Student Loan Discharge: Where Are We in 2015?

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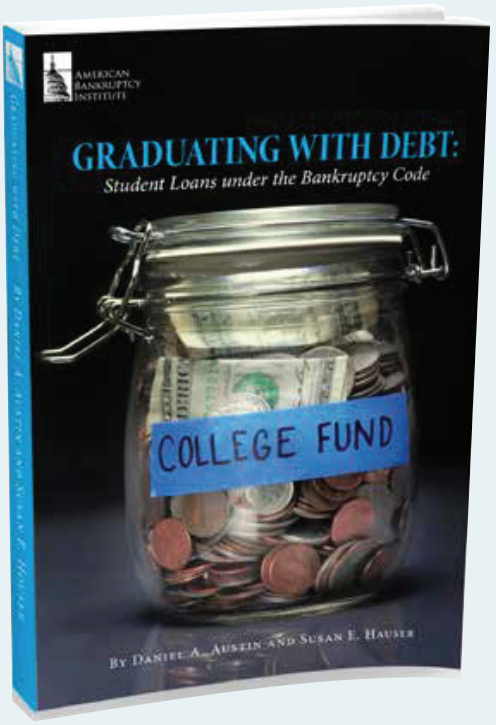

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Student Loan Issues in Bankruptcy·

I. Introduction

This paper discusses the treatment of student loan debt in bankruptcy. It starts by providing a background on student loan programs, how student loan debt has historically been treated in bankruptcy, and how debtors can obtain a discharge of their student loan debt. It then discusses section 523(a)(8), the student loan discharge provision, which provides that student loan debt is presumptively nondischargeable unless a debtor can prove that repaying such debt would constitute an "undue hardship." The term is not defined in the Code. The paper explains how courts have interpreted "undue hardship" under various tests, including the Johnson test, the Bryant poverty test, the totality of the circumstances test, and the Brunner three-prong test. Since the Brunner Test is the most popular of these tests, the paper discusses the three Brunner prongs and factors that courts often considering in determining whether repaying student loan debt would create an undue hardship. The paper reviews studies that have examined student loan discharge proceedings to determine how often debtors are able to discharge their student loan debt and what factors make a debtor more likely to succeed. The paper then discusses another wrinkle in the student loan debate: whether courts can discharge some of a debtor's student loan debt. Finally, the paper concludes by discussing proposals regarding the treatment of student debt in bankruptcy.

I. Student loan programs

Congress first established a federal sponsored student loan program, the National Defense Student Loan Program (later known as the Perkins Loan Program), in 1958 as part of the

· This paper was prepared by Alexandra CC Schnapp, law clerk to the Honorable C. Ray Mullins, Chief Judge of the United States Bankruptcy Court for the Northern District of Georgia.

National Defense Education Act. The program allowed students to obtain student loans from the government at five percent interest.[1]

Seven years later, Congress passed the Higher Education Act of 1965 which established the Guaranteed Student Loan Program (later called the Stafford Loan Program).[2] Stafford loans are primarily funded by private lenders and guaranteed by the United States Department of Education. The program was designed to reduce financial barriers and ensure that college students would have reasonable access to low-interest loans; it is based on the principle that a student should be able to obtain a higher education regardless of his financial resources. In 1972, the federal loan program was expanded to provide grants and loans for junior colleges, trade schools, and career colleges.[3]

In 1978, Congress made federal loans available to students without significant regard to need with the Middle Income Student Assistance Act.[4] The Middle Income Student Assistance Act of 1978 did not create any new programs, but it extended federal loan eligibility to virtually all students regardless of income. The previous Higher Education Act requirement that only families with incomes less than $25,000 were eligible was deleted. As a result, student borrowing increased rapidly and federal loan expenditures skyrocketed.

Today, millions of students depend on federal loans to finance their educations. Federal loans constitute about 85% of all outstanding education loan debt, and approximately 93% of all

[1] Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783, 786-87 (2004).
[2] Higher Education Act of 1965, Pub. Law No. 89–329, § 430 (a), 79 Stat. 1219 (1965).
[3] Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 338 (2013) (citing Education Amendments Act of 1972, Pub. L. 92-318, § 302(a)(1), 86 Stat. 241-42 (1972)).
[4] Middle Income Student Assistance Act, Pub. L. No. 95-566, § 2, 92 Stat. 2402 (1978).

new loans.[5] Most institutions, both public and private, depend on revenue generated through the federal loan program.[6]

The federal government is authorized to make four types of direct loans at specified interest rates: Subsidized Stafford, Unsubsidized Stafford, PLUS, and Consolidation Loans.[7] The Subsidized Stafford loan offers the lowest interest rate and borrowers must meet a financial needs test to qualify; graduate and professional students are not eligible for these loans. All other loans are available to borrowers at any income level.[8] Unsubsidized Stafford loans are made without regard to financial need. PLUS Loans (Parents Plus) are available to parents with dependent undergraduate, graduate, and professional degree students. Plus Loan applicants may not have any adverse credit history. Consolidation Loans are available for borrowers with existing loans in order to combine the loans and extend payment schedules and terms based on their total existing loans. Interest rates for these loans are currently fixed but have historically been priced at a spread to Treasury bills.[9] Whether based on a fixed or variable rate, the interest rate does not reflect the borrower's risk – if the borrower is eligible for a loan, he or she will be charged the same rate as any other eligible borrower.[10]

In additional to federal education loans, private lenders also loan money to students. A student might take out a non-federal loan if he has reached the annual or aggregate federal loan

[5] Austin, *supra* note 3, at 339-40.
[6] Cloud, *supra* note 1, at 786-87. Education lending is also an income-producing endeavor for the federal government. Profit is made on the spread between the government's borrowing rate, around 1%, and the subsidized lending rate, currently at 3.4% for the lowest rate Subsidized Stafford loan and increasing with other types of loans. There is also an origination fee of 1%. The Department of Education anticipated that federal subsidized student loan activity (including new loans and consolidation of existing loans) would generate $ 38.9 billion in revenue for the government in 2012, and approximately $ 36.8 billion in 2013. [98] The federal government expected to earn 20.08% on each dollar of loans originated in 2013. Austin, *supra* note 3, at 342-43
[7] *See* 20 U.S.C. § 1087e (describing the terms and conditions of the federal direct loan program).
[8] Austin, *supra* note 3, at 341 (citing U.S. Dep't of Educ., Student Loans Overview, Fiscal Year 2013 Budget Request, at R-18, available at http://www2.ed.gov/about/overview/budget/budget13/justifications/r-loansoverview.pdf).
[9] Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 593-94 (2012) (hereinafter "Exceptionalism").
[10] *Id.* at 594.

cap. Unlike federal loans, most non-federal loans are priced according to creditworthiness standards, and there is no cap on interest rates.[11]

After graduation, Stafford loans allow for a grace period of six months; upon expiration of the grace period, it is time to repay.[12] There are different modes for doing so.[13] The standard repayment program gives students ten years to repay and requires student-loan debtors to pay a fixed amount per month of at least $50. Students with federal loans in excess of $ 30,000 may qualify for Extended Repayment, which allows up to twenty-five years for repayment with the option of either fixed or graduated repayment.[14] Under the Income Contingent Repayment Program,[15] students make monthly payments calculated on the basis of adjusted gross income, family size, and total amount of Direct Loans.[16] The maximum repayment period is twenty-five years and, if students do not fully repay their loans after twenty-five years, the unpaid portion is discharged. If a debtor qualifies for an Income-based Repayment plan, he will make monthly payments based on his income.[17] Such payments may be adjusted annually and payments may be $0. After a period of time, the outstanding balance may be cancelled. To participate in this program, a debtor must provide extensive medical and financial information to show he qualifies. There are also several specialized loan forgiveness programs.[18]

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[11] *See id*. at 594.
[12] Austin, *supra* note 3, at 346-47.
[13] *See Repayment Plans*, U.S. DEP'T OF EDUC., http://www.direct.ed.gov/RepayCalc/dlindex2.html (last visited Mar. 27, 2014) (discussing repayment options).
[14] *Id.* Fixed payments are the same amount each month, while graduated payments start low and increase every two years.
[15] Parent Plus loans are not eligible.
[16] Students pay the lesser of: 1) the amount they would pay if the loan was repaid in 12 years multiplied by an annual percentage factor or 2) 20% of monthly discretionary income.
[17] A U.S. Department of Education on-line calculator allows borrowers to determine if they are eligible.
[18] For example, members of the military may be eligible for loan forgiveness programs.

According to a 2010 report, thirty-seven million Americans owe approximately one trillion dollars in student loans.[19] The cost of a college education has risen by three times the cost of inflation since 1983.[20] Not surprisingly, the percentage of students borrowing for education and the amount of debt per student have expanded.[21] Between 2004 and 2013, the number of borrowers increased from 23 million to 42 million (with a steadily increasing share of younger people taking out student loans) and the average debt per borrower increased from $15,000 to $25,000 (though there is a great variation in balances among borrowers).[22]

Compounding the problem is that new graduates are entering one of the worst job markets in decades.[23] Outstanding student loan debt is at an all-time high; it is approaching $ 1.2 trillion.[24] While other forms of household debt (mortgages, credit cards, auto loans, and home equity lines of credit) declined during and after the Great Recession, student debt has steadily risen.[25] Student loan debt now surpasses credit cards as the second-largest form of consumer debt behind home mortgages.[26] High student loan debt is also correlated with, if not a cause of,

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[19] The Inst. for Coll. Access & Success, *Quick Facts About Student Debt*, THE PROJECT ON STUDENT DEBT (Jan. 2010), http://projectonstudentdebt.org/files/File/Debt_Facts_and_Sources.pdf. A recent feature in the Fulton County Daily Report surveying new partners illustrates just how pervasive student loan debt is. *The New Partners Survey*, FULTON CNTY. DAILY REPORT (Mar. 10, 2014), http://pdfserver.amlaw.com/dailyreport/Editorial/NewPartners_Charts_2014.pdf. The survey asked fifty-nine new partners, the majority of whom had been practicing for eight or more years, whether they were still paying student loans. 76.6% of those surveyed reported that they were. Of those that were still paying student loans, the largest group of respondents (19.4%) reported that they owed $30,001 - $40,000; half of the partners still paying student loans owed more than $40,000.

[20] Austin, *supra* note 3, at 334 (citing *The College-Cost Calamity*, ECONOMIST (Aug. 4, 2012), http://www.economist.com/node/21559936)).

[21] *Id.*

[22] Meta Brown et al., *Student Debt Growth and the Repayment Progress of Recent Cohorts*, 23 AM. BANKR. INST. L. REV. 331, 334 (2015). The authors give several reasons for these increases: more students are attending college; students are staying in college longer and attending graduate schools in greater numbers; non-education sources of credit have generally become less available since 2008; and the cost of a higher education has grown sharply in recent years. *Id*. at 336.

[23] Austin, *supra* note 3, at 332.

[24] The total student debt in the United States tripled between 2004 and 2013, increasing an average of about 14% per year to total $1.08 trillion in 2013. Brown et al*, supra* note 22.

[25] *Id*. at 333-34.

[26] Rohit Chopra, *Student Debt Swells*, *Federal Loans Now Top a Trillion*, CONSUMER FINANCIAL PROTECTION BUREAU (July 17, 2013), www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-

reduced access to credit and lower rates of car and home purchases. Traditionally, student loan borrowers had more other debt compared to those with lower or no student debt.[27] During the financial crisis and after, other debt balances declined for all borrowers but other debt balances declined more for student loan borrowers than for others; the decline in other debt was especially significant for those with high levels of student debt.[28] The higher student loan burden and the high delinquency rate affect borrowers' home purchases, debt payments, and access to credit. There is thus no longer a positive association between student loans and other debts.[29]

Recent articles have stated that while the student loan bubble has not yet reached the tipping point, the reality is that this situation is unsustainable.[30] This is in part because as the amount of outstanding student debt climbs, so too does the student loan default rate. In 2010, the Secretary of Education announced that the average default in 2008 was 7%.[31] One study finds that almost one-third of borrowers in repayment are delinquent on their student-loan debt.[32] As

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trillion/; *see also* Brown et al., *supra* note 22, at 334; Jessica L. Gregory, Note, *The Student Debt Crisis: A Synthesized Solution for the Next Potential Bubble*, 18 N.C. BANKING INST. 481 (2014) (discussing the student loan bubble).

[27] Student debt has historically indicated that the borrower has some higher education and a higher income. Brown et al., *supra* note 22, at 342.

[28] *Id.* at 343.

[29] The authors speculate that this is in part because student loan borrowers may be less confident about their future income and may demand less credit, and in part because lenders are more conservative in supplying credit to those with high student loan debt *Id.* at 343; *see also* Meta Brown & Sydnee Caldwell, *Young Student Loan Borrowers Retreat from Housing and Auto Markets*, LIBERTY STREET ECON. (Apr. 17, 2013), http://libertystreeteconomics.newyorkfed.org/2013/04/young-student-loan-borrowers-retreat-from-housing-and-auto-markets.html#.VWcGmS7issQ; Robert C. Cloud and Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 467, 495 (2014) ("a substantial percentage of Americans may not be able to buy homes and automobiles, start businesses, invest in capital ventures, educate their children, or save for a secure and dignified retirement because they are overly burdened with debt incurred in completing their postsecondary educations.").

[30] *The Student Loan 'Debt Bomb': America's Next Mortgage-Style Economic Crisis?*, NACBA (Feb. 7, 2012), http://nacba.org/Portals/0/Documents/Student%20Loan%20Debt/020712%20NACBA%20student%20loan%20debt%20report.pdf; *see also Student Loan Affordability: Analysis of Public Input on Impact and Solutions*, CONSUMER FINANCIAL PROTECTION BUREAU, 7 (May 8, 2013), http://files.consumerfinance.gov/f/201305_cfpb_rfi-report student-loans.pdf; *see also* Gregory, *supra* note 23.

[31] *Student Loan Default Rates Increase*, U.S. DEP'T OF EDUC. (Sept. 13, 2010), http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0.

[32] Brown et al., *supra* note 22, at 337. The study finds that student loan borrowers are increasingly 90 days or more delinquent on their student loan payments and that many other non-delinquent borrowers are not paying down their loans (because their payments are deferred or they are in an income-based repayment program, for example).

Secretary Duncan explained, "This data confirms what we already know: that many students are struggling to pay back their student loans during very difficult economic times . . . ."[33]

While the Bankruptcy Code permits some homeowners to address underwater mortgages, student-loan debtors generally cannot discharge their student loans in bankruptcy and very few even attempt to do so. A recent study found that of the 169,774 debtors that filed bankruptcy in 2007 with student loan debt, only 217 filed an adversary proceeding in an effort to discharge their loans.[34] Interestingly, about half of those who did file adversary proceedings received relief, either in the form of full or partial discharges or repayment plans. This paper will now discuss how student loans are treated in bankruptcy and how a student-loan debtor seeking to discharge may do so.

II. History of bankruptcy provisions re: student loans

Over the past three decades, Congress has curtailed the bankruptcy relief available to student-loan debtors.[35] Before the late 1970s, educational loans were treated like any other form of unsecured debt in bankruptcy and were generally dischargeable. In the early 1970s, federal student loan spending grew steadily (in part because the ever-increasing expense of higher education forced more students to turn to student loan programs to attend college). Student loans were not exempted from discharge and concern grew that debtors would file bankruptcy to avoid student loan repayments.

In 1978, federal loans became available to most middle class Americans regardless of need. That same year, Congress added 523(a)(8) undue hardship exception, largely in response to the "fear that students might take advantage of the bankruptcy system by incurring large

[33] *Id.*
[34] Jason Iuliano, *An Empirical Assessment of Student Loan Discharges & the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012).
[35] Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009).

amounts of student debt, only to obtain a discharge of the debt on the eve of lucrative careers."[36] While there was no hard numerical evidence suggesting that any serious problem existed, [37] a Congressional Commission[38] nevertheless concluded that even a small percentage of discharges created a negative public image that discredited the system and eventually could threaten the existence of the programs.[39] Thus, the Commission recommended establishing a discharge limitation to prevent abuses and sustain the integrity of the student loan programs.[40] The Commission proposed that student debtors could receive a discharge of the loan debt only if a five-year period had passed since the loan first became due, or if an undue hardship would result if the loan were not discharged within the five-year period.[41]

Congress codified the Commission's recommendation in the Education Amendments of 1976.[42] Under this legislation, a student-loan debtor could discharge of student loan debt only if a five-year period had passed since the loan first became due, or if an undue hardship would result if the loan were not discharged within the five-year period.[43] The provision was meant to

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[36] Kyle L. Grant, Note & Comment, *Student Loans in Bankruptcy and the "Undue Hardship" Exception: Who Should Foot the Bill?*, 2011 B.Y.U.L. REV. 819, 825 (2011) (citing H.R. Rep. No. 95-595, at 536-537 (1977)).

[37] A more careful examination of the numbers, however, shows that the student loan discharge rate was nominal. For example, a 1976 report submitted to Congress from the General Accounting Office stated that "less than one percent of all matured student loans [were] discharged in bankruptcy." H.R. Rep. No. 95-595, at 536-537 (1977) (The default rate on student loans was 18%, and of that group only 3-4% received a discharge in bankruptcy. Where student-loan debtors filed bankruptcy, most had "a true need for . . . relief rather than an abuse of the bankruptcy system."). Hence, ideas about substantial abuse of a bankruptcy loophole were founded more upon public relations hype than real evidence. Thad Collins, Note, *Forging Middle Group: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)*, 75 IOWA L. REV. 733, 743 (1990). The public's perception of widespread abuse of the student loan program appeared to have a more significant impact on the treatment of student loans in bankruptcy than the nominal abuse that actually existed. *Id*.

[38] Congress appointed the 1973 Congressional Commission on Bankruptcy Laws to evaluate and propose reformation of the then-existing bankruptcy laws. Collins, *supra* note 37, at 740 (citing Report of the Comm'n on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess., pt. I, at 11, 170 (1973)).

[39] *Id*.

[40] *Id*.

[41] Collins, *supra* note 37, at 740.

[42] *Id*. (citing Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2041 (codified at 20 U.S.C. § 1087-3 (1976) (repealed 1978))).

[43] *Id.*

prevent abusive discharges while still allowing an honest, financially burdened student debtor to obtain a financial fresh start.[44]

Two years later, Congress passed the Bankruptcy Reform Act of 1978 and, with it, section 523(a)(8)(B).[45] The provision merely carried over the standard from the 1976 Education Amendments, thus a student-loan debtor could receive a discharge of his student loan debt if five-years had passed since the loan first became due, or if an undue hardship would result if the loan were not discharged within the five-year period. Later amendments further limited the dischargeability of student loans. A 1979 amendment, for example, broadened the types of loans that were protected from discharge, and accorded loans made by nonprofit organizations and others the same protections available to federal student loans.[46]

In 1990, Congress further restricted the narrow instances in which debtors could discharge student loan debt. Up until then, section 523(a)(8) had only applied to chapter 7 cases, so chapter 13 debtors were able to discharge their student loans through their repayment plans. Congress amended the Code in 1990 to make section 523(a)(8) applicable in chapter 13 cases; as a result, student loans were no longer dischargeable in chapter 13 cases.[47] Congress also lengthened the five-year exception period to seven years.[48] In 1998, Congress eliminated the five- and seven-year exceptions altogether.[49] As a result, the only option left for debtors seeking to discharge student loan debt in bankruptcy is to demonstrate that repaying their student loans

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[44] *Id.* at 743-44.
[45] The Senate had proposed a bill that included the same limitations as included in the 1976 Education Amendment. The House bill treated student loans as any other unsecured loans and thus dischargeable at the close of a chapter 7 case. Congress settled on the Senate bill. 11 U.S.C. § 523 (1978).
[46] Collins, *supra* note 37, at 743 n. 92 (citing Pub. L. No. 96-56 (Aug. 14, 1979)).
[47] B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 100 (2002).
[48] See Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1837 (1998) (codified as amended at 11 U.S.C. § 523(a)(8) (2000)).
[49] Huey, *supra* note 47, at 100.

would subject them to an undue hardship.[50] In 2005, Congress overhauled the Bankruptcy Code and had the opportunity to review section 523(a)(8), but it chose not to do so.[51] In fact, Congress expanded the exception even further to apply to a larger set of loans.[52]

Commentators have suggested various theories for why student loans should be treated as nondischargeable debts.[53] First, there is the argument that without the exception, lenders would be unwilling to lend to students with little or no credit history.[54] Second, lenders argue that they need to ensure a pool of loan money for future students; if education loans were easily dischargeable, the pool of fund available for new student loans would shrink.[55] Third, there is the concern that student borrowers will abuse student loan programs by filing bankruptcy after graduation, only to enjoy a lifetime of income without the expense of paying back loans. Fourth, some argue that the decision of whether to borrow for college lies with individuals and those students that have taken on a debt burden should be responsible for repaying that debt.[56] And finally, some contend that a debtor's misfortune should not be borne by creditors. While many of these arguments cannot be limited to educational loans, together they suggest why student loans receive special attention in bankruptcy.

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[50] *See id.*
[51] Grant, *supra* note 36, at 829.
[52] Congress expanded 523(a)(8) to cover "any other education loan that is a qualified education loan." *Id.* Prior to 2005, the "undue hardship" exception applied only to loans "insured, or guaranteed by a government unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." *Id*. (citing 11 U.S.C. § 523(a)(8)(A)(i) (2000)).
[53] *See* Austin, *supra* note 3, at 368-70; John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 2006 CAN. BUS. L. J. 245, 264-65 (2005) (exploring six theories for why educational debt should be treated exceptionally).
[54] *See* Austin, *supra* note 3, at 368-70
[55] *See Pottow*, *supra* note 53, at 261 ("A different justification for treating student loans as nondischargeable in bankruptcy proceedings is couched in terms of 'protecting' the solvency of the public student loan programme").
[56] *Id*. at 256 (discussing the theory of internalization which builds on the notion that the recipient of a private benefit (education) should have to bear its cost (the debt for tuition)).

III. How to obtain a discharge

The Code and Bankruptcy Rules set forth procedures for how a debtor can discharge of student loan debt. Education loan debt must be listed by the debtor on Schedule F along with other general unsecured debt. In a chapter 7 case, education loan claims receive the same distribution as general unsecured debt. However, while general unsecured debt is discharged, student loan debt is not.[57] After the chapter 7 case is closed, the debtor continues making payments to the creditor.

A typical chapter 13 is quite different. Payments to general unsecured creditors can extend for up to five years. The debtor's monthly plan payment is distributed pro rata to unsecured creditors, so education loan creditors will typically receive some money under the plan. However, unless the plan provides for 100% payment to unsecured creditors (which seldom happens), the education loan creditor will not receive the full amount it is owed each month. As a result, principal and interest may continue to accrue on student loan debt during the chapter 13 bankruptcy. At the end of the plan, while other unsecured debt is discharged, the student loan debt may have actually increased. Thus, debtors in chapter 7 generally fare better with regards to student loan payments.

[57] Recently, some chapter 7 trustees have tried to use fraudulent transfer provisions to recover pre-petition tuition payments debtors made for their children's educational expenses. *See* Bonnie C. Mangan, *Recovery of Tuition Payments as Fraudulent Conveyances*, 34-1 AM. BANK. INSTIT. L. REV. 14 (2015). The trustees in these cases argue that the debtors failed to receive "reasonably equivalent value" for the payments. The Code does not define "reasonably equivalent value," and courts tend to consider direct and indirect benefits to the debtors and often look to the motivation for the payments. For example, in *Gold v. Marquette University*, 454 B.R. 444 (Bankr. E.D. Mich. 2011), the court held that more than $20,000 in college tuition that parents made on behalf of their eighteen-year-old son constituted an avoidable fraudulent transfer because the parents received no economic benefit in exchange for the payments. *Id*. at 457-59; *see also Banner v. Lindsay (In re Lindsay)*, No. 06-36352 (CGM), Adv. No. 08-0-91, 2010 WL 1780065 (Bankr. S.D.N.Y. May 4, 2010). Other courts have found that debtors received reasonably equivalent value for tuition payments in the form of the education that was provided to their children. *See e.g., Geltzer v. Xaverian High Sch. (In re Akanmu)*, 502 B.R. 124 (Bankr. E.D.N.Y. 2013) (dismissing trustee's complaint to recover $ 46,526 in tuition payments debtors made to two parochial schools pre-petition); *see also Shearer v. Oberdick (In re Oberdick)*, 490 B.R. 687 (Bankr. W.D. Pa. 2013).

In order to obtain a discharge of student loan debt, the debtor must file an adversary proceeding, during which debtors have the additional burden of proving that repaying their student loans would constitute an "undue hardship." Student-loan debtors must file and serve a complaint and summons on the student loan creditor in accordance with the Federal Rules of Bankruptcy Procedure.[58] In *United Student Aid Funds, Inc. v. Espinosa (In re Espinosa)*,[59] the Supreme Court made clear that debtors may only discharge student loan debts by establishing undue hardship through an adversary proceeding; attempting to discharge a student loan debt by a plan alone is improper. Accordingly, bankruptcy courts should not confirm a plan modifying student loan debt if the debtor has not established undue hardship in an adversary proceeding.[60]

IV. Section 523(a)(8)

Section 523(a)(8) allows the court to discharge an otherwise nondischargeable student loan if excepting the debt from discharge will impose an undue hardship on the debtor or the debtor's dependents. Section 523(a)(8)(B) provides:

> (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

[58] *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (U.S. 2010); *see also Stephens v. Educ. Credit Mgmt. Corp.*, Case No. 98-90875 (Bankr. N.D. Ga. July 20, 2004) (discharge of student loan cannot be done by motion).
[59] 559 U.S. 260.
[60] *See In re Kinney*, 456 B.R. 748, 753 (Bankr. E.D. N.C. 2010) ("inclusion of student loan discharge provisions as part of a Chapter 13 plan without filing an adversary proceeding . . . and without consideration of whether facts exist to support undue hardship, will not be allowed by this Court.").

> (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[.]

11 U.S.C. § 523(a)(8)(B) (emphasis added). Whereas most debts are dischargeable unless proven otherwise,[61] this section provides that student loan debts are nondischargeable unless the debtor can establish that paying such debt would constitute an undue hardship.[62] The student-loan debtor bears the burden of proof,[63] and he must establish each of the elements by a preponderance of the evidence.[64] Section 523(a)(8) thus represents a conscious choice to override the normal "fresh start" goal of bankruptcy.[65]

While 523(a)(8) excepts a broad category of loans from discharge, it does have some limits. Recent cases have explained that: the mere obligation to pay tuition does not constitute a

[61] A presumption exists that all debts owed by the debtor are dischargeable unless the party contending otherwise proves non-dischargeability. 11 U.S.C. § 727(b). The purpose of this "fresh start" is to protect the "honest but unfortunate" debtor. *United States v. Fretz (In re Fretz)*, 244 F.3d 1323, 1326 (11th Cir. 2001).

[62] Generally, the burden is on the creditor to prove the exception to discharge by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287–88 (1991); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 680 (11th Cir. 1993). Bankruptcy courts may not equitably relieve or discharge a debtor's student loans without a finding of undue hardship. In *Educ. Credit Mgmt. Corp. v. Pulley*, Case No. 3-14cv00864-HEH, 2015 U.S. Dist. LEXIS 56851 (E.D. Va. Apr. 30, 2015), the chapter 13 trustee had made payments in accordance with the debtor's plan and payments related to the debtor's student loans were tendered to the student-loan creditor. Thereafter, the student-loan creditor returned uncashed checks to the Trustee stating that it was unable to locate the debtor's account. The trustee ended payments to the student-loan creditor and withdrew the proof of claim as paid in full. After the debtor received a discharge and the case was closed, the debtor filed an adversary proceeding seeking a determination that the creditor was estopped from collecting portions of her student loans that would have been paid during the course of her plan. The bankruptcy court granted the complaint. On appeal, the district court found that the bankruptcy court's order was, in effect, the functional equivalent of a discharge and that there was no statutory basis by which the court could equitably estop a creditor from reaching non-dischargeable student loans.

[63] *Fabrizio v. U.S. Dep't of Educ. Borrower Servs. Dep't Direct Loans (In re Fabrizio)*, 369 B.R. 238, 244 (Bankr. W.D. Pa. 2007) (citations omitted).

[64] *Id*.

[65] *Johnson v. Edinboro State Coll.*, 728 F.2d 163, 164 (3d Cir. 1984) (section 523(a)(8) represents a conscious Congressional choice to override the normal "fresh start" goal of bankruptcy); *see also Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003) ("Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness.").

loan excepted from discharge under section 523(a)(8)(A)(i);[66] a debtor must have received actual funds in order to qualify under section 523(a)(8)(A)(ii);[67] and loans obtained to attend schools that are not "eligible educational institutions" will not be "qualified education loans" excepted from discharge under § 523(a)(8)(B).[68]

V. Defining "undue hardship"

Section 523(a)(8) is difficult to apply because, while it requires a student-loan debtor to establish that repaying his student loan would impose an undue hardship, Congress did not define "undue hardship." The concept is an opaque one[69] that courts analyze on a case-by-case

[66] *See D'Youville College v. Girdlestone (In re Leonard P.)*, 525 B.R. 208, 209 (Bankr. W.D.N.Y. 2015) (when she registered for classes, the debtor signed documents acknowledging a liability to pay tuition but she did not execute a note and did not receive any cash distributions; the court found that the school may have provided services, but that the debtor never received any funds that she was obligated to repay).

[67] In *Inst. of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624, 626 (B.A.P. 9th Cir. 2015), the school offered the debtor $6,000 in financial aid to pay a portion of the tuition for that school year; debtor did not receive any actual funds from the school, but she instead she received a tuition credit. Debtor signed an enrollment agreement acknowledging the school's offer to "finance" $6,000 of the tuition, and she signed a promissory note in favor of the school evidencing her obligation. The following year, the debtor was granted a $5,000 financial aid award and signed a second promissory note. The debtor withdrew before completing her coursework, and the school unsuccessfully attempted to collect the balance due from the debtor on the two notes. When the debtor filed bankruptcy, the school filed a complaint seeking a determination that the debt owed to it was excepted from discharge under § 523(a)(8)(A)(ii). The bankruptcy court found that the debt did not meet the requirements of § 523(a)(8)(A)(ii), and, on appeal, the bankruptcy appellate panel agreed. The panel found that the agreements between the school and the debtor constituted an "obligation to repay" "educational benefits" provided by the school to the debtor. However, the debtor did not actually receive any funds from the school, and, consequently, the debt was not excepted from discharge under § 523(a)(8)(A)(ii).

[68] Section 523(a)(8)(B) excepts from discharge "any other education loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986." 26 U.S.C. § 221(d) in turn provides that "qualified education loan" means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses. 26 U.S.C. § 221(d). The term "qualified higher education expenses" means "the cost of attendance . . . at an eligible educational institution . . . ." *Id*. at § 221(d)(2). The statute provides that the term "eligible educational institution" has the same meaning given such term by 26 U.S.C. § 25A(f)(2), i.e. an institution described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), and which is eligible to participate in a program under title IV of such act. 26 U.S.C. § 25A(f)(2). Thus, loans obtained to attend schools that are not "eligible educational institutions" are not be "qualified education loans," and will not be excepted from discharge under § 523(a)(8)(B). For example, in *Nunez v. Key Educ. Res./GLESI (In re Nunez)*, 527 B.R. 410 (Bankr. D. Or. 2015), the debtor enrolled a flight school and, to finance his attendance, applied for and received two loans. The debtor filed bankruptcy and sought to discharge the loans. The court found that the flight school was not an "eligible educational institution" and, consequently, the loans obtained to attend flight school were not "qualified education loans," as defined in 26 U.S.C. § 221(d)(1) and (2), and were thus dischargeable.

[69] Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 509 (2005).

basis.[70] Commentators agree that the undue hardship requirement is a burdensome one that can be inconsistently applied.[71] Courts devised numerous tests to interpret the exception, namely the Johnson test, the Bryant poverty test, the totality of the circumstances test, and the Brunner Test. In recent years, the Brunner Test has been the dominant test.[72] It has been officially adopted in nine circuits[73] and is employed by approximately 70% of courts.[74]

The Eighth Circuit uses a more holistic totality of the circumstances test.[75] Although the test is unique,[76] studies have found no statistically significant differences in the outcomes under the Brunner Test and that used in the Eighth Circuit.[77]

While the First Circuit has not settled the issue,[78] the Bankruptcy Appellate Panel for the First Circuit has endorsed the totality of the circumstances test.[79] Some decisions have found that "[t]he appropriate test for assessing undue hardship remains an open question in the First

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[70] *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 302 (3d Cir. 1995) (citing Kurt Wiese, Note, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of "Undue Hardship,"* 26 ARIZ. L. REV. 445, 447 (1984) ("The drafters said that bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor's circumstances.")).

[71] Iuliano, *supra* note 34, at 498; *see also* Huey, *supra* note 47.

[72] Iuliano, *supra* note 34. For a description of the tests, see Huey, *supra* note 47, at 101-12.

[73] *See Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *U.S. Dep't. of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003); *United Student Aid Funds, Inc., v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).

[74] *See* G. Michael Bedinger VI, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1827 (2014) (citing Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 487).

[75] *See Long v. Educ. Credit Mgmt. Corp*. (*In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003) (adopting the totality-of-the-circumstances test).

[76] *See* Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 489 (explaining that the Brunner Test and the totality of the circumstances test are not functional equivalents, in part because they cast the threshold of ability to repay in different terms).

[77] *See* Iuliano, *supra* note 34, at 497; Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 487.

[78] *See Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 190 (1st Cir. 2006) ("We see no need in this case to pronounce our views of a preferred method of identifying a case of 'undue hardship.'"); *see also* Neil T. Phillips, Note, *How Poor is Poor Enough? Tracking the Evolution of Student Loan Dischargeability from Judge Haight to Judge Easterbrook*, 12 GEO. J.L. & PUB. POL'Y 329, 340 (2014) ("The First Circuit is the last remaining holdout after thirty years of undue hardship decisions and clearly prefers to leave the issue to its lower courts.").

[79] *See Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 801 (B.A.P. 1st Cir. 2010) ("the Panel declines to adopt the Brunner test . . . . The Panel is persuaded that the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8).").

Circuit[,]" and have analyzed whether a debtor is eligible for discharge under either the totality of the circumstances test or the Brunner Test.[80] Others have followed the Bankruptcy Appellate Panel and have analyzed the facts under the totality of the circumstances test.[81] Recently, cases have trended towards adopting the totality of the circumstances test.[82]

1. Johnson and Bryant

In one of the first cases to discuss the standard, *Pennsylvania Higher Education Assistance Agency v. Johnson*,[83] the bankruptcy court for the Eastern District of Pennsylvania set forth a three-pronged test. Under the Johnson Test, debtors must show: (1) a mechanical analysis of debtor's past resources and future probable resources, (2) the good faith of the debtor in attempting to pay back the student loan debt, and (3) a policy analysis focusing on the debtor's motives in filing for bankruptcy.[84] The first prong asks whether the debtor's future financial resources will be sufficient to allow the debtor to make student loan payments and maintain a minimal standard of living.[85] If the answer is no, the court would then turn to consider whether the debtor was irresponsible in managing his expenses, resources, and employment.[86] Finally, the third prong asks whether the debtor filed bankruptcy primarily to discharge his student loan debt and whether the debtor has benefitted from his education.[87] If the answer to these questions

[80] *See e.g., Ayele v. Educ. Credit Mgmt. Corp.*, 490 B.R. 460, 462 (D. Mass. 2013) ("This Court agrees that Ayele has failed to meet his burden under either test.").
[81] *See e.g., Smith v. United States Dep't of Educ. (In re Smith)*, 499 B.R. 55 (Bankr. D. Mass. 2013).
[82] *See* Phillips, *supra* note 78, at 340 ("the trend is clearly in the direction of totality of the circumstances test, which has been used by the Bankruptcy Appellate Panel."). For example, in *Blanchard v. N.H. Higher Educ. Assistance Found. (In re Blanchard)*, Adv. No. 13-1038-JMD, 2014 BNH 008 (Bankr. D.N.H. 2014), the bankruptcy court stated that, while it did not think the result would be different between the totality of the circumstances test and the Brunner Test, it thought that the Brunner Test was unnecessarily harsh. The court said it was "an appropriate juncture to adopt the totality of the circumstances test," and found that, under the totality of the circumstances, the debtor did not have the ability to repay the loans at issue in this case while maintaining a minimal standard of living.
[83] 5 Bankr. Ct. Dec. 532 (Bankr. E.D. Pa. 1979).
[84] *Id*. at 544. For a discussion of how courts interpreted the three prongs, see Huey, *supra* note 47, at 102-104.
[85] *Id.*
[86] *Id*.
[87] *Id*.

is no, discharge is appropriate.[88] Although the Johnson Test was riddled with complexity, it remained the leading approach in determining undue hardship for almost a decade.[89]

Eight years after *Johnson*, the same court decided *Bryant v. Pennsylvania Higher Education Assistance Agency*,[90] in which it acknowledged that the *Johnson* test was too complicated.[91] In *Bryant*, the bankruptcy court attempted to devise an objective test tying undue hardship to net income and poverty benchmarks. Under the test, often called the Bryant Poverty Test, debtors with an after-tax net income below the federal poverty level guidelines are entitled to discharge their student loan debt.[92] In all other cases, a discharge may be granted if there are "unique" or "extraordinary" circumstances that would make repayment of student loans difficult for the debtor.[93] To be extraordinary, the circumstances must amount to more than mere unpleasantness. Under this test, a debtor's student loans are presumed dischargeable if the debtor's income is not "significantly greater than the poverty [level]."[94] However, the court did not define this phrase. Few courts adopted the Bryant test wholesale, but many courts following Bryant have considered the Federal Poverty Guidelines as part of their analysis.[95] Recently, some commentators have suggested that the Bryant test should be more widely considered.[96]

2. Totality of the circumstances

Some courts eschew adherence to any particular test and instead consider the totality of the circumstances surrounding the debtor's financial condition. Though this test is less

[88] *Id.*
[89] Franky Bayuk, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(a)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. UNIV. L. REV. 1090, 1098 (2004).
[90] 72 B.R. 913 (Bankr. E.D. Pa. 1987).
[91] *Id*. at 915.
[92] *Id*.
[93] *Id*. at 917.
[94] *Id*. at 915.
[95] Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 162 (1996).
[96] *See* Phillips, *supra* note 78, at 352 (arguing that "[a]ny undue hardship analysis should be conducted under *Bryant*: if the debtor's income does not substantially exceed federal poverty guidelines then discharge is appropriate.").

restrictive than others, it is subjective and its application can be somewhat unpredictable particularly since courts consider different factors.[97] The Eighth Circuit has adopted[98] the totality of the circumstances test set out in *Andrews v. South Dakota Student Loan Assistance Corporation*.[99] The Eighth Circuit's test for undue hardship considers "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding that particular bankruptcy case."[100] Courts applying this test will look at "the debtor's present employment and financial situation-including assets, expenses, and earnings-along with the prospect of future changes-positive or adverse-in the debtor's financial position."[101] The Eighth Circuit has stated that it prefers this less restrictive approach to the undue hardship inquiry because it is more equitable.[102]

3. *Brunner*

The most widely used test for evaluating dischargeability of a student loan under section 523(a)(8), the Brunner Test, states that a debt is dischargeable if three conditions are met. The test originated in *Brunner v. New York State Higher Education Services Corporation*.[103]

In *Brunner*, the debtor obtained a master's degree in social work and owed $9,000 for undergraduate and graduate education.[104] Seven months after receiving her master's degree, the

[97] *Id*. at 164 ("Since there is no uniformly accepted statement of the policy behind section 523(a)(8), the courts naturally differ in their interpretations.").
[98] *See Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003) ("we reaffirm the totality-of-the-circumstances test as set forth in *Andrews*); *see also Andresen v. Nebraska Student Loan Program, Inc., (In re Anderson)*, 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999).
[99] 661 F.2d 702, 704 (8th Cir. 1981).
[100] *Id.*
[101] *Long*, 322 F.3d at 555.
[102] *Id.* at 554 ("fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.").
[103] 46 B.R. 752, 757-58 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (stating that the debtor failed, under the second prong, to show her dire circumstances were likely to continue).
[104] *Brunner*, 46 B.R. at 753.

debtor filed bankruptcy.[105] The debtor was unemployed and received support in the form of Medicaid and food stamps.[106] While the debtor had sent out over 100 resumes, she was unable to find employment.[107] Representing herself in court, the debtor sought to discharge the student loan debt. After a short hearing, the bankruptcy court issued an oral order discharging the debtor's student loan debt pursuant to section 523(a)(8)(B).[108] The loan guarantor appealed, and the district court reversed.

The district court began by examining the "undue hardship" standard. After reviewing legislative history and case law, the district court pronounced a rigid three-prong test. The test is meant to analyze not the debtor's mere inability to pay, but that the debtor's inability to pay is likely to continue for a significant time.[109] The standard requires a three-part showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[110]

Under this three-part test, the debtor must prove they have: 1) a current inability to repay, 2) future inability to repay, and 3) made a good faith effort to repay.[111] Because the test is written in the conjunctive, the debtor must prove all three elements; if the debtor fails to meet a requirement, the inquiry ends there and the student loan cannot be discharged.[112]

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[105] *Id.*
[106] *Id.* at 757.
[107] *Id.*
[108] *Id.* at 753.
[109] *See Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1242 (11th Cir. 2003).
[110] *Brunner*, 831 F.2d at 396.
[111] *See* Pardo & Lacey, *Scandal*, *supra* note 35, at 196-200 (summarizing the three *Brunner* prongs).
[112] *See id.* at 195 n.68 (collecting citations). It should be noted that the creditor initially bears the burden of establishing that the debt owed constitutes educational debt that is presumptively nondischargeable. Once the creditor makes that showing, the burden shifts to the debtor to prove undue hardship within the meaning of section 523(a)(8). *See also* Note, *Forgive and Forget: Bankruptcy Reform in the Context of For-Profit Colleges*, 128 HARV. L. REV. 2018, 2027-2028 (2015) (explaining that the district court in *Brunner* deliberately articulated a standard that would prove difficult to overcome).

The district court in *Brunner* found that the debtor satisfied the first prong of the test: her student loans accounted for 80% of her total debt, and she received public assistance.[113] The debtor failed, however, to satisfy the second prong. She had no dependents and had employment-related job skills.[114] The court thus found no evidence that her difficulties would persist.[115] Finally, the court found that the debtor failed to meet the third prong since she filed bankruptcy just one month after her first loan payment became due and made no to attempt to repay or defer payments on her loans.[116] The district court concluded that the bankruptcy court erred when it concluded that debtor's student loans were dischargeable, and remanded the action for the debts to be declared nondischargeable.[117] The debtor appealed. On appeal, the second circuit embraced the district court's three-prong test[118] and agreed that Brunner did not satisfy these criteria.[119]

In context, the decision is sensible. The amount of debt was not exceedingly high and the debtor sought a discharge within months of graduating without first making meaningful repayment efforts.[120] The test, however, has since been widely adopted and used in cases involving very different facts, causing some to note that "[n]othing better exemplifies the old adage 'bad facts make bad law' than the lock-step response of most courts to the *Brunner* decision."[121]

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[113] *Brunner*, 46 B.R. at 757-58.
[114] *Id*. at 757-58.
[115] *Id.*
[116] *Id.* at 758.
[117] *Id.*
[118] *Brunner*, 831 F.2d at 396 ("For the reasons set forth in the district court's order, we adopt this analysis.").
[119] *Id.* at 396-97.
[120] *See Acosta-Conniff v. ECMC (In re Acosta-Conniff)*, Adv. No. 13-3059-WRS, 2015 Bankr. LEXIS 937 (Bankr. M.D. Ala. Mar. 25, 2015) (contrasting the case before it with *Brunner* and noting that the debtor in *Brunner* filed bankruptcy within one month of her first student loan payment coming due, that Brunner had no dependents, no health issues, and no period of unemployment).
[121] Michael B. Kaplan, *Student Loan Debtors Need a Light at the End of the Tunnel*, AM. BANKER (Oct. 7, 2014), http://www.americanbanker.com/bankthink/student-loan-debtors-need-a-light-at-the-end-of-the-tunnel-1070380-1.html.

1) Current inability to repay

Under the first prong of the Brunner Test, the debtor must establish a current inability to repay his student loans by reference to a certain threshold quality of life.[122] A debtor is not expected to live in "abject poverty" to repay a student loan,[123] but student loan debt will not be discharged solely because the debtor may have to make personal and financial sacrifices.[124]

A court should examine the debtor's income and expenses in a manner that is sensitive to the particular circumstances of the case, taking into account the debtor's needs for care, including food, shelter, clothing, transportation medical treatment and a small source of recreation. In *Ivory v. United States (In re Ivory)*,[125] the bankruptcy court for the Northern District of Alabama articulated six specific needs: 1) shelter (including heating and cooling); 2) basic utilities such as electricity, water, natural gas, and telephones; 3) food and personal hygiene products (decent clothing and footwear and the ability to clean and replace those items when necessary); 4) vehicles, along with insurance, gas, licenses, and maintenance; 5) health insurance or money to pay for healthcare; 6) some amount of entertainment or diversion, even if only a television or pet.[126] Courts look to these elements in considering the debtor's income and expenses and whether there is anything left, after accounting for such needs, to pay towards student loans. This is a factual analysis that must be conducted on a case-by-case basis. Courts retain discretion over the methodological approach they use and may use different mechanisms to determine whether a debtor has satisfied the first prong of the Brunner Test. A review of

[122] *Brunner*, 831 F.2d at 396.
[123] *See Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995).
[124] *See Educ. Credit Mgmt. Corp. v. Howe (In re Howe)*, 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005).
[125] 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001).
[126] *Id.*

cases shows that the calculation is quite fluid[127] and it can change with time. For example, courts have recently found that costs for cell phones and Internet are reasonable expenses.[128]

2) Future inability to repay

If a debtor satisfies the first element of the Brunner Test, he must then establish that, by virtue of additional circumstances, this state of affairs is likely to persist for a significant portion of the repayment period.[129] In other words, the debtor must establish by a preponderance of the evidence that his financial situation is *not* likely to improve, that his inability to pay will persist.[130] The "additional circumstances test" requires that the court make a predictive judgment as to the likelihood that the debtor's financial hardship will continue.[131] This has been described as "the heart of the Brunner test," and it is often difficult to prove because it requires the debtor to show that he will be unable to repay his student loan debt in the future for reasons outside his control.[132] This prong has been equated to a debtor's showing of a certainty of hopelessness, an almost impossible burden to overcome.[133] Many commentators and some courts have noted that strictly construing this prong leads to harsh results that are unfavorable to debtors.[134]

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[127] Pardo & Lacey, *Scandal*, *supra* note 35, at 197.
[128] *See e.g., Nixon v. Key Educ. Ress. (In re Nixon)*, 453 B.R. 311, 329 (Bankr. S.D. Ohio 2011) (finding that telecommunications expenses are reasonable for entertainment, apply for employment online, and to communicate).
[129] *Brunner*, 831 F.2d at 396.
[130] There are two elements to the second prong: 1) whether the debtor's financial difficulties are "likely" to continue, and 2) that the duration of the debtor's financial hardship will be a significant portion of the repayment period.
[131] *See* Pardo & Lacey, *Scandal*, *supra* note 35, at 197 (calling analysis under the second prong a "predictive exercise").
[132] Austin, *supra* note 3, at 420; *see also Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1089 (9th Cir. 2001) (calling this requirement "instrumental" in effectuating congressional intent).
[133] Huey, *supra* note 47, at 115-116.
[134] *Id.*; *see also Blanchard v. N.H. Higher Educ. Assistance Found. (In re Blanchard)*, Adv. No. 13-1038-JMD, 2014 BNH 008 (Bankr. D.N.H. 2014) ("to the extent the Brunner test has been read to require some 'certainty of hopelessness,' the Court agrees . . . that such a requirement is not supported by the text of the Bankruptcy Code."); Bedinger, *supra* note 74, at 1836-1837 ("The 'certainty of hopelessness' bar is unnecessarily high when compared to the language of § 523(a)(8), and it hinders the Bankruptcy Code's 'fresh start' policy.").

The Court may consider the debtor's education, work history, health, and other circumstances. In *In re Nys*,[135] the Bankruptcy Appellate Panel for the Ninth Circuit compiled a nonexhaustive list of factors that may constitute "additional circumstances": 1) serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; 2) the debtor's obligations to care for dependents; 3) lack of or severely limited education; 4) poor quality of education; 5) lack of usable or marketable job skills; 6) underemployment; 7) maximized income potential in the debtor's chosen education field and no other lucrative job skills; 8) a limited number of years remaining in the debtor's work life to allow repayment; 9) age or other factors that prevent restraining or relocation that would facilitate repayment; 10) lack of assets to repay the loans (whether exempt or not); 11) potentially increasing expenses that outweigh potential appreciation in value of the debtor's assets and/or likely increases in the debtor's income; and 12) lack of better financial options elsewhere.[136] The most important factor seems to be that the additional circumstances are beyond the debtor's control and not a result of the debtor's choice.[137]

Many debtors who seek to discharge their student loan debt suffer from a medical condition or have a dependent who does,[138] and studies show that a medical condition greatly increases a debtor's odds of being granted a discharge.[139] This is often because medical

[135] 308 B.R.436 (B.A.P. 9th Cir. 2004).
[136] *Nys*, 446 F.3d at 946.
[137] Some recent decisions, though, have stated that bankruptcy courts should carefully and fully consider all of the *Nys* factors. *See Mees v. J.P. Morgan Chase*, Case No. 2:13-cv-01892-KJM, 2014 U.S. Dist. LEXIS 100735 (E.D. Cal. July 22, 2014) (ordering the bankruptcy court to clarify its findings regarding factors five, six, seven, eight, and eleven).
[138] Pardo & Lacey, *Scandal*, *supra* note 35, at 205 (finding that the majority of debtors in their study – 55% - suffered from a medical condition or had a dependent who suffered from such a condition; 81% of those debtors had a work-limiting medical condition); *see also* Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 447 (finding that approximately 62% of the debtors in a study subset suffered from either a physical or mental condition).
[139] Rafael Pardo, *Illness & Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505 (2008) (revisiting data from his 2005 study with Michelle Lacey and finding that a medical condition increased a debtor's odds of being granted a discharge by 140%); *see also* Ryan Freeman, Comment, *Student Loan Discharge – An Empirical Study of the Undue Hardship Provision of § 523(a)(8) under Appellate*

conditions may interfere with a debtor's ability to work and generate income.[140] The debtor has the burden of proof to show the mental illness is severe enough to qualify for the discharge.[141] While medical records, depositions, and expert testimony can support the existence of a medical condition,[142] a debtor can testify about his medical problems and generally should not need to submit independent medical evidence to corroborate his testimony.[143] The most important factor when considering any mental illness under the Brunner Test is whether the medical condition is long-term, or extends into the future long enough, to prevent employment possibilities and thus render the ability to repay the student loan impossible.[144] While a debtor's health may play a role in determining whether a debtor's inability to repay will persist, commentators counsel that courts should be cautious not to rely too much on a debtor's health as a proxy for repayment ability.[145]

A debtor's older age may also constitute an additional circumstance. Age relates to a debtor's ability to repay because an individual's earning capacity plateaus, and may even decline, with age.[146] The *Brunner* opinion itself found that there were no additional

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Review, 30 EMORY BANKR. DEV. J. 147, 190 (finding that while few characteristics impact a debtor's success appealing an undue hardship decision, the presence of a medical condition appears to be a differentiating factor).

[140] Additionally, such debtors may have the financial burden of significant medical costs. *See* Pardo & Lacey, *Scandal*, *supra* note 35, at 205.

[141] Kevin J. Smith, *Defining the Brunner Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 263 (2013) (citations omitted).

[142] *Mosley v. Gen. Revenue Corp. (In re Mosley)*, 330 B.R. 832, 842-43 (Bankr. N.D. Ga. 2005).

[143] *See Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1325 (11th Cir. 2007) (following *Barrett v. Educ. Credit Mgmt. Corp.*, 487 F.3d 353 (6th Cir. 2007)).

[144] Smith, *supra* note 141, at 263 (citing *King v. Vt. Student Assistance Corp. (In re King)*, 368 B.R. 358, 371 (Bankr. D. Vt. 2007)).

[145] Pardo, *supra* note 139, at 522 (explaining that reference to a debtor's medical condition as part of the undue hardship inquiry may result in the improper sorting of debtors).

[146] Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 443-44. The authors explain that health problems, and related costs, also increase with age which can contribute to reduced productivity and lower earnings. *Id*. at 444 n.173.

circumstances noting that the debtor "was not disabled nor elderly,"[147] thus suggesting that advanced age may constitute an additional circumstance in some cases.[148]

3) **Good faith efforts to repay**

Finally, if a debtor has established both a current and future inability to repay, the debtor must show that he has made a good faith effort to repay the student loans.[149] Courts look to whether the debtor has acted responsibly toward his creditors and whether he is responsible for creating the hardship. This prong asks courts to consider a debtor's pre-bankruptcy conduct to determine whether he should be eligible for relief. Some argue that this factor should get more attention.[150]

Failure to make a payment, standing alone, does not establish lack of good faith.[151] The debtor must show that his failure to make payments results from factors "beyond his reasonable control."[152] Courts often consider the debtor's payment history and efforts to negotiate a plan, as well as the debtor's efforts to obtain employment, maximize income, and minimize expenses.[153] Generally, the longer it is between the student's graduation, or leaving school, and the filing of a bankruptcy petition, the more this factor weighs in favor of the debtor.[154]

While courts often consider whether the debtor has negotiated a repayment plan, such as an Income Contingent Repayment Plan, a debtor is not *per se* required to apply for such a

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[147] *Brunner*, 831 F.2d at 396.
[148] *See e.g., Gordon v. U.S. Dep't of Educ. (In re Gordon)*, No. 07-9049-MGD, 2008 Bankr. LEXIS 3878 (Bankr. N.D. Ga. Oct. 10, 2008) (noting that the debtor was 62-years-old in concluding that repaying the debtor's student loan debt would constitute an undue hardship); *Hinckle v. Wheaton Coll. (In re Hinckle)*, 200 B.R. 690, 694 (Bankr. W.D. Wash. 1996) (concluding that it was unlikely that the debtor, who was over the age of fifty, would be able to afford increased payments).
[149] *Brunner*, 831 F.2d at 396.
[150] *See* Smith, *supra* note 141, at 266.
[151] *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1311 (10th Cir. 2004).
[152] *Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993).
[153] Pardo & Lacey, *Scandal*, *supra* note 35, at 199.
[154] Smith, *supra* note 141, at 266.

plan.[155] Courts recognize that such programs are not always viable options for debtors – while payments under such plans may be zero, interest of the debt continues to accrue and the amount forgiven at the end of twenty-five years can be treated as taxable income.[156] Recognizing this, commentators have questioned whether income-contingent repayment plans should be considered at all.[157] Other courts have found that a debtor's failure to enroll in a repayment plan is almost prima facie evidence of a lack of good faith.[158] Often, the record before the court may not indicate whether the debtor and the student loan creditor explored alternative repayment options, deferment, or forbearance.[159]

This final prong turns on several considerations including the debtor's efforts to make his payments by obtaining employment, maximizing income, reducing expenses, and/or participating in alternative payment options. These factors try to capture whether a debtor has used his best efforts to repay his student loan debt and are often hard to quantify.[160]

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[155] *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007).

[156] Thus, such plans essentially require debtors to trade one nondischargeable debt for another. *See Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007); *In re Barrett*, 487 F.3d 353, 364 (6th Cir. 2007); *see also Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010) ("The [income contingent repayment program] might be beneficial for a borrower whose inability to pay is temporary and whose financial situation is expected to improve significantly in the future. Where no significant improvement is anticipated, however, such programs may be detrimental to the borrower's long-term financial health." (citations omitted)).

[157] *See* Phillips, *supra* note 78, at 340 ("One wonders how much weight the ICRP should be given."). In *Dorsey v. United States Dep't of Educ.*, 528 B.R. 137, 140 (E.D. La. 2015), in holding that the bankruptcy court erred by first requiring the debtor to pursue an administrative discharge before filing a complaint under § 523(a)(8), the district court noted that, with regard to income-contingent repayment programs, the overwhelming consensus of the courts that have faced this issue is that a debtor is *not* precluded from seeking an undue hardship discharge under § 523(a)(8) of the Bankruptcy Code solely because the debtor did not first pursue an administrative option he was eligible for. The court explained that to find that a debtor is *required* to seek an administrative discharge or pursue a repayment option before being permitted to seek a § 523(a)(8) undue hardship discharge under the Bankruptcy Code runs counter to the Code's underlying policy of permitting debtors a fresh start.

[158] *See e.g., Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane)*, 287 B.R. 490, 500 (B.A.P. 9th Cir. 2002) (failing the "good faith" prong of the Brunner Test because debtor did not apply for the ICR plan).

[159] *See e.g., Mosley v. Gen. Revenue Corp. (In re Mosley)*, 330 B.R. 832, 847 n.14 (Bankr. N.D. Ga. 2005).

[160] Good faith findings under the Brunner Test should be reviewed for clear error. *See Hedlund v. Educ. Res. Inst., Inc.*, 718 F.3d 848, 854 (9th Cir. 2013); *see also* Richard B. Keeton, *Guaranteed to Work or It's Free!: The Evolution of Student Loan Discharge in Bankruptcy and the Ninth Circuit's Ruling in Hedlund v. Educational Resources Institute Inc.*, 89 AM. BANKR. L.J. 65 (2015) (discussing the *Hedlund* opinion).

VI. Studies

There are several studies that have reviewed student loan discharge proceedings to see how often debtors obtain a discharge from their student loans and what factors make a debtor more likely to succeed. Three empirical studies warrant discussion: Rafael Pardo and Michelle Lacey's study of published court opinions spanning a ten-year period; Pardo and Lacey's examination of student loan discharges in the Western District of Washington over a four-year period; and Jason Iuliano's study of student loan adversary proceedings filed nationwide in 2007.

1. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 487 (2005)

Pardo and Lacey set out to systematically analyze the decision-making process of bankruptcy judges who make undue hardship determinations. The authors looked at 261 hardship opinions issued by bankruptcy courts from October 1993 to October 2003. They concluded that nearly half of the debtors (45%) who filed an adversary proceeding to discharge student loan debt were successful in obtaining some relief.[161] Pardo and Lacey found that a court's assessment of a debtor's future inability to repay was often determinative,[162] but found very few statistically significant differences in the factual circumstances of those debtors who were granted a discharge and those who were denied a discharge.[163] The authors found that debtors who obtained a student loan debt discharge generally had: 1) lower monthly incomes, 2) lower monthly expenses, and 3) were more likely to have a medical problem or a dependent with a medical problem.[164] Pardo and Lacey also suggested that the judge's personal sentiments and

[161] Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 479.
[162] *Id*. at 503.
[163] *Id.* at 433.
[164] *Id*. at 481-86. They also found that women predominated the group seeking relief from educational debt and that debtors in the study tended to be middle-aged. *Id*. at 441-445. The majority of debtors also had at least one dependent.

the experience of the debtor's attorney were important variables in the outcome. The authors concluded that the opinion that student-loan debtors with an ability to repay will abuse the bankruptcy system by seeking to discharge student loans is unfounded; rather, cases shows that debtors who do seek to discharge their student loan debt are generally struggling under the weight of oppressive educational debt.

2. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009)

Pardo and Lacey conducted a second empirical study based on a dataset of 115 student-loan discharge proceedings that were filed in the Bankruptcy Court for the Western District of Washington from 2002 – 2006. Pardo and Lacey found that granting a debtor a discharge from student loan debt was the rule rather than the exception – approximately 57% of adversary proceedings resulted in an undue hardship discharge – but that relief was granted in a haphazard fashion.[165] They examined the cases and found that seven variables weighed in favor of discharge: 1) the debtor's annual household income was below the poverty line; 2) the debtor failed to attain the education pursued with the borrowed funds; 3) the debtor or a dependent suffered from a medical condition; 4) the debtor suffered from a work-limiting medical condition; 5) the debtor was more than 55 years old; 6) the debtor obtained the student loans on behalf of a third-party (as a co-signing parent for example); and 7) the debtor was unemployed.[166] Most of these variables relate to the debtor's future inability to repay,[167] thus underscoring the prominence of the second prong of the Brunner Test in student loan discharge decisions. Additionally, Pardo and Lacey found that debtors with "highly experienced" attorneys

[165]Pardo & Lacey, *Scandal*, *supra* note 35, at 183.
[166] *Id.* at 223.
[167] *Id*. (explaining that the first variable relates to the debtor's current inability to repay, while the last variable speaks to the debtor's good faith efforts to repay).

were more likely to obtain discharges.[168] They also found that discharge decisions depended upon which judge presided over the case.[169] While they found that the typical debtor seeking to discharge student loan debt is "in horrible financial shape,"[170] the authors ultimately concluded that financial hardship is a less significant factor than it should be. Pardo and Lacey conclude that congressional reform is necessary to allow debtors access to a fresh start.[171]

3. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges & the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495 (2012)

A more recent study shows that 99.9 of bankrupt student-loan debtors do not even try to discharge their student loans. Jason Iuliano examined 207 student loan cases filed in 2007 and found that eighty-one debtors (39%) discharged some portion of their student loans.[172] When debtors do seek to discharge their student loan debts, he found that three variables were predictive of discharge: 1) whether the debtor had a medical hardship; 2) whether the debtor was employed; and 3) the debtor's income the year before filing bankruptcy. Medical hardship was positively correlated with receiving a discharge; being employed and having a larger income in the year preceding bankruptcy were negatively correlated.[173]

First, at to a medical hardship, it appears that just having a medical condition is a strong predictor of whether a debtor will receive a discharge. This variable is indicative of one's future inability to repay. Second, Iuliano found that unemployed debtors are significantly more likely to receive discharges. This variable relates to both the current and future inability to repay prongs. Third, the debtor's income the year before filing bankruptcy is indicative of a debtor's

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[168] *Id*. at 233.
[169] *Id*. at 234. Pardo and Lacey posit that this may be because some judges more actively attempt to facilitate settlement than others. *Id*.
[170] *Id.* at 207. Debtors in their study had an annual household income of approximately $20,800. *Id.*
[171] *Id*. at 235.
[172] Iuliano, *supra* note 34, at 512. Most commonly, in fifty-six cases, debtors settled with their student loan creditors. In twenty cases, judges entered a judgment that the student loan debt was dischargeable. Four cases ended with default judgment and one case ended in summary judgment. *Id*.
[173] *Id*. at 518.

current inability to repay student loan debt. These three factors match the first two prongs of the Brunner Test quite closely and show that debtors in bad economic positions are more likely to get relief. Iuliano found that judges will consider a number of factors in determining whether a debtor has made a good faith effort to repay his student loans, such as whether he has pursued administrative remedies or is actively seeking employment, none of which were particularly easy to quantify. Iuliano found that whether a debtor hires an attorney appears to have little correlation with discharge outcome.[174] Thus, according to Iuliano's data, a debtor who proceeds *pro se* is just as likely to receive a discharge as a debtor who is represented by counsel.[175]

Iuliano's main conclusion, that debtors overwhelming do not even attempt to discharge student loan debt in bankruptcy, is supported by other recent studies.[176] Iuliano posits that so few student-loan debtors attempt to discharge their student debt in part because the view that student loans are nearly impossible to discharge is a self-fulfilling process – debtors who hear that it is nearly impossible to meet the undue hardship standard believe that they are unlikely to succeed and will not even attempt to discharge their student loans.[177] Some debtors may also not pursue an adversary proceeding if they believe that they need an attorney but cannot afford one.[178]

These studies show that debtors rarely attempt to discharge their student loan debt. When they do, certain factors (such as medical hardship, employment status, and income) have a bearing on whether the student loan debt will be discharged. These studies all show that debtors

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[174] *Id.*
[175] *Id*. at 521-22.
[176] *See* Austin, *supra* note 3, at 399-400 ("Even in seemingly plausible cases the debtors did not attempt to have the debt discharged. . . . A number of cases I reviewed showed debtors with five-figure or six-figure student loan debt and modest income, but they did not attempt to have the debt discharged."); *see also* Exceptionalism, *supra* note 9, at 589 (noting that few debtors even attempt to make use of section 523(a)(8)).
[177] Iuliano, *supra* note 34.
[178] *Id*. at 523; *see also* Betsy Mayotte, *Debunking the Student Loan Bankruptcy Myth*, U.S. NEWS & WORLD REPORT (Aug. 13, 2014), http://www.usnews.com/education/blogs/student-loan-ranger/2014/08/13/debunking-the-student-loan-bankruptcy-myth.

seeking to discharge their student loan debt generally do so while experiencing significant financial distress, and many are destitute. As Pardo and Lacey explain, this contrasts sharply with the image of an opportunistic debtor seeking to avoid repayment of student loans on the eve of a lucrative career.[179]

VII. Recent cases – possible changes?

A majority of bankruptcy courts apply *Brunner*'s tough standards in today's challenging financial environment.[180] As the studies discussed above demonstrate, a debtor must often show some disabling infirmity or condition of utter hopelessness to prevail. However, "signs that the hard-line approach to discharge may be coming to an end are increasingly apparent[.]"[181] Two recent cases demonstrate this: the Seventh Circuit's opinion in *Krieger v. Educational Credit Management Corporation*, and the Ninth Circuit Bankruptcy Appellate Panel's decision, particularly the concurring opinion, in *Roth v. Educational Credit Management Corporation.*

1. *Krieger*

The Seventh Circuit recently took subtle aim at the Brunner Test in *Krieger v. Educational Credit Management Corporation*.[182] The debtor had pursued a paralegal degree financed by five loans.[183] When the debtor filed bankruptcy at age fifty-two, she was dependent on her mother for support and her sole source of income was $200 per month in government

[179] Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 405.
[180] Numerous articles and cases have noted that the total amount outstanding in student loans has steadily grown along with an accompanying number of defaults. *See e.g.*, *Hedlund v. Educ. Res. Inst., Inc.*, 468 B.R. 901, 908 (D. Or. 2012) (noting that "the current higher education system has become untenable and unsustainable," and devoting nearly three pages to an overview of the student debt problem and stagnant job market before reaching its analysis), *rev'd*, 718 F.3d 848 (9th Cir. 2013); *see also* Phillips, *supra* note 78.
[181] Phillips, *supra* note 78, at 341.
[182] 713 F.3d 882 (7th Cir. 2013); *see also* Brenda Beauchamp & Jason R. Cooper, *Survey 2014: Bankruptcy + Student Loan Debt Crisis*, 30 TOURO L. REV. 539, 559-560 (2014) (discussing the case).
[183] *Krieger v. Educ. Credit Mgm't Corp. (In re Krieger)*, Adv. No. 11-8010, 2012 Bankr. LEXIS 1449 (Bankr. C.D. Ill. Apr. 5, 2012).

benefits.[184] The debtor testified that she applied for at least 180 job positions over ten years without success.[185] Unable to find a position as a paralegal, she attempted to locate employment outside her field, again with no success.[186] Further, the debtor had attempted to pay what she could and actively sought and received forbearances;[187] she had not "played the bankruptcy card shortly after completing her subsidized education."[188] The bankruptcy court concluded that the debtor had established each of the elements of the Brunner Test and was entitled to a discharge of her student loan debts.[189]

The creditor appealed, and the district court reversed.[190] The district court painted a strikingly different portrait of the debtor. The district court noted that the debtor was relatively young[191] with no disabilities.[192] The court also found that her failure to enroll in an income-based repayment plan constituted "very strong evidence" of bad faith.[193] Consequently, the district court held that Krieger failed *Brunner* second and third prong and that she was not entitled to discharge.

On appeal, the Seventh Circuit Court of Appeals reversed the District Court's decision.[194] The Seventh Circuit hewed closely to the bankruptcy court's analysis,[195] and found that the debtor had no hope of ever paying back the loan. The opinion, written by Judge Easterbrook,

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[184] *Id*. at *5-6.
[185] *Id*.
[186] *Id*. at *6. The court noted, "[r]arely has the Court seen the kind of persistent job search efforts in which this debtor has engaged over the past decade." *Id*. at *16.
[187] *Id*. at *17-18.
[188] *Id.* at *18.
[189] *Id*.
[190] *Educ. Credit Mgmt. Corp. v. Krieger*, 482 B.R. 238 (C.D. Ill. 2012).
[191] The debtor was fifty-two years old.
[192] *Id*. at 244.
[193] *Id*. at 247.
[194] *Krieger*, 713 F.3d 882.
[195] Id. at 883 ("The evidence shows that Krieger cannot pay the debt now or in the foreseeable future. She is living with her mother, age 75, in a rural community where few jobs are available; mother and daughter between them have only a few hundred dollars (from governmental programs) every month. She is too poor to move in search of better employment prospects elsewhere, and her car, which is more than a decade old, needs repairs. She lacks Internet access, which coupled with the lack of transportation hampers a search for work.").

began by noting that the debtor was "destitute,"[196] and concluded: "Krieger simply cannot pay."[197] The opinion is significant because it seems to reject an overly restrictive application of the Brunner Test. The decision also notes that section 523(a)(8) does not mention either good faith or a "certainty of hopelessness," and that "[i]t is important not to allow judicial glosses . . . to supersede the statute itself."[198] Judge Easterbrook writes, "we must remember that the statutory inquiry is 'undue hardship,' a case-specific, fact-dominated standard" and, as such, a judge applying the standard "necessarily has latitude."[199]

2. *Roth*

The Ninth Circuit's Bankruptcy Appellate Panel, which also applies the Brunner Test, recently reexamined the third prong, whether the debtor made good faith efforts to repay, in *Roth v. Educational Credit Management Corporation*.[200]

In Roth, the bankruptcy court had no trouble concluding that the debtor met the first two prongs of the Brunner Test.[201] The bankruptcy court, however, had struggled with the third prong. While the bankruptcy court noted that participation in an income-based repayment plan was not required to find good faith, the court concluded that the debtor's lack of efforts to renegotiate, obtain a forbearance, or obtain a disability discharge weighed against a finding of dischargeability. On appeal, the Bankruptcy Appellate Panel considered whether the bankruptcy court erred in concluding that the debtor failed to make a good faith effort to repay her student loans. The panel explained that "[g]ood faith is measured by the debtor's efforts to obtain

[196] *Id*. at 883.
[197] *Id.* at 885.
[198] *Id.* at 884. *See also* Phillips, *supra* note 78, at 342-34 (noting that the opinion suggests that a "certainty of hopelessness" appears to demand more than "undue hardship.").
[199] *Id*.
[200] 490 B.R. 908 (B.A.P. 9th Cir. 2013).
[201] *Id* at 913 ("the evidence showed that, based on her current income and expenses, she could not maintain a minimal standard of living if forced to repay the FFELP Loans, and, further, additional circumstances indicated it was more likely than not that her financial difficulties would persist for a significant portion of the Loans' repayment period.").

employment, maximize income, and minimize expenses."[202] While courts consider a debtor's efforts – or lack thereof – to negotiate a repayment plan, the panel noted that failure to negotiate or accept an alternative repayment plan is not dispositive.[203] In fact, the panel concluded that the debtor's refusal to participate in such a plan "should not be weighed against her, especially given her age, poor health, and limited income or prospect."[204] It was a "close case," but the panel concluded that the debtor had met her burden and reversed and remanded the matter to the bankruptcy court to enter a judgment discharging the debtor's student loans.[205]

Judge Pappas wrote a concurring opinion in which he declared that Brunner was "too narrow, no longer reflects reality, and should be revised by the Ninth Circuit."[206] He stated that the Brunner Test is a relic – it was decided under the early version of section 523(a)(8) that provided that student loan could be discharged five years after it first came due, or earlier if the debtor could prove undue hardship.[207] Judge Pappas observed that, over the years, Congress has made changes to § 523(a)(8), all excepting a broader array of educational obligations from discharge in bankruptcy, while educational borrowing has changed drastically.[208] In short, the pool of student loan debts that are excepted from discharge has increased while the possibility for obtaining a discharge of such debts has become more difficult.

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[202] *Id*. at 917 (citations omitted). The following factors may also be relevant: 1) whether the debtor has made any payments on the loan prior to filing for discharge; 2) whether the debtor has sought deferments or forbearances; 3) the timing of the debtor's attempt to have the loan discharged; and 4) whether the debtor's financial condition resulted from factors beyond her reasonable control. *Id*.

[203] *Id*. at 920 (citing *Educ. Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen)*, 479 B.R. 79, 89 n.4 (9th Cir. BAP 2012)).

[204] *Id*. at 919-20.

[205] *Id*. at 920.

[206] *Id*. at 920 (Pappas, J., concurring).

[207] Moreover, the Brunner case typified the sort of student loan discharge cases encountered by bankruptcy courts at the time (the debtor sought to discharge $9,000 in student loans just a few months after she obtained her master's degree, without making efforts to pay the loans). *Id.* at 921. Not surprisingly, the Brunner court held that the debtor had not made a case for an undue hardship discharge. *Id*.

[208] *Id.* at 921-22.

The opinion notes that requiring the debtor to demonstrate "additional circumstances" to prove that his or her impecunious status will persist into the future "is an unrealistic standard."[209] Further, Judge Pappas found that the third requirement, that a debtor show that he made "good faith efforts" to repay a student loan is "of little utility in determining true undue hardship" and not required by the language of section 523(a)(8).[210] He concluded that the "Ninth Circuit should reconsider its adherence to Brunner.[211] Courts should instead "consider all the relevant facts and circumstances on a case-by-case basis to decide, simply, can the debtor currently, or in the near-future, afford to repay the student loan debt while maintaining an appropriate standard of living."[212]

Judge Pappas' concurring opinion represents a significant minority of judges, but it may represent a shift in the zeitgeist of student debt forgiveness in the bankruptcy context. Whether the concurring opinion in *Roth* demonstrates a trend remains to be seen. Some recent lower

[209] *Id.* at 923.
[210] *Id.* ("Of course, as a matter of statutory construction, this 'prong' of the test lacks any textual basis in the Bankruptcy Code.").
[211] *Id*.
[212] *Id*.

court decisions suggest that it may be.[213] Indeed, lower courts seem to be increasingly careful to consider all the relevant facts and circumstances on a case-by-case basis.[214]

VIII. Partial discharge

Further complicating the student loan discharge issue is that some courts permit a debtor to discharge a part of an educational debt while others do not. Some courts permit partial discharges, others do not, and some courts take a "hybrid," or loan-by-loan, approach where the debtor has multiple student loan debts by declaring some of the individual loans dischargeable.

[213] For example, the bankruptcy court in *Wolfe v. United States Dep't of Educ. (In re Wolfe)*, 501 B.R. 426, 440 (Bankr. M.D. Fla. 2013), reviewed the historical landscape in which the Brunner Test was developed and noted that an "overly restrictive interpretation of the Brunner Test fails to further the Bankruptcy Code's goal of providing a 'fresh start' for the honest but unfortunate debtor." The court nevertheless evaluated the facts under the Brunner framework and found that he had met his burden to prove that excepting the student loans would be an "undue hardship" on him. *See also Turturo v. Access Group, Inc. (In re Turturo)*, 522 B.R. 419 (Bankr. N.D.N.Y. 2014) (noting that the Brunner Test is harsh and outdated but stating that the court was nevertheless bound by the standard); *Johnson v. Sallie Mae, Inc. (In re Johnson)*, Adv. No. 11-62350, 2015 Bankr. LEXIS 525 (Bankr. D. Kan. Feb. 19, 2015) (noting that the student-loan exception to discharge was enacted in response to highly publicized circumstances in which professionals, who enjoyed a prospect for future increases in income, filed bankruptcy to discharge student loans soon after conclusion of their educations and that *Brunner* was decided when time that student loans were eventually dischargeable; the court stated that, "[c]onsidering a significant shift of the skyrocketing costs of college education to the middle class over the last three decades, it is disconsonant with public policy and bankruptcy's fresh start to leave debtors in virtual lifetime servitude to student loans" and "doubtful that Congress intended to leave the courts so constrained or the student borrowers so burdened[.]").

[214] *See e.g., Macon v. U. S. Dep't of Educ. (In re Macon)*, Adv. No. 13-4014, 2014 Bankr. LEXIS 4308 (Bankr. N.D. Ga. Oct. 6, 2014). Considering a motion for summary judgment, the court stated that it was unable to predict the future without evidence about the debtor's job prospects, past work history, health, current financial circumstances, and other relevant factors. The court also observed that while the Brunner Test requires the debtor to prove that her circumstances will persist for a "significant portion of the repayment period of the student loans," neither the debtor nor the defendant has identified "the repayment period" at issue. As to the third *Brunner* factor, the court found that the defendant had not asserted facts that demonstrated, as a matter of law, that the debtor had not made good faith efforts to repay her student loans. The court found that the debtor's failure to avail herself of an income contingent repayment program, standing alone, did not demonstrate a lack of good faith. The issue was not whether the debtor's failure to participate in the ICRP demonstrated a lack of good faith; the issue was whether this factor, among the totality of circumstances such as her age, job prospects, her income, expenses, and repayment history, demonstrated good faith or the lack thereof. The court concluded that there were disputes as to material fact that precluded the entry of summary judgment on the second and third prongs of the Brunner Test and observed that an "unduly rigid application of the *Brunner* test, especially the second and third prongs, may prejudice debtors who are destitute." *Id.* (citing *In re Mosley*, 330 B.R. 832, 842 (Bankr. N.D. Ga. 2007), *aff'd*, 494 F.3d 1320 (11th Cir. 2007)). The court thus concluded that, at a minimum, it would afford the debtor the opportunity to make her case for the dischargeability of her student loan debt at trial. *See also Nightingale v. N.C. State Educ. Assistance Auth. (In re Nightingale)*, Adv. No. 13-2060, 2015 Bankr. LEXIS 1361 (Bankr. M.D.N.C. Apr. 20, 2015) (denying defendant's motion for summary judgment).

The courts are split and the debate over whether a court may partially discharge a debtor's student loan has grown over the past two decades.[215]

1. Partial discharge allowed

Because of the harsh outcomes most debtors face as a result of the undue hardship tests, some courts allow partial discharges of student loans as a way to "promote[] fairness by affording some relief to the debtor, while ensuring that the government is not unjustly deprived by a complete discharge of student loans that could be repaid in part without imposing 'undue hardship.'"[216]

Some courts in favor of partial discharges infer their authority from the equitable powers codified in section 105(a) of the Bankruptcy Code. Section 105(a) provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[217] Some courts rely on this provision, in connection with section 523(a)(8), to grant a partial discharge of student loan debt by discharging part of the principal, accrued interest, or attorney's fees.[218] For example, the Sixth[219] and Ninth[220] Circuits, have held that bankruptcy courts may exercise their equitable authority under section 105(a) to partially discharge student loan debt.[221] Some commentators have argued that granting partial discharges comports with the legislative history of section 523(a)(8) while ensuring fairness.[222]

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[215] Scott Pashman, Note, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(A)(8): Reassessing "Undue Hardship" After the Elimination of the Seven-Year Exception*, 44 N.Y.L. SCH. L. REV. 605, 617-18 (2001).
[216] *Id*.
[217] 11 U.S.C. § 105(a).
[218] *See e.g., Griffin v. Eduserv (In re Griffin)*, 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996) ("It would be an 'undue hardship' for the Debtors to pay any of the accrued interest and attorneys' fees associated with . . . student loans.").
[219] *See Tenn. Student Assistance v. Hornsby (In re Hornsby)*, 144 F.3d 433, 440 (6th Cir. 1998); *Miller v. Pa. Higher Assistance Agency (In re Miller)*, 377 F.3d 616, 620 (6th Cir. 2004) ("When a debtor does not make a showing of undue hardship with respect to the entirety of her student loans, a bankruptcy court may - pursuant to its § 105(a) powers - contemplate granting . . . a partial discharge of the debtor's student loans.").
[220] *Saxman v. Educ. Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1173 (9th Cir. 2003).
[221] Some bankruptcy courts in other circuits have also seemingly allowed partial discharge of student loan debt. *See Bumps v. Wells Fargo Educ. Fin. Servs. (In re Bumps)*, Adv. No. 6:12-ap-00107-ABB, 2014 Bankr. LEXIS 207, 9-10 (Bankr. M.D. Fla. Jan. 15, 2014) (finding that the debtor had established that it would be an undue hardship if she

2. No partial discharges

Courts in other circuits have held that the Bankruptcy Code does not allow for partial discharge.[223] These opinions adopt the view that Congress's silence in 523(a)(8) should foreclose that possibility. These courts reason that if Congress intended for courts to revise or partially discharge student loans, Congress could have expressly provided for those options in 523(a)(8) or included broader language revealing such equitable solutions as a policy objective.[224] Although the argument for allowing partial discharges is that they seem like a fair and equitable solution to the strict application of the undue hardship exception, this is an argument better made to Congress than to the bankruptcy courts.[225] Several commentators have argued that, until Congress specifically amends section 523(a)(8) to allow for partial discharges, courts must take an all-or-nothing approach.[226]

Critics of a partial discharge also argue that section 105(a) of the Bankruptcy Code does not provide authority for partial discharge or revision of student loans; rather, the equitable powers of bankruptcy courts may only be exercised within the enumerations of the Code. This argument seems particularly relevant in light of the recent Supreme Court decision, *Law v. Siegel*,[227] in which the Supreme Court emphasized that section 105(a) has its limits. The Court

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were forced to repay the loan in full, discharging $12,000 of the loan, and rendering the remaining amount due non-dischargeable).

[222] *See* Bayuk, *supra* note 89; *see also* Bedinger, *supra* note 74, at 1837 ("If Congress leaves § 523(a)(8) in its ambiguous state, the federal circuits should uniformly allow partial discharge of educational debt").

[223] *See e.g., Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 307 (3d Cir. 1995); *Educ. Credit Mgmt. Corp. v. Carter*, 279 B.R. 872, 876 (M.D. Ga. 2002) (concluding that section 523(a)(8) does not allow the bankruptcy court to grant a partial discharge of student loan debt).

[224] *See* Pashman, *supra* note 215, at 617 (citing *Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999)).

[225] Huey, *supra* note 47, at 114 (stating that partial discharges portray an obvious case of judicial lawmaking and add to the unpredictability in this area of bankruptcy law.).

[226] Huey, *supra* note 47, at 114; *see also* Amanda M. Foster, *All or Nothing: Partial Discharge of Student Loans Is Not the Answer to Perceived Unfairness of the Undue Hardship Exception*, 16 WIDENER L.J. 1053, 1084 (2007) (asserting that partial discharge is not permitted because under § 523(a)(8), "the entire debt must create an undue hardship.").

[227] 134 S. Ct. 1188 (2014).

explained, "It is hornbook law that §105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'"[228] Section 105(a) confers authority to "carry out" the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits.[229] This suggests that courts should not necessarily rely on section 105(a) to partially discharge student loan debt.

3. Loan-by-loan approach

Finally, some courts take a "hybrid," or loan-by-loan, approach where the debtor has multiple student loan debts by declaring some, but not all, of the individual loans dischargeable. For example, in *Hinkle v. Wheaton College (In re Hinkle)*,[230] the debtor sought to discharge her student loan debt, consisting of six separate loans. The court found that while it could not bifurcate a single loan into dischargeable and nondischargeable portions, it could conduct an analysis for each separate loan and discharge those loans that would create an undue hardship.[231] The Bankruptcy Appellate Panel recently came to a similar conclusion in *Conway v. National Collegiate Trust (In re Conway)*.[232] The debtor in *Conway* sought to discharge fifteen loans totaling over $100,000. The bankruptcy court found that the debtor's "well-developed writing and reasoning skills" gave her "at least 30 years left to navigate the job market" and turn things around. It denied the debtor's complaint. On appeal, the Bankruptcy Appellate Panel overturned the decision, and insisted that the bankruptcy court evaluate each of the fifteen loans individually to determine which the debtor could reasonably repay them.[233]

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[228] *Id*. at 1194 (citing 2 Collier on Bankruptcy ¶105.01[2], p. 105–6 (16th ed. 2013)).
[229] *Id.* The Court continued: "We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." *Id*. at 1196 (internal citations omitted).
[230] 200 B.R. 690 (Bankr. W.D. Wash. 1996).
[231] The court discharged three of the debtor's six loans, but it failed to provide reasoning as to which three loans should be discharged.
[232] 459 B.R. 416 (8th Cir. B.A.P. 2013), *aff'd*, 2014 U.S. App. LEXIS 10638 (8th Cir. June 9, 2014).
[233] The creditor appealed the decision, and a three-judge panel affirmed the decision in June.

The current debate over partial discharges adds another wrinkle to the student loan issue and shows that bankruptcy courts often struggle with how they should to fairly treat student-loan debtors in the face of harsh "undue hardship" standard.[234]

IX. The future and alternatives

For years, commentators have derided the undue hardship requirement as too burdensome and have attacked the courts for applying the standard in an inconsistent manner.[235] There are many different suggestions for how to change the treatment of student loans in bankruptcy. For example, critics have advocated for: repealing section 523(a)(8) to treat student loan debt like other general unsecured debt; excluding private student loans from the exception (thereby making private student loans dischargeable); reinstating the time-lapse discharge; defining undue hardship with a clear national standard; amending the Code in other ways; encouraging student-loan debtors to pursue federal loan repayment programs; and, finally, risk-based student loans.

1. Repealing section 523(a)(8)

Many commentators and consumer advocates have argued that Congress should repeal section 523(a)(8) to allow student-loan debtors to discharge their student loans.[236] By repealing the undue hardship exception, student loans would be treated like other unsecured debts and would be presumptively dischargeable.[237] This is a fairly popular argument and, in 1997, the

[234] *See* Huey, *supra* note 47, at 115 ("the current debate over partial discharges is one dilemma that has developed as a result of another problem: the current undue hardship tests provide too harsh a burden for most student loan debtors to overcome.").
[235] Iuliano, *supra* note 34, at 525.
[236] *See e.g.,* Linda E. Coco, *Mortgaging Human Potential: Student Loan Indebtedness & the Practices of the Neoliberal State*, 42 SW. L. REV. 565, 599-600 (2013); Huey, *supra* note 47, at 119 ("Congress should repeal 523(a)(8) to enable student loans to be dischargeable under the Bankruptcy Code once again."); Exceptionalism, *supra* note 9, at 598-600 (urging the federal government to begin risk-rating its student loans and to repeal section 523(a)(8)); *see also The Student Loan "Debt Bomb": America's Next Mortgage-Style Economic Crisis?*, NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, www.nacba.org.
[237] Austin, *supra* note 3, at 415 (explaining that many commentators have recommended that student debt be returned to the list of nonpriority general unsecured debt).

National Bankruptcy Review Commission[238] recommended that all educational loans be treated no differently than other unsecured debts.[239] Advocates argue that repealing 523(a)(8) would resolve much of the confusion surrounding the undue hardship exception while also providing student-loan debtors with some recourse.[240] This proposal recognizes that if debtors cannot discharge their student loan obligations they often have little hope of every getting out from under their debt.[241] Pardo and Lacey emphasize this point in writing: "If Congress is actually serious about restoring the social safety net for student-loan debtors, all fingers point for wholesale repeal of the Bankruptcy Code's student-loan discharge provision."[242]

A bill has been introduced in Congress to do just that.[243] H.R. 449 was introduced in the House on January 21, 2015, and proposes to remove section 523(a)(8) from the Code and render student loan debts dischargeable. The "Discharge Student Loans in Bankruptcy Act of 2015" was referred to committee.[244] It has a long way to go before becoming law, but the bill suggests that lawmakers may be increasingly willing to consider changes to the Code.

2. Making private student loans dischargeable

Some have argued that private student loans should be dischargeable. Prior to 1984, student loans obtained from an entity other than a "non-profit institution of higher education" were treated the same in bankruptcy as other unsecured debt, and many believe that private loans

[238] The National Bankruptcy Review Commission is an independent commission established pursuant to the Bankruptcy Reform Act of 1994.
[239] *See* Coco, *supra* note 236, at 599-600 (citing *Nat'l Bankr. Review Comm'n, Bankruptcy: The Next Twenty Years*, NAT'L BANKR. REVIEW COMM'N. 6-17 (Oct. 20, 1997)).
[240] Huey, *supra* note 47, at 119.
[241] Exceptionalism, *supra* note 9, at 604.
[242] Pardo & Lacey, *Scandal*, *supra* note 35, at 182.
[243] Austin, *supra* note 3, at 415 n.567 (citing H.R.J. Res. 365, 112th Cong. (2011), 2011 CONG. U.S. H.RES. 365 (Westlaw)).
[244] The bill was referred to the House Committee on the Judiciary and, on February 5, 2015, it was referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law.

should be dischargeable to the same extent as other unsecured debt.[245] Supporting this proposal is the fact that eligibility for a private educational loan is already based on the borrower's creditworthiness.

H.R. 5043, the Private Student Loan Bankruptcy Fairness Act of 2010, would have reversed the amendments of 2005 and removed bankruptcy protections for for-profit student lenders. A similar companion bill was introduced in the senate. The House bill was sent to committee but never made it to a vote on the floor; the Senate bill also stalled.[246] The student loan industry opposed the legislation.[247] While H.R. 5043 did not succeed, it did incite interest in student loan reform.[248] Similar legislation was introduced in the House[249] and the Senate[250] earlier this year.

3. Reinstating the time-lapse discharge

Some have argued that Congress should reinstate a time-lapse discharge. From 1978 to 1990, unless he could prove undue hardship, a debtor had to wait five years after a loan first became due before the debt could be discharged in bankruptcy.[251] From 1990 to 1998 that time was extended to seven years. Those in favor of reinstating the older language argue that a time-

[245] Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 234 (2012).
[246] Brendan Baker, Comment, *Deeper Debt, Denial of Discharge: the Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, & Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1221-22 (2012).
[247] Interestingly, a spokeswoman for Sallie Mae indicated that the while the company wanted to private student loans to receive the same protections as federal student loans, the company would support "reform that would allow federal and private student loans to be dischargeable in bankruptcy for those who have made a good-faith effort to repay their student loans over a five-to-seven-year period and still experience financial difficulty." It thus seems that the loan industry might be somewhat willing to reinstate the time lapse rule that was eliminated in 1998. *Id*. at 1222-23.
[248] *Id*. at 1223.
[249] H.R.1131, the Fairness in Student Loan Lending Act, would allow debtors with private student loans the ability to discharge those private loans in bankruptcy. The bill was introduced in the House on February 26, 2015, and has since been referred to the Subcommittee on Higher Education and Workforce Training.
[250] S.729, the Fairness for Struggling Students Act of 2015, was introduced in the Senate on March 12, 2015. It similarly proposes to place private student loans on equal footing with other consumer debts. The bill was read twice and referred to the Committee on the Judiciary.
[251] Austin, *supra* note 3, at 416.

lapse balances the equitable interests of borrowers with the need to prevent potential abuse.[252] One commentator has likened time-lapse discharge to the discharge of tax debt, noting that most tax debt can be discharged after three years of its accrual, thus mitigating the soft fraud of new graduates filing for bankruptcy promptly upon graduation.[253]

4. A national standard for undue hardship

Alternatively, Congress could define the term "undue hardship." Some have argued that Congress should adopt a national standard for undue hardship that would test whether the debtor is able to afford to pay the debt. Such a standard would allow bankruptcy courts to take a more uniform approach in determining whether to discharge a debtor's student loan debt.[254] One author suggests using the current "means test" for the chapter 7 and 13 bankruptcy petitions in order to determine a debtor's ability to maintain a minimal standard of living under the first prong of the Brunner Test.[255] Another has argued that the Brunner Test does a good job of analyzing "undue hardship" and should stay, but that the test should be modified to shift the burden of proof regarding "additional circumstances" from the debtor to the party opposing dischargeability.[256] Another has advocated for a less restrictive test or one that would consider educational benefits actually obtained under the "additional circumstances" prong.[257]

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[252] Alexander Yi, *Reforming the Student Debt Market: Income-Related Repayment Plans or Risk-Based Loans?*, 21 VA. J. SOC. POL'Y & L. 511, 544-545 (2014) ((starting that a time bar would prevent opportunistic borrowers from using bankruptcy to obtain a free education while still allowing student debtors "to seek the shelter provided the Bankruptcy Code.").

[253] *Id.*; *see also* Abbye Atkinson, *Race, Education Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 36-37 (2010).

[254] Smith, *supra* note 141, at 257.

[255] *Id.*

[256] Grant, *supra* note 36, at 847.

[257] *Forgive, supra* note 112, at 2027-2028 (arguing that courts should consider the educational benefits actually obtained by a student – i.e. the quality of the education and type of degree program – in assessing whether an individual debtor's inability to meet his or her loan obligations is likely to persist for the foreseeable future).

Some have also suggested that section 524(m)'s definition of "undue hardship" should inform the meaning of "undue hardship" under section 523(a)(8).[258] Section 524(m) provides that a debtor is not permitted to reaffirm debts – that is, agree to pay a debt otherwise subject to discharge – if those debts pose an undue hardship. The term is defined as a situation in which a debtor's monthly net income simply is not enough to permit payment of the specific debt.[259] Notably, the definition does not include a "good faith" or "certainty of hopelessness" requirement.[260]

5. Amending the Code in other ways

One author has proposed that the Code be amended to include a new claim of an education loan or education benefit creditor: if the debtor wants any of his education debt discharged, then instead of filing an adversary proceeding to establish undue hardship under section 523(a)(8), the debtor would file a motion to determine the fair market value of his student loan debt.[261] The motion would be similar to a motion to determine the value of a secured interest under section 506.[262] The amount of the claim equal to the fair market value would be nondischargeable; the remaining balance would be treated as dischargeable, general unsecured

[258] *See e.g.,* Bedinger, *supra* note 74, at 1839; Kaplan, *supra* note 121; Pardo & Lacey, *Empirical Assessment*, *supra* note 69, at 510-14.

[259] Section 524(m) provides: "it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt." 11 U.S.C. § 524(m).

[260] Note that even if this definition is applied, the debtor may still not be able to discharge student loan debts. *See Hansen v. Sallie Mae, Inc.*, Case No. 12:14-cv-00116-MJP (W.D. Wa. Aug. 14, 2014) (affirming the decision of the bankruptcy court that had applied the definition in section 524(m) and found that the definition did not alter the analysis because "the debtor can still make the payments"); *Vasilyeva v. Edu. Resources Inst., Inc.*, Case No. 09-709 (D.N.J. Oct. 20, 2009) (finding that issues of reaffirmation of dischargeable debt were inapposite and that, accordingly, the bankruptcy court did not err in applying the Brunner Test rather than the presumption under section 524(m)).

[261] Austin, *supra* note 3, at 417-19. The author suggests that fair market value means the amount that an investor would pay to purchase the respective student loan obligation. He states that it would not be difficult to determine the fair market value of student loans because there is an active secondary market in bonds backed by bundles of student loans. *Id*.

[262] *Id*.

debt.[263] While this is a unique idea (it has yet to be embraced by others), it suggests that there may be other ways to deal with student loan debt in bankruptcy.[264]

6. Restricting access on the front end: risk-based pricing

Others have proposed changes to the student loan process that would make access to loans more difficult.[265] According to these proposals, the Government should price its student loans by looking at a student's post-graduation employment prospects.[266] Risk-based pricing of student loans would signal the long-term financial risks inherent in different courses of study. A fully risk-based approach to loan limits would focus on expected debt-service- payment-to-income ratios.[267] The relevant question would not simply be how much students borrow each year; instead, the focus would be on whether students' incomes at graduation and beyond will be sufficient to repay their debts over the next ten to thirty years.[268] According to one paper, the Government should consider 1) the institution the borrower plans to attend and 2) the course of study the borrower pursues.[269] Risk-based pricing would help students understand the links between educational choices, such as picking a major, and employment opportunities.[270]

This proposal seems somewhat likelier than others. In August 2013, President Obama proposed a college rating system that would rate colleges on value and performance. Under this system, high-scoring colleges would receive more federal student aid or better interest rates on federal loans. Education Secretary Arne Duncan has defended the idea, saying that "helping

[263] *Id*.
[264] Along those lines, another author has suggested amending section 523(a)(8) to define undue hardship and to allow for partial discharge. *See* Bedinger, *supra* note 74, at 1836-1837. For more on partial discharges, see discussion *supra*.
[265] *See* Exceptionalism, *supra* note 9, at 598-600 (urging the federal government to begin risk-rating its student loans and to repeal section 523(a)(8)); Yi, *supra* note 252, at 544-545 (arguing for a risk-based student loan policy in conjunction with a revision of the Bankruptcy Code); *see also* Beauchamp & Cooper, *supra* note 182, at 559-560 (discussing proposals).
[266] Exceptionalism, *supra* note 9, at 598-600.
[267] *See* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527 (2013).
[268] *Id*.
[269] *Id*. at 599. The article also argues that Congress should repeal section 523(a)(8). *Id*. at 603-610.
[270] *See id*.

young people and families have more information and make better choices."[271] While this proposal has several proponents, there are still many who are skeptical.[272]

Legislation has also been introduced to allow student-loan debtors the ability to refinance certain student loans. H.R. 1131, the Fairness in Student Loan Lending Act, was introduced in the House in February 2015. Under the bill, student loan borrowers in good standing would be able to refinance their loans to a rate equal to the 10-year Treasury note on the last day of business of the previous month plus one percent.[273]

7. Encourage students to pursue remedies available through federal programs

Some argue that student-loan debtors struggling to repay their educational debt should strongly consider alternative repayment programs. The President recently directed the Secretaries of Education and the Treasury to work together to help borrowers manage their student loan debts, in part by promoting awareness of repayment options.[274] While these alternative repayment programs are not a silver bullet, they may provide a debtor some breathing room and flexibility while he attempts to repay student loan debt. A debtor's efforts to explore an income contingent repayment plan or loan consolidation options may also be relevant if bankruptcy courts continue to apply the Brunner Test – such efforts often indicate that a debtor is putting forth his best efforts to repay the loan obligations in light of her financial circumstances.

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[271] Nick Anderson, *Duncan defends Obama's college rating plan*, THE WASHINGTON POST (Dec. 13, 2013), http://www.washingtonpost.com/local/education/duncan-defends-federal-college-rating-plan-one-week-after-napolitano-voiced-skepticism/2013/12/13/9b9f4af0-640e-11e3-a373-0f9f2d1c2b61_story.html.

[272] *Id.*

[273] For example, a borrower who refinanced in February 2015 could refinance to a rate of 2.64%.

[274] Memorandum from President Barack Obama for the Secretary of the Treasury and the Secretary of Education, *Helping Struggling Federal Student Loan Borrowers Manage Their Debt* (June 9, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments.

X. Conclusion

While debtors can generally use bankruptcy to deal with insurmountable debts, student-loan debtors encounter tough obstacles to discharge. Academics have argued that the undue hardship standard is burdensome and applied in a harsh and inconsistent manner. Recent studies suggest that debtors often do not even attempt to discharge their student loans. Commentators have proposed a variety of remedies, from simply encouraging debtors to file adversary proceedings to repealing 523(a)(8). Recently, the issue of student-loan debt in bankruptcy has garnered national attention and calls for reform have increased and; it seems likely that both trends will continue.

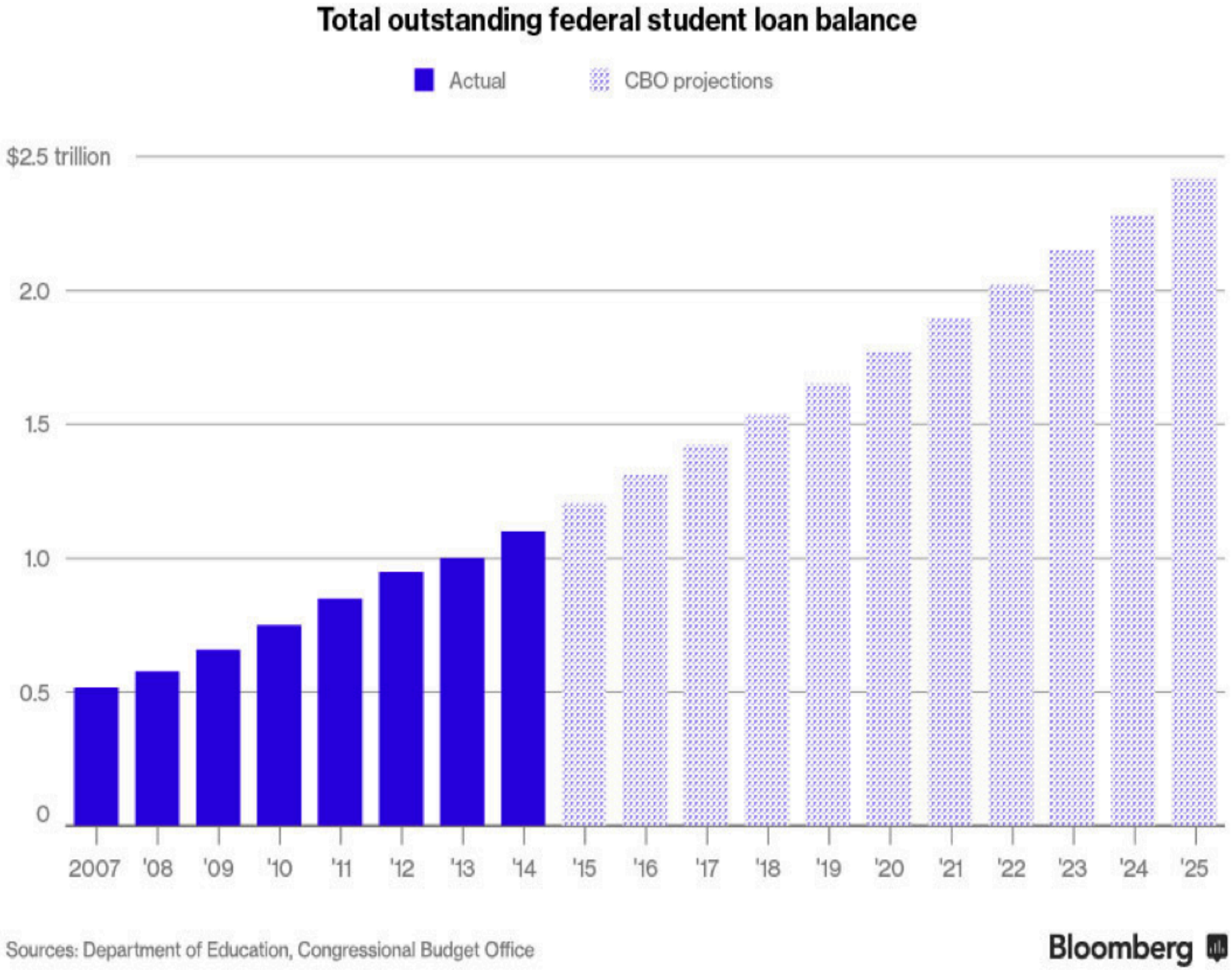
Student Loan Discharges:

Where Are We In 2015?

Hon. C. Ray Mullins,
Moderator
Prof. Susan E. Hauser
Erlene W. Krigel
Hon. Cynthia A. Norton

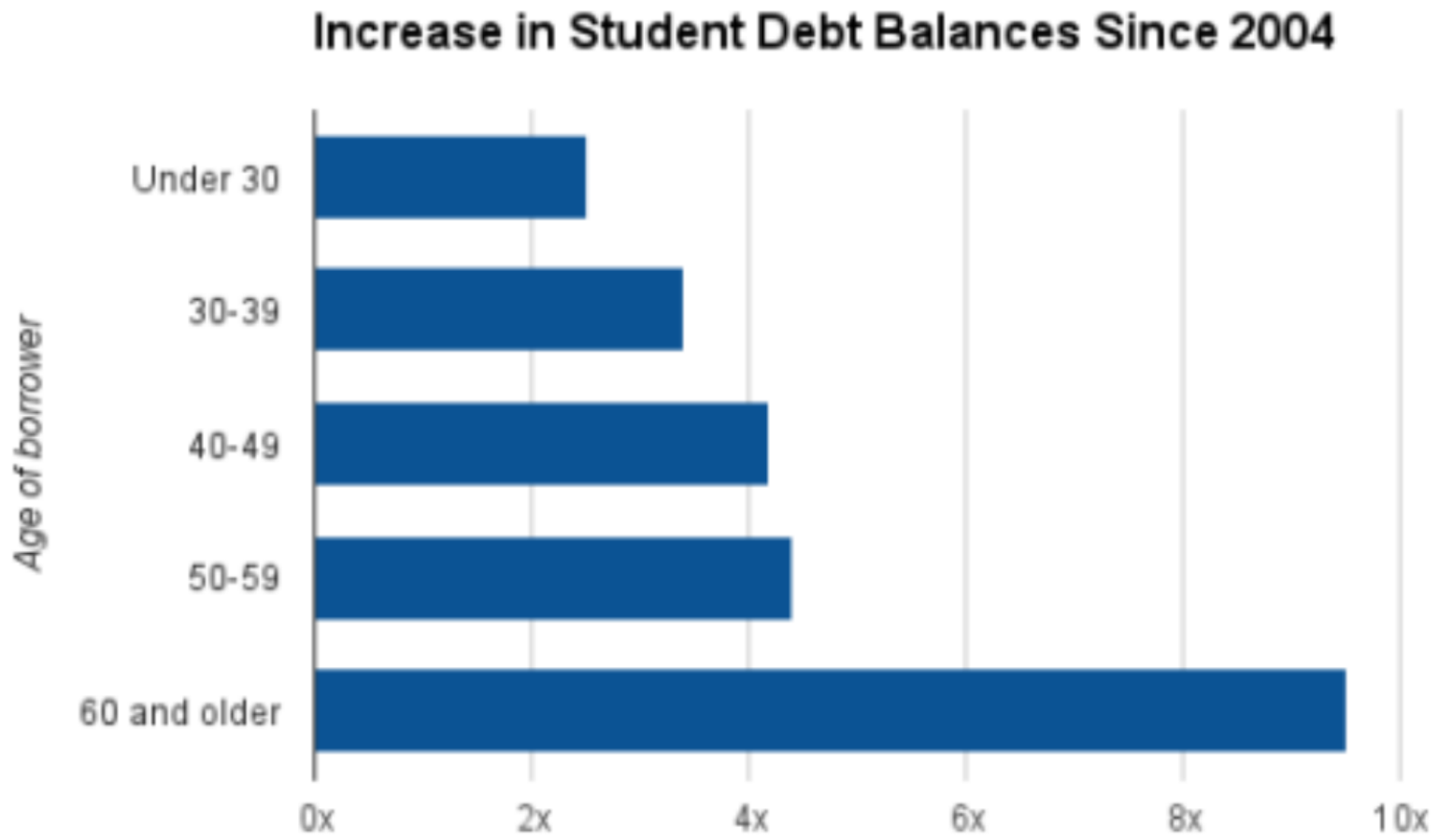
Part I: *Introduction*

Federal Student Loan Portfolio Projected to Double by 2025



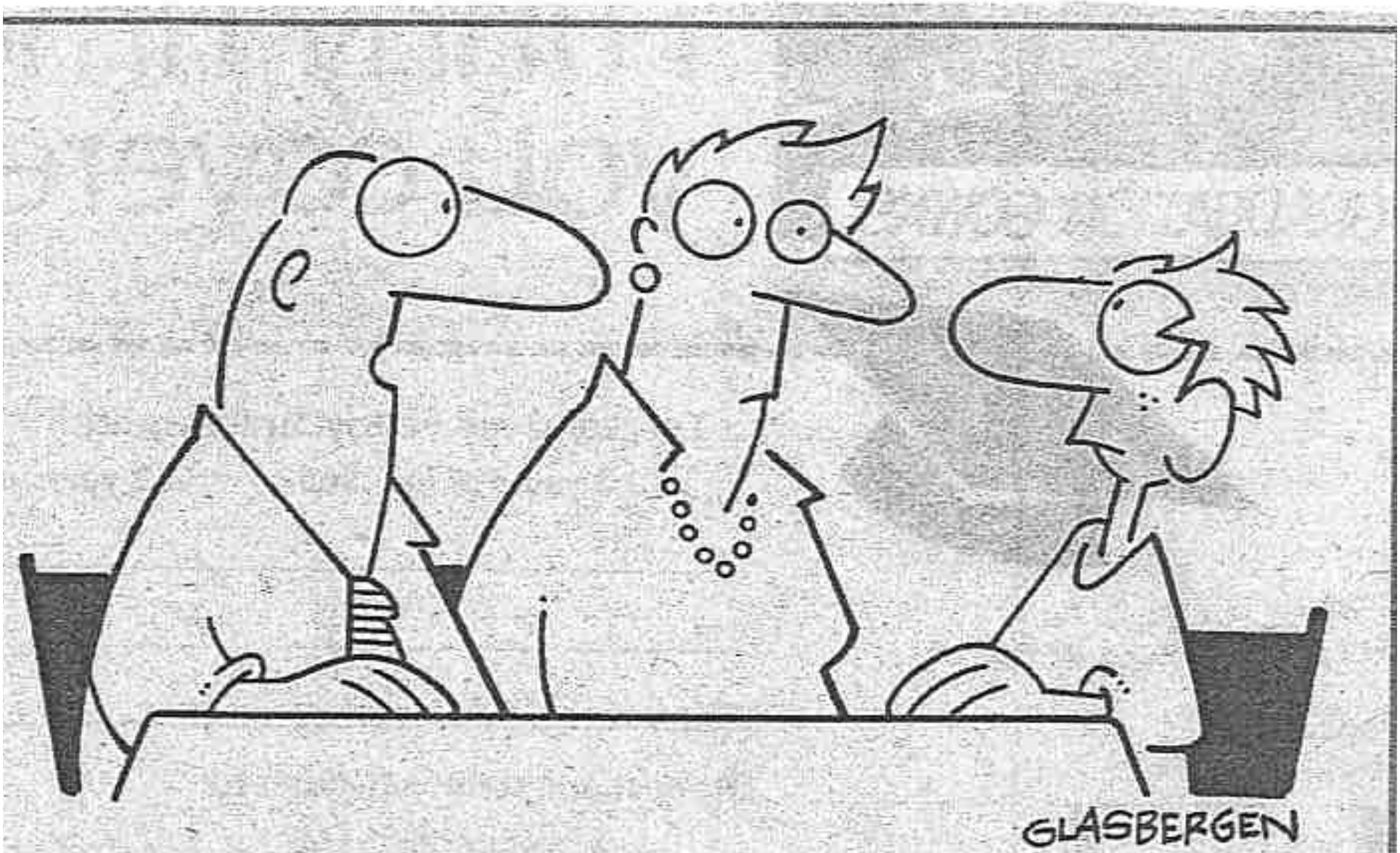
Sources: Department of Education, Congressional Budget Office

Bloomberg


Increase in Student Debt Balances Since 2004
Age of borrower
Under 30
30-39
40-49
50-59
60 and older
0x
2x
4x
6x
8x
10x

Part II: If it Walks Like a Duck…

When is a loan an "Educational Loan"



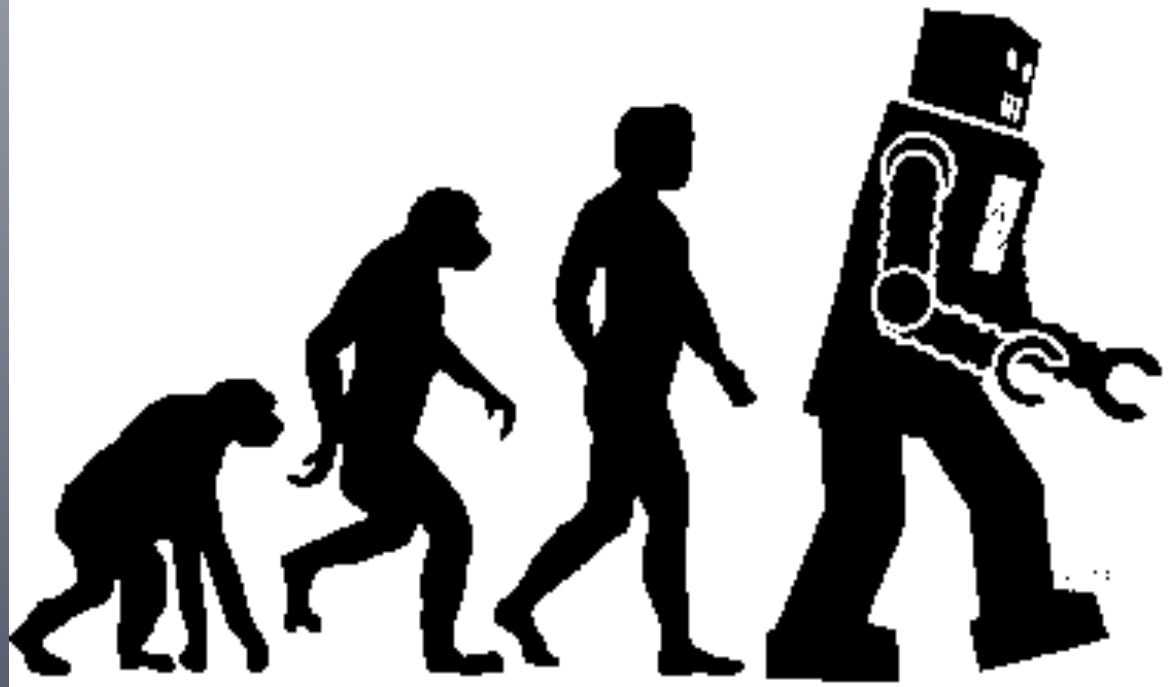
"We'll pay for your college, but only if you go to law school and handle our bankruptcy when you graduate."

What is an "Educational Loan"?

- Code does not define
- 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 compared to 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 in this area and cases dealing with a third party's advance of funds for an educational expense

Part III: The *Brunner*/Totality Tests

Are the Tests Evolving?



The *Brunner* Test

- (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 the loan.

CRITICISM OF *BRUNNER*

- *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."

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 loans covered by the statute.

2. Educational borrowing has changed dramatically since 1987.

Standard of Appellate Review

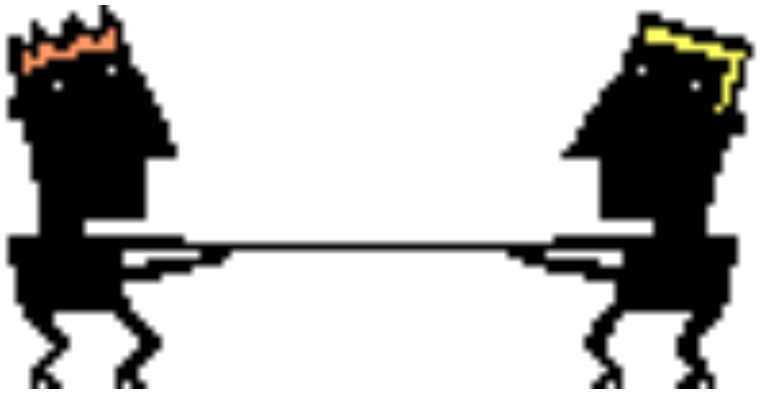
- **Majority rule: Undue hardship is a question of law reviewed *de novo* on appeal.**
  - **On appeal, a bankruptcy court's findings of fact are subject to "clear error" review and will stand if reasonably supported.**
  - **Questions of law are subject to *de novo* review.**
- **Recent circuit court 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).**

One More Possible Change

- *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)
- Calendared for argument before the First Circuit on November 5, 2015
- Significance: The First Circuit has never adopted a test for undue hardship.
  - Amicus briefs urge the First Circuit to reject both *Brunner* and the totality of the circumstances test

Part IV: Partial Discharge?

Courts Are Split



#1: All-Or-Nothing or Strict Approach

2: Flexible Approach

3: Hybrid Approach

- Conway 495 BR 416 8th Cir BAP (2013)

Part V: IBR & Other Options

Income-Based Repayment Plans

- 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)

Income-Based Repayment Plans

- 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

Income-Based Repayment Plans

- 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)

Part VI: Will Chapter 13 Work?

Classification Update

- *Copeland/Groves* in 8th Cir – no separate classification for student loans – uses 4 part *Leser/Wolff* test

- *Stull/Knowles* – D. Kan – use the *Bentley* test

Another Twist on Classification

ontract?

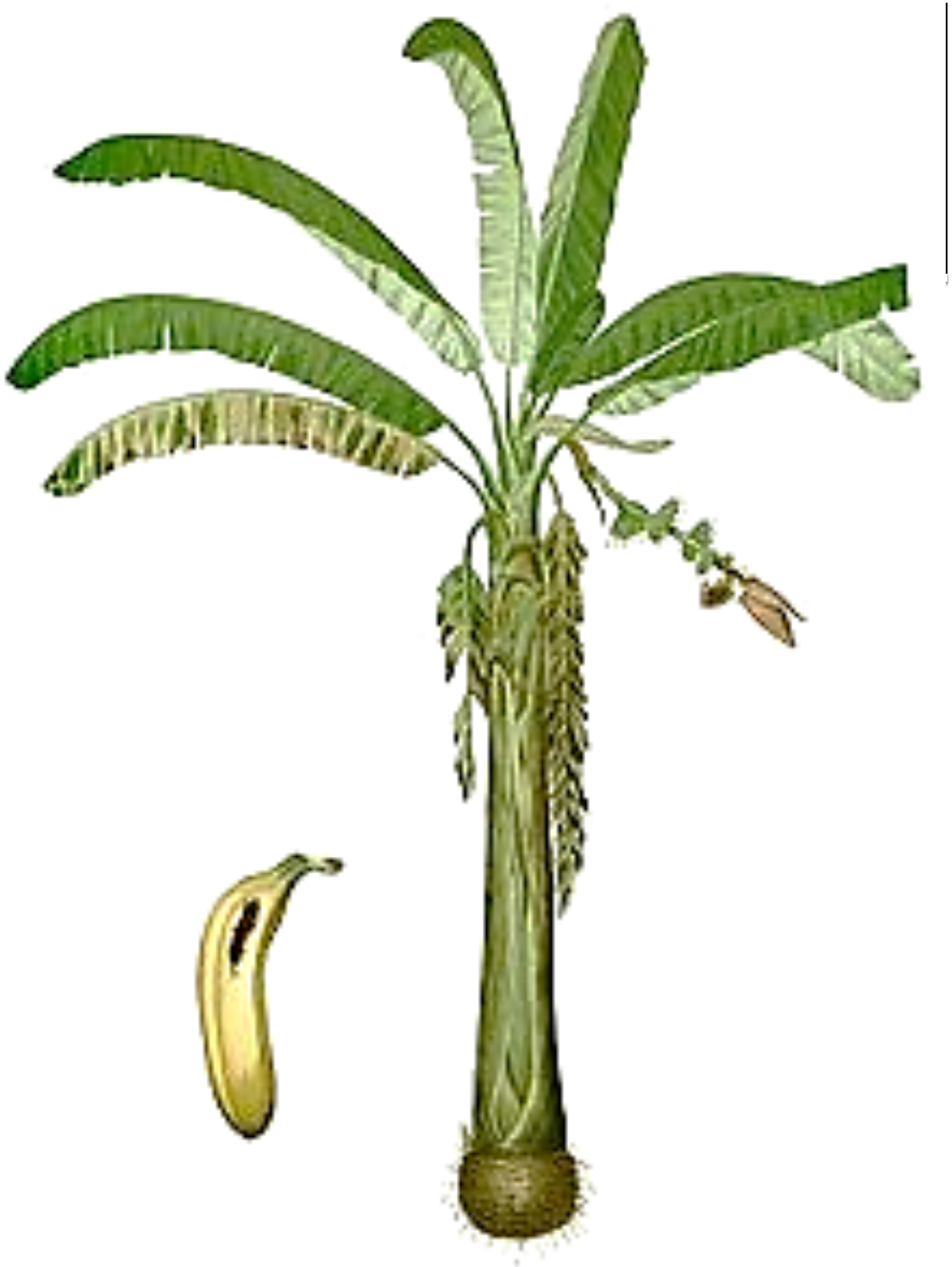
;

Equitable Estoppel?

Ripeness?

- *Murray* – D. Kan
at least 12 mos.

- *Bender*, 8th Cir
"relatively close" to discharge



Part VII: Legislative/Regulatory Update


LOAN

The End
Fin