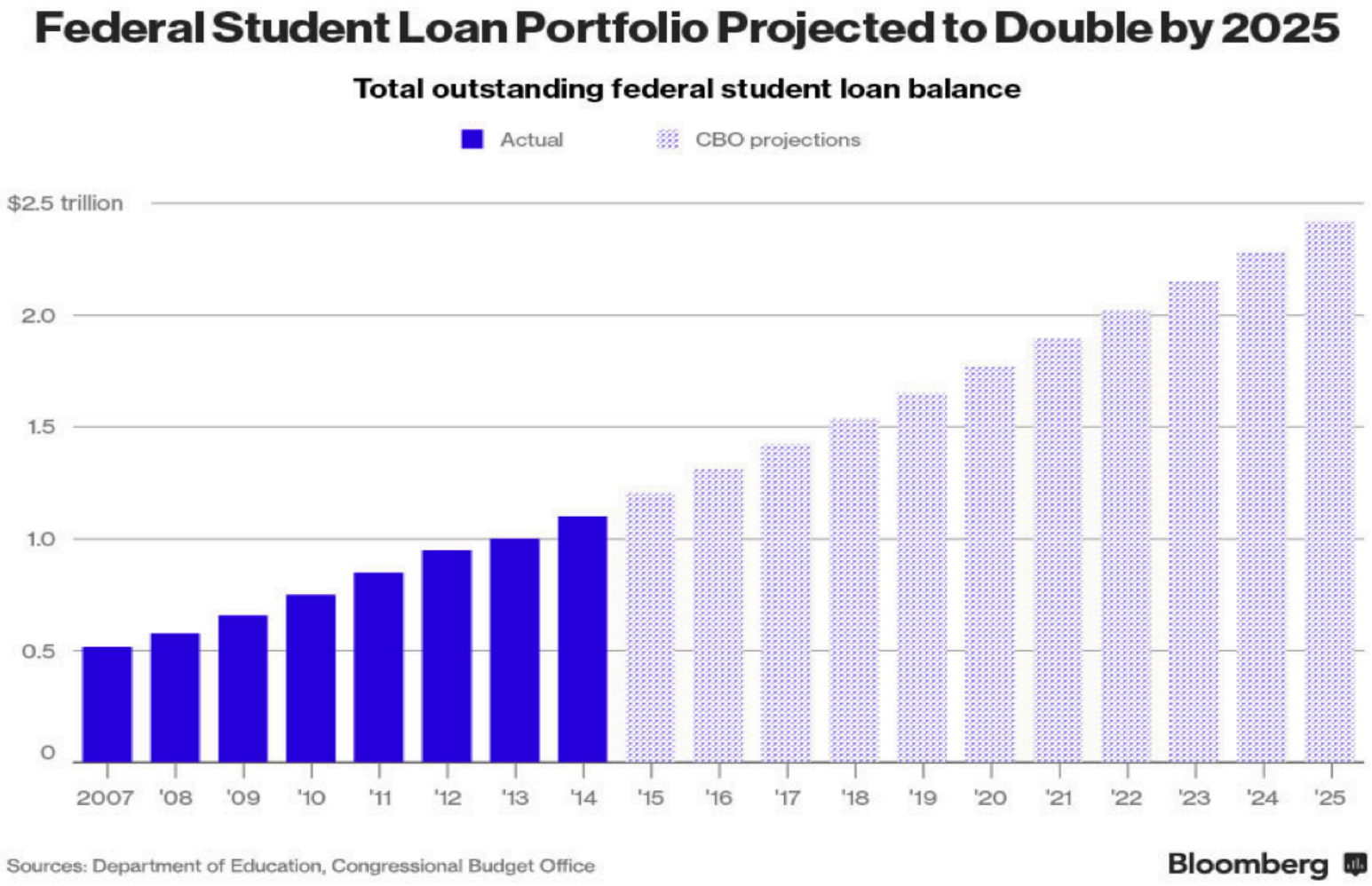
- Delinquent = borrower has missed 1 payment
- Default = status after 9 months of delinquency

- Q1 2015: 11.1% 90+ days delinquent or in default
  - 11.3% in Q3 2014
  - 11.5% in Q4 2013

Class of 2009

- 8.8% had defaulted by the end of 2010.
- Only 17% of the original debt had been paid down after five years.
- More than 20% of high balance borrowers owe more than when they graduated.

Federal Student Loan Portfolio Projected to Double by 2025



Sources: Department of Education, Congressional Budget Office

Bloomberg

114th Congress

- S. 1958. "Christopher Bryski Student Loan Protection Act.
- S. 729. Fairness for Struggling Students Act of 2015.
- H.R. 3634. Student Loan Debt Protection Act of 2015.
- H.R.3474. "Christopher Bryski Student Loan Protection Act"
- H.R. 3451. Student Loan Parity Act of 2015.
- H.R. 1674. Private Student Loan Bankruptcy Fairness Act of 2015.
- H.R. 1352. Student Loan Borrowers' Bill of Rights Act of 2015.

Discharge in Bankruptcy

- Section 523(a)(8) excludes public and private student loans from discharge unless:
  - "excepting such debt from discharge . . . would impose an ***undue hardship*** on the debtor or the debtor's dependents . . . ."

A Brief History of 523(a)(8)

- Before 1976:
  - Student loans were dischargeable.
- 1976:
  - Most government-backed student loans non-dischargeable for 5 years after due date, unless undue hardship proven.
- 1984:
  - Addition of private loans funded or guaranteed by a governmental or nonprofit entity.

A Brief History of 523(a)(8)

- 1990:
  - 5 year period increased to 7 years.
- 1998:
  - 7 year period eliminated, leaving undue hardship as the sole basis for discharge.
- 2005:
  - Private loans became non-dischargeable, even when not backed by a governmental entity.

Loans Within 523(a)(8)

- 523(a)(8)(A)(i): "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 nonprofit institution; or"
- 523(a)(8)(A)(ii): "an obligation to repay funds received as an educational benefit, scholarship, or stipend; or"
- 523(a)(8)(B): "any other educational loan that is a qualified education loan, as defined in § 221(d)(1) of the Internal Revenue Code …, incurred by a debtor who is an individual…"

"Educational" Loans

- To fall within the scope of § 523(a)(8), a debt must be an *educational* loan.
- Not every debt connected to education is an "educational" loan.
  - Tuition
  - Post-graduate "buy-out" loans
- To determine the "educational" character of a loan, most courts apply a "substance of the transaction" test that looks to the purpose of the loan transaction, and not to the use to which the debtor puts the funds.

What is an "Educational Loan"?

- To constitute a "loan," there must be a writing or contract where one party transfers a defined quantity of money, goods, or services to another, and the other party agrees to pay for the sum or items transferred at a later date. Cazenovia College v. Renshaw (*In Re* Renshaw),222 F.3d 82, 88 (2d Cir. 2000).
- *In Re* Girdlestone, 525 B.R. 208 (Bankr. W.D.NY 2015).
- Girdlestone recognized the distinction when a college bills a student for tuition without having the student sign a promissory note, as compared with a case like *In Re* Hardy, 535 B.R. 528 (Bankr. W.D.N.Y. 2015), where the college had the debtor sign a promissory note. In Girdlestone, the college merely had rights of an unpaid provider of educational services which did not satisfy the Second Circuit's definition of an educational loan.
- *In Re* Christoff, 510 B.R. 876 (Bankr. N.D. CA. 2014) provides a detailed analysis of cases dealing with a third party's advance of funds for an educational expense.

Undue Hardship

- Majority test: Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987).
  - Adopted by the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.
- Minority test: Totality of the Circumstances
  - Adopted by the Eighth Circuit and followed by bankruptcy courts in the First Circuit

The Brunner Test

- To establish undue hardship, the debtor has the burden of proving:
  - (1) she cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
  - (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
  - (3) she has made good faith efforts to repay her loans.

Criticism of Brunner

- *In re* Johnson, 2015 B.R. 795830 (Bankr. D. Kan. 2015).
  - "Within an historical context, the Brunner framework is an unfortunate relic."
- *In re* Bene, 474 B.R. 56 (Bankr. W.D.N.Y. 2012).
- *In re* Roth, 490 B.R. 908 (9th Cir. BAP 2013), Pappas, J., concurring.
  - *Brunner* "is too narrow, no longer reflects reality, and should be revised."

Criticism of Brunner

1. "Significant changes in the statutory landscape" since 1987.
   - In 1987, student loans were dischargeable five years after the loan first became due.
   - Expansion in types of loans covered by the statute.

2. Educational finance has expanded and changed dramatically since 1987.

National Developments

- Murphy v. ECMC, 511 B.R. 1 (D. Mass. 2014), *appeal filed sub nom. Murphy v. U.S. Dept. of Educ.*, (1st Cir. June 30, 2014)
  - Significance: The First Circuit has never adopted a test for undue hardship.
  - Removed from Nov. 5, 2015 hearing calendar to allow additional briefing.
- Tetzlaff v. ECMC, 794 F.3d 756 (7th Cir. 2015), petition for cert. filed, October 15, 2015.

"Young, healthy, debtors . . ."

- In re Johnson, 2015 WL 795830 (Bankr. D. Kan. 2015).
- In re DeLaet, 2015 WL 850629 (Bankr. D. Neb. 2015).
- Hedlund v. Educational Resources Inst., Inc., 718 F.3d 848 (9th Cir. 2013).

Partial Discharge

- Allows the debtor to discharge PART of her student loan debt, while remaining obligated to repay the remainder.
- Allowed in the Sixth, Ninth, Tenth, and Eleventh Circuits, as well as some bankruptcy courts in other circuits.
  - In re Hornsby, 144 F.3d 433 (6th Cir. 1998); In re Miller, 377 F.3d 616 (6th Cir. 2004); In re Saxman, 325 F.3d 1168 (9th Cir. 2003); In re Alderete, 412 F.3d 1200 (10th Cir. 2005); In re Cox, 338 F.3d 1238 (11th Cir. 2003).
  - Disallowed in the Third Circuit and many bankruptcy courts.
- Theories:
  - (1) The Brunner or totality of circumstances test is applied to part of the debt.
  - (2) Section 105(a).

IBR Plans and 523(a)(8)

- Two approaches in case law from lower courts:
  - 1. Debtor must enter IBR Plan. She cannot show good faith under Brunner ***unless*** she enters such a plan.
  - 2. A debtor who enters an IBR Plan cannot prove undue hardship, because the plan greatly reduces her student loan payment (potentially to zero).

IBR Plans and 523(a)(8)

- The first approach: Debtor cannot show good faith under *Brunner* unless she enters such a plan

- This is not supported by circuit level case law

- No *per se* rule requiring the debtor to enter ICR/IBR plan to show good faith

  - Tirch, 6th Cir. 2005
  - Mosley, 11th Cir. 2007
  - Krieger, 7th Cir. 2013

IBR Plans and 523(a)(8)

- The second point of view: A debtor under an IBR plan cannot show undue hardship because her payment is greatly reduced (potentially to zero) by the plan

  -- Again, no *per se* requirement coming from circuit courts.
  - ICRP/IBR Plans are a factor for the court to consider

- "Placing undue weight on the debtor's ability to qualify for ICRP improperly limits the inherent discretion afforded to bankruptcy judges." ECMC v. Jesperson, 571 F.3d 775 (8th Cir. 2009).

Standard of Appellate Review

- Majority rule: Undue hardship is a question of law reviewed *de novo* on appeal.
  - On appeal, a bankruptcy court's findings of fact are subject to "clear error" review and will stand if reasonably supported.
  - Questions of law are subject to *de novo* review.
- Recent circuit court decisions give bankruptcy judges more leeway.
  - Krieger v. ECMC, 713 F.3d 882 (7th Cir. 2013).
  - Hedlund v. Educ. Resources Inst., Inc., 718 F.3d 848 (9th Cir. 2013).

Edward C. Boltz, President, NACBA, Durham, NC

Student Loans and Chapter 13

Participation in IDR and Ch. 13

- Previously the Department of Education, its Guaranty Agencies and Student Loan Servicers would place all student loans for Chapter 13 Debtors in administrative forbearance.
- This meant that no collection actions were taken, but interest continued to accrue.
- Accordingly, $100,000 of student loans at 8% interest will grow to $148,984.57 at the end of a 60-month Chapter 13 Plan.

- The "fresh start" becomes a "false start."

Participation in IDR and Ch. 13

- The Department of Education had refused to allow Chapter 13 Debtors to participate in the various income driven repayment plans.
- When pressed with the argument that 11 U.S.C. § 525(c) prohibited such discrimination, the Department of Education consented to allowing Chapter 13 Debtors to participate in IDRs if Chapter 13 Plans contained the following provisions from the *Buchanan* case:

Buchanan Provisions

- The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part, of her student loan obligations.
- The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment ("IDR") plan with the U. S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), without disqualification due to her bankruptcy.
- Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.
- The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
- Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.
- In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.
- The Debtor's attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR.

Buchanan Provisions

- The Debtor is not seeking nor does this Plan provide for any discharge, in whole or in part, of her student loan obligations.

An over-arching concern by the Department of Education appears to be that, following *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), "unscrupulous debtors [will] abuse the Chapter 13 process by filing plans proposing to dispense with the undue hardship requirement in the hopes the bankruptcy court will overlook the proposal and the creditor will not object." *Id.* at 16.

It is best to address this concern directly, both by specifically disavowing any present attempt at discharge and by asking that the Plan be specially set for a Confirmation Hearing.

Buchanan Provisions

- The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment ("IDR") plan with the U. S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), without disqualification due to her

This is a fundamental change in practice by Ed. and its servicers, which previously refused to consider applications by Chapter 13 debtors for IDRs, instead placing student loans into an "administrative forbearance."

The basis for this provision is the prohibition in 11 U.S.C. § 525 (c) which provides that a "A governmental unit that operates a student grant or loan program ... may not deny a student grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title ... because the debtor ... is ... a debtor under this title...."

Buchanan Provisions

- Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.

This is meant to prevent the debtor from asserting the confirmation of the plan on its own enrolled the Debtor in an IDR or that the Debtor was given any special preference.

Buchanan Provisions

- The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.

Consolidation of several student loans may be necessary for enrollment in a specific IDR or if the debtor was in default on her student loans. The plan provides that this will be approved by separate motion.

Buchanan Provisions

- Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general

This provides that once the monthly payment under an IDR is determined, the debtor will notify the Chapter 13 Trustee, who would then have an opportunity to decide whether that requires a higher dividend to unsecured creditors and if the IDR should be made directly or by "conduit."

Buchanan Provisions

- The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other

This provides a bit of a "carrot" for the Chapter 13 Trustee in consenting to the plan, in that the debtor will annually notify the Trustee of changes in the monthly IDR, which could result in a higher dividend to other unsecured creditors.

Buchanan Provisions

- During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may

The second greatest concern by Ed. appears to be that this plan is a devious attempt to trick student loan servicers into violating the automatic stay. The communications allowed are patterned on those with mortgage servicers, but stop short of allowing non-bankruptcy garnishment or other involuntary collection.

Buchanan Provisions

- In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.

This is to allow for monitoring of the IDR payments if made directly by the debtor.

It is important to remember that in regards to student loans, "delinquent" may not be the same as "default", which requires that no payments have been made for more than 270 days. *See* 34 C.F.R. § 685.102.

Buchanan Provisions

- The Debtor's attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR.

This clearly the most important provision in this plan, allowing separate and additional compensation for these services.

Solutions for Defaulted Federal Loans

Chapter 13: Cure or Waive
11 U.S.C. § 1322(b)(3) provides that "the plan may … provide for the **curing** or **waiving** of **any default**." (Emphasis added.)
"**Any default**" should include student loan or even a default under a rehabilitation.
"**Curing**", which generally means catching up on missed payments, must mean something different from "**waiving**", which implies forgiving of missed payments.

Solutions for Defaulted Federal Loans

Chapter 13: Cure and Maintain

11 U.S.C. § 1322(b)(5) provides that:

Subject to subsections (a) and (c) of this section, the plan may .... notwithstanding paragraph (2) of this subsection, provide for the **curing of any default** within a reasonable time and maintenance of payments while the case is pending on **any unsecured claim** or secured claim **on which the last payment is due after the date on which the final payment under the plan is due**; (Emphasis added.)

This is most commonly is used to allow the cure and maintenance of mortgage payments.

Solutions for Defaulted Federal Loans

Chapter 13: Cure and Maintain

11 U.S.C. § 1322(b)(5) specifically allows, however, the same treatment for "**any unsecured claim … on which the last payment is due after the date on which the final payment under the plan is due**", which would include non-dischargeable student loans.

Again, "**any**" should be broad enough to include non-dischargeable student loans.

Determining what the amount for the "**curing of any default**" could look to what was required under a rehabilitation.

Solutions for Defaulted Federal Loans

Chapter 13: Benefits

Such a cure or waiver could potentially avoid the assessment of collection costs of up to 18.5% of the outstanding principal and interest.

For example, under a normal consolidation or rehabilitation, $100,000 in student loans would increase to $118,500.

This would be a tremendous benefit to offer to potential clients, not otherwise available.

Solutions for Defaulted Federal Loans

Chapter 13: Benefits
Once a borrower is out of default, he or she is again eligible for new student loans.
Curing a default for a borrower already in an IDR, which is otherwise not an option outside of bankruptcy.

Solutions for Defaulted Federal Loans

Chapter 13: Opposition

It should be expected that such a plan would face vigorous opposition from the Department of Education and heightened judicial scrutiny, similar to the coerced surrender of homes in the *Baker* Plan.

The Department of Education will likely argue that it cannot be forced to accept a cure or waiver of default in bankruptcy as other options are available.

Solutions for Defaulted Federal Loans

Chapter 13: Opposition

Mortgage claims are not allowed to "opt out" of cure for arrearages, so it is unclear how this would be different.

Additionally, just as many courts have rejected the application of FDCPA to the claims process, finding that the Bankruptcy Code is sufficient to deal with such issues, so too should the Bankruptcy Code be sufficient to deal with student loan defaults without turning to other federal laws.

Getting Paid for Student Loans in Ch. 13

Allowance of Additional Services

11 U.S.C. § 330(a)(4)(B) provides that:

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney **for representing the interests of the debtor in connection with the bankruptcy case** based on a consideration of **the benefit and necessity of such services to the debtor** and the other factors set forth in this section. (Emphasis added.)

Getting Paid for Student Loans in Ch. 13

Allowance of Additional Services

This makes it clear that the services regarding student loans need not benefit the bankruptcy estate, but instead only the debtor.

While many courts have presumptive "no look" fees, student loan services such as enrollment in IDRs or administrative discharges should clearly be outside the scope of the usual fee.

Getting Paid for Student Loans in Ch. 13

Allowance of Additional Services

Having a written contract is both vital and likely mandated by the Debt Relief Agency requirements of 11 U.S.C. § 528.
(See sample contract.)

Payment of such fees through Chapter 13 plan should make it easier for many borrowers to afford additional student loan services.
(Sample Order allowing fees will be posted later.)