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Bankruptcy and Student Loans

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SUMMARY

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Bankruptcy and Student Loans

As overall student loan indebtedness in the United States has increased over the years, many borrowers have found themselves unable to repay their student loans. Ordinarily, declaring bankruptcy is a means by which a debtor may discharge—that is, obtain relief from—debts he is unable to repay. However, Congress, based upon its determination that allowing debtors to freely discharge student loans in bankruptcy could threaten the student loan program, has limited the circumstances in which a debtor may discharge a student loan. Under current law, a debtor may not discharge a student loan unless repaying the student loan would impose an "undue hardship" upon the debtor and his dependents.

The Bankruptcy Code does not define "undue hardship," and the legislative history of the relevant statutory provision does not precisely specify how courts should determine whether a debtor qualifies for an undue hardship discharge. The task of interpreting this statutory term has consequently fallen to the federal judiciary. Courts, however, have disagreed regarding exactly what a debtor must prove in order to discharge a student loan on undue hardship grounds.

The vast majority of courts have interpreted "undue hardship" to require the debtor to prove three things: (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) additional circumstances exist indicating that the debtor's inability to pay is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. The debtor must prove each of these elements by a preponderance of the evidence. This standard is commonly called the "*Brunner*" test, after the case in which the standard originated. The *Brunner* test is highly fact-intensive, and not all courts apply the *Brunner* standard the same way. Indeed, each factor has resulted in various subsidiary splits in the courts with respect to a host of issues.

Whereas the vast majority of courts apply the *Brunner* test to determine whether excepting a student loan from discharge would impose an undue hardship upon the debtor, two courts have explicitly declined to adopt the *Brunner* standard. Instead, these courts apply an alternative standard known as "the totality-of-the-circumstances test," weighing numerous, nonexclusive factors when considering whether student loan debt should be discharged.

In response to this split of authority, as well as calls to make student loans less difficult to discharge in bankruptcy, some Members of Congress and commentators have advanced various proposals to amend or repeal the Bankruptcy Code's undue hardship provision. These proposals implicate a variety of legal issues that Congress may consider.

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Introduction

The aggregate student loan debt owed by borrowers in the United States has increased markedly over time. According to the U.S. Department of Education (ED), "[a]verage tuition prices have more than doubled at U.S. colleges and universities over the past three decades, and over this time period a growing proportion of students borrowed money to finance their postsecondary education."[1] Per ED's Federal Student Aid Data Center, the total amount of outstanding federal student loan debt exceeded $1.4 trillion at the end of the first quarter of 2019.[2]

As overall student loan indebtedness has increased, many borrowers have found themselves unable to repay their student loans. Statistics published by ED suggest that many borrowers face an average educational debt burden that exceeds the "manageable percentage of income that a borrower can" realistically "be expected to devote to loan payment" while still providing for the basic needs of himself and his household.[3]

Declaring bankruptcy is one means by which an individual may potentially obtain relief from a student loan that he cannot repay.[4] However, for public policy reasons, the Bankruptcy Code[5] limits the circumstances in which a debtor may discharge—that is, obtain relief from—a student loan through the bankruptcy system. Unlike many other types of consumer debts, which are generally freely dischargeable in bankruptcy,[6] student loans are dischargeable only if the debtor proves that repaying the debt "would impose an undue hardship on the debtor and the debtor's dependents."[7] By requiring the debtor to demonstrate an undue hardship in order to discharge a student loan, Congress attempted to balance the goal of providing debtors in dire financial straits with a "fresh start" against the countervailing goals "of preventing abuse of the student loan program"[8] and "protect[ing] student loan programs and their participants."[9] However, as this

[1] Nat'l Ctr. for Educ. Statistics, *Stats in Brief: Use of Private Loans by Postsecondary Students: Selected Years 2003-04 Through 2011-12*, U.S. DEP'T OF EDUC. 1 (2016), https://nces.ed.gov/pubs2017/2017420.pdf [hereinafter *Private Loans*].

[2] Fed. Student Aid, *Federal Student Loan Portfolio*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited June 16, 2019).

[3] Nat'l Ctr. for Educ. Statistics, *Stats in Brief: The Debt Burden of Bachelor's Degree Recipients*, U.S. DEP'T OF EDUC.16 (2017), https://nces.ed.gov/pubs2017/2017436.pdf [hereinafter *Debt Burden*].

[4] For a discussion of other means by which a debtor may potentially obtain relief from student loan debt, including repayment plans, borrower repayment relief, loan discharge, and loan forgiveness, see CRS Report R40122, *Federal Student Loans Made Under the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers*, by David P. Smole, at 20-32, 34-38; and CRS Report R43571, *Federal Student Loan Forgiveness and Loan Repayment Programs*, coordinated by Alexandra Hegji [hereinafter Hegji, *Forgiveness and Loan Repayment*].

[5] 11 U.S.C. §§ 101-1532.

[6] *E.g.*, Daniel A. Austin, *Student Loan Debt in Bankruptcy: An Empirical Assessment*, 48 SUFFOLK U. L. REV. 577, 579 (2015) [hereinafter Austin, *Student Loan Debt*].

[7] 11 U.S.C. § 523(a)(8).

[8] *E.g.*, Cheesman v. Tenn. Student Assistance Corp. (*In re* Cheesman), 25 F.3d 356, 361 (6th Cir. 1994).

[9] Hoffman v. Tex. Guaranteed Student Loan Corp. (*In re* Williams), Case No. 15-41814, Adv. No. 16-4006, 2017 WL 2303498, at *4 (Bankr. E.D. Tex. May 25, 2017). *See also, e.g.*, De La Rosa v. Kelly (*In re* Kelly), 582 B.R. 905, 909 (Bankr. S.D. Tex. 2018) ("§ 523(a)(8) balances two competing policy objectives: (1) the debtor's right to a fresh start; and (2) the need to protect the financial integrity of educational loan programs and to induce lenders to lend to students who cannot qualify for loans under traditional underwriting standards."); Brown v. Rust (*In re* Rust), 510 B.R. 562, 566 (Bankr. E.D. Ky. 2014) (same).

report explains, courts have reached divergent conclusions regarding exactly what an "undue hardship" entails.

More broadly, some Members of Congress, courts, scholars, and other commentators have debated whether to amend the Bankruptcy Code to change the way that student loans are treated in bankruptcy in order to rebalance these competing policy objectives. Whereas some support the law in its current form,[10] there are presently several bills pending in the 116th Congress that, if enacted, would modify the treatment of student loans in bankruptcy.[11]

This report provides a comprehensive overview of the various legal issues related to whether—and under what circumstances—a debtor may discharge a student loan in bankruptcy. The report begins by providing general background on bankruptcy law and the principles governing the discharge of outstanding debt. In so doing, the report explains how and why the Bankruptcy Code generally makes student loans nondischargeable absent an "undue hardship." The report then describes the various legal standards that courts have applied when determining whether a particular debtor is entitled to an undue hardship discharge. The report closes by describing various potential considerations for Congress, including ways in which Congress could alter the Bankruptcy Code's current treatment of student loans.

Background on Bankruptcy Law

Declaring bankruptcy is a means by which individuals may potentially obtain relief from debts that they are unable to pay.[12] According to the U.S. Supreme Court, one of the "central purposes" of the bankruptcy system "is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'"[13] The Bankruptcy Code implements this "fresh start" principle by "forgiv[ing] [the debtor's] existing debt" and "restor[ing] the debtor to economic productivity" in exchange for the debtor giving up either a subset of his assets or a portion of his future income.[14]

An individual who satisfies the Bankruptcy Code's eligibility requirements[15] may attempt to obtain bankruptcy relief by filing a document known as a bankruptcy "petition"[16] in a federal bankruptcy court—a specialized court authorized to resolve certain bankruptcy-related matters.[17]

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[10] *See* 124 CONG. REC. 1795 (1978) (statement of Rep. Michel) (contending that "restrictions on student bankruptcies" are "logical"). *Cf.* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 495 (2012) (rejecting arguments that the existing standard for discharging student loans is "unduly burdensome").

[11] *See infra* "Legal Issues Congress Could Consider."

[12] *See generally* CRS Report R45137, *Bankruptcy Basics: A Primer*, by Kevin M. Lewis.

[13] Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

[14] 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, 414 (2005) [hereinafter Pardo & Lacey, *Empirical Assessment*]. Bankruptcy may impose other costs upon the debtor as well. *See, e.g.*, Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 186 (2005) (emphasizing "the wide array of bankruptcy's costs," including "a large outlay for an attorney's fee" and "an increase in the cost of credit").

[15] *See generally* 11 U.S.C. § 109.

[16] *Id*. § 301(a) (governing the commencement of a voluntary bankruptcy case).

[17] *See* 28 U.S.C. § 157(b) ("Bankruptcy judges may hear and determine all cases under [the Bankruptcy Code] and all core proceedings arising under [the Bankruptcy Code], or arising in a case under [the Bankruptcy Code] . . . .").

If the debtor complies with certain requirements of the Bankruptcy Code,[18] the bankruptcy court may grant the debtor a "discharge"—that is, relief from many of the debtor's outstanding debts.[19] "In essence, this discharge means that a debtor will no longer face responsibility for" many debts that arose prior to the date upon which he filed bankruptcy, "even if the debtor has not repaid the debt in full during the bankruptcy."[20]

The Dischargeability Exception for Student Loans

Although many types of consumer debts are freely dischargeable in bankruptcy,[21] Congress has rendered certain debts categorically or presumptively nondischargeable for public policy reasons.[22] For example, whereas "medical debt is generally dischargeable in bankruptcy,"[23] a debt "for a domestic support obligation"[24] or a debt "for death or personal injury" resulting from drunk driving is generally nondischargeable.[25]

Under current law, student loans are among the types of debts that Congress has opted to make presumptively nondischargeable in bankruptcy. Section 523(a)(8) of the Bankruptcy Code provides that, absent an "undue hardship"—an exception that is discussed in more detail below—a debtor who files bankruptcy may not discharge any debt for

- "An educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution";[26]
- "An obligation to repay funds received as an educational benefit, scholarship, or stipend";[27] or

[18] *See, e.g.*, 11 U.S.C. § 521 (establishing duties a debtor must fulfill); *id*. § 727(a)(1)-(12) (enumerating circumstances disentitling a debtor to a discharge); *id*. § 1322(a)(1) (requiring a Chapter 13 debtor to relinquish future income pursuant to the terms of a plan to adjust the debtor's debts).

[19] *See id*. §§ 727, 1328, 1141(d). *See generally* Lewis, *supra* note 12, at 25-27 (describing the bankruptcy discharge in greater detail).

[20] Theresa J. Pulley Radwan, *Determining Congressional Intent Regarding Dischargeability of Imputed Fraud Debts in Bankruptcy*, 54 MERCER L. REV. 987, 992 (2003) [hereinafter Radwan, *Congressional Intent*].

[21] *E.g.*, Austin, *Student Loan Debt*, *supra* note 6, at 579.

[22] *See In re* Chambers, 348 F.3d 650, 653 (7th Cir. 2003) ("Congress has decided . . . that some public policy considerations override the need to provide the debtor with a fresh start, and it has excluded certain debts from discharge."). *See generally* 11 U.S.C. § 523.

[23] Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 977 (2017) [hereinafter Atkinson, *Consumer Bankruptcy*].

[24] 11 U.S.C. § 523(a)(5). *See also id*. § 101(14A) (defining "domestic support obligation").

[25] *Id*. § 523(a)(9).

[26] *Id*. § 523(a)(8)(A)(i). To determine whether a loan or benefit is "educational" for the purposes of Section 523(a)(8)(A)(i), courts generally examine the purpose of the loan, not how the debtor used the loan's proceeds. *See* Busson-Sokolik v. Milwaukee Sch. of Eng'g (*In re* Busson-Sokolik), 635 F.3d 261, 266-67 (7th Cir. 2011); Page v. JP Morgan Chase Bank (*In re* Page), 592 B.R. 334, 336 (B.A.P. 8th Cir. 2018); Jean-Baptiste v. Educ. Credit Mgmt. Corp. (*In re* Jean-Baptiste), 584 B.R. 574, 585 (Bankr. E.D.N.Y. 2018). So, for instance, "rather than trying to determine whether a computer purchased with loan money was used for schoolwork, personal use or some combination of both," courts instead inquire "whether the lender's agreement with the borrower was predicated on the borrower being a student who needed financial support to get through school." *See, e.g.*, *Busson-Sokolik*, 635 F.3d at 266. For analysis of Section 523(a)(8)(A)(i)'s "funded in whole or in part by a governmental unit or nonprofit institution" language, see, e.g., *Page*, 592 B.R. at 337-39 & nn.1-2; Wiley v. Wells Fargo Bank, N.A., 579 B.R. 1, 6-7 (Bankr. D. Me. 2017).

[27] 11 U.S.C. § 523(a)(8)(A)(ii). Notably, "the Bankruptcy Code does not define [the term] 'educational benefit'" in Section 523(a)(8)(A)(ii). *E.g.*, Beesley v. Royal Bank of Can., Bankr. No. 12-24194-CMB, Adv. No. 12-2444-CMB,

- "Any other educational loan that is a qualified education loan, as defined in [the Internal Revenue Code], incurred by a debtor who is an individual."[28]

For the sake of simplicity, this report refers to all three of these types of debts as "student loans."[29]

2013 WL 5134404, at *4 (Bankr. W.D. Pa. Sept. 13, 2013). Perhaps for that reason, courts have disagreed regarding which types of obligations qualify as presumptively nondischargeable under 11 U.S.C. § 523(a)(8)(A)(ii). *See, e.g.*, McDaniel v. Navient Solutions, LLC (*In re* McDaniel), 590 B.R. 537, 546 (Bankr. D. Colo. 2018) ("Courts in other jurisdictions are divided . . . with some courts holding private loans that provide an educational benefit to the borrower fall within Section 523(a)(8)(A)(ii) . . . and other courts embracing a much narrower view, holding such educational loans are not included within this particular subsection . . . ."). The modern trend is to interpret Section 523(a)(8)(A)(ii) narrowly to exclude loans from the subsection's coverage. *See McDaniel*, 590 B.R. at 547, 549 (adopting the "trending narrower view of Section 523(a)(8)(A)(ii)" and concluding that "'an obligation to repay funds received as an educational benefit, scholarship, or stipend' does not include a loan"). *See also* Homaidan v. SLM Corp. (*In re* Homaidan), 596 B.R. 86, 106 (Bankr. E.D.N.Y. 2019) ("The Court concludes that, in substance, an 'obligation to repay funds received as an educational benefit' refers to the wide range of benefits that aid a student in meeting the costs of his or her education, often with conditions and prospective obligations attached. But it does not include *all* debt that confers the benefits of an education on the borrower.").

[28] 11 U.S.C. § 523(a)(8)(B). *See also, e.g.*, *Wiley*, 579 B.R. at 9-13 (analyzing Section 523(a)(8)(B)'s coverage).

[29] As the preceding footnotes reflect, however, generically using the term "student loan" to describe the three categories of obligations covered by Section 523(a)(8) is in certain respects both overinclusive and underinclusive. For instance, to the extent that some—albeit not all—courts have concluded that Section 523(a)(8) does not cover certain types of loans incurred for educational purposes (such as bar exam loans), it may be overly broad to state that Section 523(a)(8) renders "student loans" presumptively nondischargeable. *See* Campbell v. Citibank, N.A. (*In re* Campbell), 547 B.R. 49, 52 (Bankr. E.D.N.Y. 2016) ("Because the Bar Loan is not an 'educational benefit' within the meaning of § 523(a)(8)(A)(ii), and is not encompassed in any other exception to discharge set forth in § 523(a)(8), the Bar Loan is dischargeable . . . ."). *But see* Brown v. CitiBank, N.A. (*In re* Brown), 539 B.R. 853, 860 (Bankr. S.D. Cal. 2015) ("[T]he court holds that the subject bar study loan is an education loan for § 523(a)(8) purposes, and thus not dischargeable in bankruptcy absent a showing of undue hardship."); Skipworth v. Citibank Student Loan Corp. (*In re* Skipworth), Bankr. No. 09-83982-JAC-7, Adv. No. 09-80149-JAC-7, 2010 WL 1417964, at *2 (Bankr. N.D. Ala. Apr. 1, 2010) ("[T]he debtor's obligation to Citibank is clearly 'an obligation to repay funds received as an educational benefit' for purposes of § 523(a)(8)(A)(ii) in that Citibank loaned funds to the debtor to assist the debtor with his educational expenses[,] i.e. the debtor's bar review course.").

At the same time, stating that Section 523(a)(8) covers "student loans" is in some respects overly narrow, as Section 523(a)(8) explicitly applies to certain types of obligations that do not qualify as "loans," such as "obligation[s] to repay funds received as [a] . . . scholarship." *See* 11 U.S.C. § 523(a)(8)(A)(ii). *See also, e.g.*, *Wiley*, 579 B.R. at 9 (concluding that "Congress . . . envisioned section 523(a)(8)(A)(ii) capturing 'obligations other than those arising from traditional student loans'") (quoting Inst. of Imaginal Studies v. Christoff (*In re* Christoff), 527 B.R. 624, 634 n.9 (B.A.P. 9th Cir. 2015)).

In many cases in which a bankrupt debtor desires to discharge an education-related debt, none of the parties dispute that the debt in question qualifies as presumptively nondischargeable under Section 523(a)(8). *See, e.g.*, Augustin v. U.S. Dep't of Educ. (*In re* Augustin), 588 B.R. 141, 147 (Bankr. D. Md. 2018) ("Here, there is no dispute that Mr. Augustin's student loans are within the scope of § 523(a)(8)(A)(i). Thus, his student loans are not subject to discharge unless they impose an undue hardship on him and his dependents."). In other cases, however, the debtor contests—and the court must accordingly decide—whether the debt at issue falls within one or more of the three subcategories set forth in Section 523(a)(8). *See, e.g.*, Carow v. Chase Student Loan Serv. (*In re* Carow), Bankr. No. 10-30264, Adv. No. 10-7011, 2011 WL 802847, at *1-5 (Bankr. D.N.D. Mar. 2, 2011); Roy v. Sallie Mae, Bankr. No. 08-33318, Adv. No. 09-1406, 2010 WL 1523996, at *1 (Bankr. D.N.J. Apr. 15, 2010). For extensive analysis of the types of debts that are covered (or not covered) by Section 523(a)(8), see Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS & SOC. JUST. 215, 272-276 (2014); 4 COLLIER ON BANKRUPTCY ¶ 523.14[2] (16th ed. 2017).

Finally, certain types of educational loans may be governed by dischargeability standards other than those set forth in Section 523(a)(8). *See* 42 U.S.C. § 292f(g) (providing that a Health Education Assistance Loan "may be released by a discharge in bankruptcy" only if three prerequisites are met, none of which explicitly require the debtor to show an undue hardship). *See also* Woody v. U.S. Dep't of Justice (*In re* Woody), 494 F.3d 939, 945-46 (10th Cir. 2007) (describing the differences between 11 U.S.C. § 523(a)(8) and 42 U.S.C. § 292f(g)). The details of those alternative

As the Supreme Court has explained, Section 523(a)(8) is "self-executing"; the discharge that a debtor generally receives at the conclusion of his bankruptcy case will usually "not include a student loan debt" unless "the debtor affirmatively secures a hardship determination" in the manner described in the following section of this report.[30] Thus, in many bankruptcy cases, student loans "pass through the bankruptcy process unaffected,"[31] such that the debtor will "emerge from bankruptcy with the continued obligation to repay his or her student loans."[32]

The "Undue Hardship" Exception

Even though Section 523(a)(8) renders student loans *presumptively* nondischargeable, however, it does not render them *completely* nondischargeable. Section 523(a)(8) as currently written allows a debtor to discharge a student loan if "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[33] In order to discharge a student loan on undue hardship grounds, the debtor must ordinarily file a separate complaint against the creditor holding the student loan debt.[34] The debtor must then prove by a preponderance of the evidence that repaying the student loan would impose an undue hardship on him.[35]

The Genesis and Evolution of Section 523(a)(8)

Student loan debt has not always been presumptively nondischargeable in bankruptcy; for many years, student loans were ordinarily dischargeable to the same extent as other forms of consumer debt.[36] Starting in the 1970s, however, Congress enacted a series of statutes that made it progressively more difficult for debtors to discharge student loans.[37] In order to explain the

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standards are beyond the scope of this report.

[30] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004).

[31] Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541, 545 (4th Cir. 2003).

[32] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 22 (Bankr. D. Mass. 2005). *See also* Iuliano, *supra* note 10, at 525.

[33] 11 U.S.C. § 523(a)(8).

[34] *See* Easterling v. Collecto, Inc., 692 F.3d 229, 232 (2d Cir. 2012) ("To seek an undue hardship discharge of student loans, a debtor must 'commence an adversary proceeding by serving a summons and complaint on affected creditors.'") (quoting United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 269 (2010)); *In re* Quinn, 586 B.R. 1, 3 (Bankr. E.D. Mich. 2018) ("If a debtor does not affirmatively secure an undue hardship determination, the discharge order will not include a student loan debt."). *See also* FED. R. BANKR. P. 4007(a), 7001(6) ("A debtor . . . may file a complaint to obtain a determination of the dischargeability of any debt."). Although there are limited circumstances in which a debtor may discharge a student loan in bankruptcy without filing a separate lawsuit, they are complex and beyond the scope of this report. *See Espinosa*, 559 U.S. at 263-79.

[35] "The creditor bears the initial burden of proving the debt exists and that the debt is of the type excepted from discharge under § 523(a)(8)." Educ. Credit Mgmt. Corp. v. Savage (*In re* Savage), 311 B.R. 835, 839 (B.A.P. 1st Cir. 2004). *See also, e.g.*, Ivory v. United States (*In re* Ivory), 269 B.R. 890, 893 (Bankr. N.D. Ala. 2001); Raymond v. N.W. Educ. Loan Ass'n (*In re* Raymond), 169 B.R. 67, 69 (Bankr. W.D. Wash. 1994). If the creditor meets that burden, the burden then shifts to the debtor to prove an undue hardship by a preponderance of the evidence. *E.g.*, *Savage*, 311 B.R. at 839; *Ivory*, 269 B.R. at 893; *Raymond*, 169 B.R. at 69.

The undue hardship requirement applies equally to consumer bankruptcy cases filed under Chapter 13 of the Bankruptcy Code, liquidation cases under Chapter 7, and reorganization cases filed by individual consumers under Chapter 11. *E.g.*, *In re* Maura, 491 B.R. 493, 513 n.33 (Bankr. E.D. Mich. 2013); 11 U.S.C. §§ 523(a)(8), 1141(d)(2), 1328(a)(2).

[36] *E.g.*, Pappas v. Tex. Higher Educ. Coordinating Bd. (*In re* Pappas), 517 B.R. 708, 716 (Bankr. W.D. Tex. 2014), *aff'd*, Corletta v. Tex. Higher Educ. Coordinating Bd., 531 B.R. 647 (W.D. Tex. 2015).

[37] *See, e.g.*, John Patrick Hunt, *Help or Hardship? Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO.

"undue hardship" standard, the policies underlying it, and potential ways in which Congress could alter the way student loans are currently treated in bankruptcy, this report first addresses why Congress enacted Section 523(a)(8) and how Congress has amended Section 523(a)(8) over time.

The Enactment of the Bankruptcy Code

The Bankruptcy Reform Act of 1978—which created the modern Bankruptcy Code that remains in effect in modified form today[38]—contained the first version of Section 523(a)(8).[39] Like the current version of Section 523(a)(8), the 1978 version rendered student loans presumptively nondischargeable in bankruptcy.[40]

Section 523(a)(8)'s sponsors offered several policy justifications for making student loans presumptively nondischargeable in bankruptcy. First, several Members cited the country's interest in "keep[ing] our student loan programs intact" as a justification for making student loans presumptively nondischargeable.[41] When a debtor defaults on a federal student loan, the taxpayers are the ones who must generally foot the bill.[42] The Bankruptcy Reform Act of 1978 therefore reflected the view that allowing debtors to easily discharge student loans would adversely impact the public fisc and thereby prevent future students from obtaining federal student loans of their own.[43] Section 523(a)(8)'s supporters in Congress therefore argued that, "if the student loan program is to remain viable," it was necessary to make student loans presumptively nondischargeable so that, in the words of one Member, "we insure our youngsters in the future that loan money will be available to them as it was to past generations."[44]

Second, Section 523(a)(8)'s supporters sought to address the concern "that student borrowers will abuse student loan programs by filing bankruptcy" immediately "after graduation, getting a discharge, and then enjoying a lifetime of income that education provides, but without the

L.J. 1287, 1300-12 (2018) (tracing the development of Section 523(a)(8)).

[38] *E.g.*, Peter A. Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C. L. REV. 655, 676 & n.142 (1983).

[39] P.L. 95-598, § 523(a)(8), 92 Stat. 2549 (1978). Congress derived Section 523(a)(8) from a 1973 recommendation made by the Commission on the Bankruptcy Laws of the United States. *See* H.R. DOC. NO. 93-137, at 11-12 (1973) ("The Commission recommends that . . . an educational loan not be dischargeable in any bankruptcy case commenced within five years after the first installment becomes due, absent unusual circumstances."). Congress also briefly experimented with making student loans nondischargeable in bankruptcy during the few years immediately preceding the Bankruptcy Code's enactment. For further information regarding precursors to Section 523(a)(8), see Education Amendments of 1976, P.L. 94-482, § 439(a), 90 Stat. 2081 (1976); Bd. of Regents of Univ. Sys. of State of Ga. v. Williamson (*In re* Williamson), 665 F.2d 683, 684-685 (5th Cir. 1982); N.Y. State Higher Educ. Servs. Corp. v. Adamo (*In re* Adamo), 619 F.2d 216, 218-222 (2d Cir. 1980).

[40] P.L. 95-598, § 523(a)(8), 92 Stat. 2549 (1978).

[41] 124 CONG. REC. 1791 (1978) (statement of Rep. Ertel).

[42] *See, e.g.*, *id*. at 1793 (statement of Rep. Erlenborn) ("Because of our interest in seeing that young people have an opportunity to obtain an education, we have made loans available to them by extending the credit of the United States to guarantee that [student] loan[s] will be repaid.").

[43] *See, e.g.*, *id*. at 1792 (statement of Rep. Ertel) ("Without this amendment, we are discriminating against future students, because there will be no funds available to them to get an education . . . It is to keep the student loan program going, and to keep it viable."); *id*. at 1794 (statement of Rep. Erlenborn) ("Students who are really in need are not going to be able to get the loans that they need.").

[44] *Id*. at 1792 (statement of Rep. Mottl). *See also id*. (statement of Rep. Ertel) ("Without this amendment, we are discriminating against future students, because there will be no funds available to them to get an education . . . It is to keep the student loan program going, and to keep it viable."); *id*. at 1794 (statement of Rep. Erlenborn) ("Students who are really in need are not going to be able to get the loans that they need.").

expense of paying back the loans."[45] "When a student borrower graduates, the accumulated student debt almost always dwarfs the student's tangible assets" that could be distributed to creditors in bankruptcy.[46] However, the debtor "will presumably use her loan-funded education to substantially increase her income in the near future."[47] Put another way, although a recent graduate will likely be unable to immediately repay his student loans right after completing his degree, he will hopefully reap economic benefits from his education that will allow him to repay the debt over the long term. If, however, a student could freely discharge her loans immediately after graduation, a recent graduate could thereby obtain "debt relief at the point in time when her realizable assets and present income are at their lowest and her debt and future income are at their highest."[48] At least one of the Members who supported Section 523(a)(8) therefore believed that declaring bankruptcy immediately after graduation—and thereby "making the taxpayers pick up the tab" for the debtor's student loans—would be "tantamount to fraud."[49] Congress therefore intended Section 523(a)(8) to "prevent[] debtors from easily discharging their debts at the expense of the taxpayers who made possible their education."[50]

Third, several Members who supported Section 523(a)(8) also emphasized that, in contrast to many other forms of consumer debt, a creditor cannot "repossess" the subject of the loan if the debtor defaults.[51] That is, whereas a debt collector may repossess and resell a house if a homeowner fails to pay his mortgage, a creditor cannot remove a college education from a graduate's brain, nor can an auctioneer sell a defaulting debtor's degree on the open market.[52]

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[45] Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 369 (2013) [hereinafter Austin, *Indentured Generation*]. *See also supra* note 44.

[46] Mathews v. Higher Educ. Assistance Found. (*In re* Mathews), 166 B.R. 940, 943 (Bankr. D. Kan. 1994). *See also* 124 CONG. REC. 1793-1794 (1978) (statement of Rep. Erlenborn) (noting that the average student loan debtor "does not have assets and would not, in the ordinary course of events, be able to obtain credit").

[47] Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 944 (9th Cir. 2006). *See also* 124 CONG. REC. 1793-1794 (1978) (statement of Rep. Erlenborn) ("The student on his part, not having assets to pledge, is pledging his future earning power.").

[48] *See* John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 253 (2006).

[49] 124 CONG. REC. 1793-1794 (1978) (statement of Rep. Erlenborn).

[50] Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 545 (4th Cir. 2008). *See also, e.g.*, 124 CONG. REC. 1793-1794 (1978) (statement of Rep. Erlenborn) ("The student has pledged his future earning power for the payment of a debt that has been guaranteed by the United States and then, rather than using that earning power to discharge the debt, as he has promised, he seeks, through bankruptcy, to be discharged of the debt, thereby making the taxpayers pay it for him.").

[51] 124 CONG. REC. 1792 (1978) (statement of Rep. Ertel) ("Some people have said, 'Why should student loans be treated any differently than any other loans?' Well, I would suggest that when one gets a business loan, one has collateral or something to justify that loan. But, on student loans the only thing one can put up for collateral is the ability he will have to make a better living after he has gotten that education. And so, what we have is an unsecured loan granted to students to get a better education."); *id*. (statement of Rep. Erlenborn) ("The student is not like the average debtor. The average debtor has credit extended to him because he has assets. He pledges those assets . . . to the payment of the debt. The student does not have assets.").

[52] Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 475 (2012) ("A college education is different [than a home] in that it cannot be surrendered."); Julie Swedback & Kelly Prettner, *Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases*, 36 WM. MITCHELL L. REV. 1679, 1683 n.16 (2010) ("The creditor cannot seize a borrower's education in the event of a default."); Pottow, *supra* note 48, at 255 ("It is difficult to divest the debtor of an educational benefit *ex post*. Liquidation of an M.D. degree would be an unruly affair, and few if any jurisdictions allow licenses to practice medicine to be assignable.").

Members who supported Section 523(a)(8) therefore argued that these distinctions from other forms of consumer debt supported treating student loans differently in bankruptcy.[53]

Subsequent Amendments to Section 523(a)(8)

Congress has periodically amended Section 523(a)(8) since 1978.[54] Each of these amendments has made it more difficult for debtors to discharge student loans in bankruptcy.[55] Two of these amendments are particularly important.

Elimination of the Temporal Discharge Option

In its original form, Section 523(a)(8) gave debtors two separate options for discharging student loans: the debtor could either (1) demonstrate an undue hardship or (2) prove that the loan first became due[56] at least five years before the debtor filed for bankruptcy.[57] Thus, if a debtor's student loan was more than five years old, he could potentially discharge that loan in bankruptcy without proving an undue hardship.[58]

In 1990, Congress extended the five-year period to seven years.[59] Thus, between 1990 and 1998, a "debtor seeking to discharge her educational loans in bankruptcy had to wait until seven years after those loans first became due to file if he hoped to discharge those loans without proving that their repayment constituted an undue hardship."[60]

Then, in 1998, Congress entirely eliminated this "temporal discharge" option—that is, the option for debtors to discharge student loans without demonstrating an undue hardship if the loans first became due a sufficient number of years before the debtor filed bankruptcy—when enacting the Higher Education Amendments of 1998 (Amendments).[61] The legislative history of the Amendments states that Congress "eliminat[ed] the current bankruptcy discharge for student borrowers after they have been in repayment for seven years" in an "effort to ensure the budget

[53] *See supra* note 51.

[54] P.L. 96-56, 93 Stat. 387 (1979); Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, § 454(a), 98 Stat. 333 (1984); Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, § 3007, 104 Stat. 1388 (1990); Crime Control Act of 1990, P.L. 101-647, § 3621(1)-(2), 104 Stat. 4789 (1990); Higher Education Amendments of 1998, P.L. 105-244, § 971(a), 112 Stat. 1581 (1998); Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, P.L. 109-8, § 220, 119 Stat. 23 (2005).

[55] *E.g.*, Swedback & Prettner, *supra* note 52, at 1681 ("Over the last three decades, Congress has increasingly narrowed the bases on which debtors may discharge their loans in bankruptcy.").

[56] Many (but not all) courts interpreted the phrase "first became due" to mean the date on which the borrower's first installment payment came due. *See, e.g.*, Nunn v. Washington (*In re* Nunn), 788 F.2d 617, 618 (9th Cir. 1986) ("Nunn argues that her loan 'first became due' when the first installment was due . . . The vast majority of courts that have considered the issue have adopted the interpretation of section 523(a)(8)(A) which Nunn advocates. We find that interpretation to be consistent with the language and the legislative history of the statute.").

[57] P.L. 95-598, § 523(a)(8), 92 Stat. 2549 (1978).

[58] Braucher, *supra* note 52, at 473.

[59] Crime Control Act of 1990, P.L. 101-647, § 3621(2), 104 Stat. 4789 (1990).

[60] Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 36 (2010) [hereinafter Atkinson, *Race*].

[61] Higher Education Amendments of 1998, P.L. 105-244, § 971(a), 112 Stat. 1581 (1998).

neutrality of" the Amendments.[62] As a result, demonstrating an undue hardship is presently the only way a debtor may discharge a student loan in bankruptcy.[63]

Expanding Section 523(a)(8) to Private Educational Loans

Although most borrowers fund their education using federal student loans, "education loans are also available from such private sources as banks [and] credit unions."[64] Whereas discharging a federal student loan will shift the cost of the debtor's default to American taxpayers,[65] commentators have noted that taxpayers are not directly "footing the bill for private loan defaults."[66]

As originally enacted, Section 523(a)(8) did not cover private loans; whereas federal student loans were presumptively nondischargeable in bankruptcy, private educational loans were generally freely dischargeable like many other forms of consumer debt.[67] In 2005, however, Congress "changed the definition of student loans covered under § 523(a)(8) to include private loans, thus making any student loan, federal or not, essentially non-dischargeable in bankruptcy" absent a showing of undue hardship.[68] Members who supported this amendment argued that it would "ensure that the [bankruptcy] system is fair for both debtors and creditors" and "eliminate abuse in the system."[69] Thus, with limited exceptions,[70] private education loans are now equally subject to the undue hardship requirement.[71]

Interpreting "Undue Hardship"

The Bankruptcy Code does not define "undue hardship,"[72] and the legislative history of Section 523 does not precisely specify how courts should determine whether a debtor qualifies for an undue hardship discharge.[73] The task of interpreting this statutory term has consequently fallen to

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[62] H.R. Rep. No. 105-750, at 408 (1998).

[63] 11 U.S.C. § 523(a)(8); Kevin J. Smith, *The Income-Based Repayment Plans and For-Profit Education: How Does This Combination Affect the Question to Include Student Loans in Bankruptcy?*, 32 GA. ST. U. L. REV. 603, 642 (2016); Atkinson, *Race*, *supra* note 60, at 36; Swedback & Prettner, *supra* note 52, at 1681 n.9.

[64] *Private Loans*, *supra* note 1, at 1-2.

[65] *E.g.*, *In re* Engen, 561 B.R. 523, 546 (Bankr. D. Kan. 2016); Campton v. U.S. Dep't of Educ. (*In re* Campton), 405 B.R. 887, 892 (Bankr. N.D. Ohio 2009).

[66] Iuliano, *supra* note 10, at 524 n.92.

[67] *E.g.*, Braucher, *supra* note 52, at 473-74.

[68] Smith, *supra* note 63, at 642. *See also* Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, P.L. 109-8, § 220, 119 Stat. 23 (2005); Braucher, *supra* note 52, at 473; Swedback & Prettner, *supra* note 52, at 1681 n.9 ("Under this amendment, non-federally backed loans enjoy[] the presumption of non-dischargeability under the bankruptcy code.").

[69] H.Rept. 109-31, at 2 (2005).

[70] *See* Rendleman & Weingart, *supra* note 29, at 274-75 (describing limited circumstances in which "a private loan may be dischargeable").

[71] Iuliano, *supra* note 10, at 524 n.92. *See also*, *e.g.*, De La Rosa v. Kelly (*In re* Kelly), 582 B.R. 905, 909-10 (Bankr. S.D. Tex. 2018) ("In 2005, Congress broadened the range of student loans that were to be considered nondischargeable under § 523(a)(8) by adding § 523(a)(8)(A)(ii) to encompass loans made by nongovernmental and profit-making organizations . . . Because there is no requirement that the loan be directly tied to a government unit, § 523(a)(8)(A)(ii) has been more broadly applied to cases where [a] third part[y], not the government, is the party holding the debt.").

[72] *E.g.*, Iuliano, *supra* note 10, at 496; Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 190 (2009) [hereinafter Pardo & Lacey, *Scandal*].

[73] *See* Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 23 (Bankr. D. Mass. 2005) ("The Congressional

the federal judiciary.[74] However, the U.S. Supreme Court has not yet directly opined on the meaning of "undue hardship,"[75] and the Court recently denied *certiorari* in a case that presented the Court with the opportunity to further interpret that term.[76]

In the absence of a controlling interpretation of Section 523(a)(8) from the Supreme Court, the lower courts have devised several different legal standards for determining whether declining to discharge a student loan would amount to an "undue hardship." The two most common standards are described below.[77]

The *Brunner* Test

The vast majority[78] of courts—specifically the U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits,[79] as well as the U.S. Bankruptcy Court for the District of Columbia—have interpreted "undue hardship" to require the debtor to prove three things:

1. the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans;
2. additional circumstances exist indicating that the debtor's inability to pay is likely to persist for a significant portion of the repayment period of the student loans; and
3. the debtor has made good faith efforts to repay the loans.[80]

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record provides little guidance as to what constitutes undue hardship under § 523(a)(8)."); Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 943 (9th Cir. 2006) ("Congress provided little in the way of express legislative intent specifically addressing the 'undue hardship' requirement when it passed the statute."); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559, 564 (7th Cir. 2003) ("Nor does the legislative history provide meaningful guidance.").

[74] *E.g.*, Iuliano, *supra* note 10, at 496; Pardo & Lacey, *Scandal*, *supra* note 72, at 190.

[75] *See, e.g.*, Hoffman v. Tex. Guaranteed Student Loan Corp. (*In re* Williams), Case No. 15-41814, Adv. No. 16-4006, 2017 WL 2303498, at *4 (Bankr. E.D. Tex. May 25, 2017) ("['Undue hardship'] is not defined in the Bankruptcy Code, nor has any particular judicial definition been endorsed by any decision of the United States Supreme Court."). Although the Supreme Court has mentioned the "undue hardship" standard in passing on at least two occasions, the Court has not yet defined the standard's contours. *See* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 263-79 (2010); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 443-55 (2004).

[76] *See* Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S. Ct. 803 (2016).

[77] In addition to the two tests described in this report, some courts previously applied a variety of other legal tests to determine whether a debtor qualified for an undue hardship discharge. *See, e.g.*, Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 153-164 (1996) (describing the "*Johnson*" and "*Bryant*" standards in addition to the *Brunner* and totality-of-the-circumstances tests). However, because these alternative tests have fallen into disuse and obscurity, this report does not discuss them in detail. *See* Swedback & Prettner, *supra* note 52, at 1684 ("Over the years, courts have developed several legal tests to give practical effect to the legal standard intended by Congress, but only two of these tests effectively remain: the *Brunner* test and the totality-of-the-circumstances test."); Hon. Terrence L. Michael & Janie M. Phelps, *"Judges?! – We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 83 n.57 (2005) (acknowledging the *Johnson* and *Bryant* tests, but explaining that "recent opinions have narrowed to field to the" *Brunner* and totality-of-the circumstances tests).

[78] *See, e.g.*, Iuliano, *supra* note 10, at 496 ("[T]he *Brunner* standard has come to dominate the field.").

[79] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the First Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[80] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). *See also* Penn. Higher Educ.

The debtor must prove each of these elements by a preponderance of the evidence.[81]

This standard is commonly called the "*Brunner*" test,[82] after the Second Circuit case in which the standard originated.[83] The *Brunner* test is highly fact-intensive,[84] and not all courts apply the *Brunner* standard the same way.[85] Indeed, each factor has resulted in various subsidiary splits in the courts with respect to a host of issues, including

- the types of expenses a debtor seeking an undue hardship discharge may permissibly incur;
- the legal standard the debtor must satisfy to prove that his inability to repay the student loans will likely persist into the future;
- whether a debtor who claims that a medical condition prevents him from repaying his student loans must introduce corroborating medical evidence to support his claim;
- whether a debtor seeking an undue hardship discharge must attempt to maximize his income by seeking employment opportunities outside his field of training;
- whether it is proper to consider the value of the education that the loan financed when determining a debtor's eligibility for an undue hardship discharge; and
- whether the "additional circumstances" mentioned in *Brunner*'s second prong must predate the issuance of the loan.

What follows is a description of the various factors that courts consider when evaluating each prong of the *Brunner* test that highlights areas of disagreement between the federal courts.

The First Requirement: Inability to Maintain Minimal Standard of Living

To obtain an undue hardship discharge in a *Brunner* jurisdiction, the debtor must first prove that 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."[86] "Courts conduct this analysis by comparing [the] debtor's disposable income, determined as the difference between his monthly income and his reasonable and necessary monthly expenses, with the monthly payment necessary

Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995) (adopting *Brunner* test); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005) (same); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003) (same); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005) (same); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (same); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998) (same); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) (same); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003) (same); Zook v. Edfinancial Corp. (*In re* Zook), Bankr. No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *1 (Bankr. D.D.C. Feb. 27, 2009) (same).

[81] *E.g.*, Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358-59 (6th Cir. 2007); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1324 (11th Cir. 2007).

[82] *See, e.g.*, *Gerhardt*, 348 F.3d at 91.

[83] *Brunner*, 831 F.2d at 396.

[84] *E.g.*, Educ. Credit Mgmt. Corp. v. Buchanan, 276 B.R. 744, 752 (N.D. W. Va. 2002).

[85] *See, e.g.*, Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 30 (Bankr. D. Mass. 2005) (arguing that, even though "both the Tenth and Eleventh Circuits" have purportedly "adopt[ed] identical versions of the *Brunner* test," "the *Brunner* test as adopted by the Eleventh Circuit does not include the same considerations as the *Brunner* test adopted by the Tenth Circuit").

[86] *E.g.*, *Brunner*, 831 F.2d at 396.

to repay the student loans."[87] This inquiry in turn requires the court to "review the reasonableness of the [d]ebtor's budget—particularly the allocation of projected expenses in relation to projected income—as it determines [the debtor's] capability to pay the [student loans] without undue hardship."[88] When evaluating whether the debtor's budget is reasonable, courts generally disregard unnecessary expenses that "would provide funds that could be directed toward repayment of the loan" if eliminated.[89] Although performing this inquiry often requires the court to scrutinize individual items in the debtor's budget,[90] courts nonetheless generally conclude that it is unnecessary to "wade through a debtor's budget to find all possible ways to create a surplus";[91] instead, the court must "examine [the] debtor's expense budget as a whole" to evaluate whether that budget is reasonable.[92]

Courts have typically held that the debtor need not "live in poverty in order to satisfy the first inquiry" of *Brunner*.[93] Rather, "a minimal standard of living is a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities."[94] As explained in an influential judicial opinion,

> A minimal standard of living in modern American society includes these elements:
>
> 1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.
>
> 2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.

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[87] McLaney v. Ky. Higher Educ. Assistance Auth., 375 B.R. 666, 674 (M.D. Ala. 2007). *See also, e.g.*, Miller v. Sallie Mae (*In re* Miller), 409 B.R. 299, 312 (Bankr. E.D. Pa. 2009) (explaining that the court must evaluate "the debtor's household income and those expenses necessary to meet his or her basic needs"). "On the income side, courts consider all sources of income and revenue streams," including, among other things, tax refunds. Tuttle v. Educ. Credit Mgmt. Corp. (*In re* Tuttle), Case No. 16-28259-beh, Adv. No. 17-02116, 2019 WL 1472949, at *8, *10 (Bankr. E.D. Wis. Mar. 31, 2019).

[88] Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 317 (Bankr. S.D.N.Y. 2002). *See also, e.g.*, Perkins v. Pa. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 305 (Bankr. M.D.N.C. 2004) ("The first prong of the *Brunner* test . . . requires the court to examine the reasonableness of the expenses listed in the [debtor's] budget.").

[89] Larson v. United States (*In re* Larson), 426 B.R. 782, 789 (Bankr. N.D. Ill. 2010). *See also, e.g.*, *Tuttle*, 2019 WL 1472949, at *8 ("Courts . . . disregard any unnecessary or unreasonable expenses that could be reduced to allow for payment of debt."); Coplin v. U.S. Dep't of Educ. (*In re* Coplin), Case No. 13-46108, Adv. No. 16-04122, 2017 WL 6061580, at *7 (Bankr. W.D. Wash. Dec. 6, 2017) ("The court . . . has discretion to minimize or eliminate expenses that are not reasonably necessary to maintain a minimal standard of living."); *Miller*, 409 B.R. at 312 ("Expenditures in excess of a minimal standard of living may have to be reallocated to repayment of the outstanding student loan depending upon the particular circumstances involved.").

[90] *See, e.g.*, *Perkins*, 318 B.R. at 305-07 (listing types of expenses that courts "often f[i]nd to be inconsistent with a minimal standard of living").

[91] *E.g.*, Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (*In re* Crawley), 460 B.R. 421, 436 n. 15 (Bankr. E.D. Pa. 2011).

[92] *E.g.*, *McLaney*, 375 B.R. at 675; Zook v. Edfinancial Corp. (*In re* Zook), Bankr. No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *9 (Bankr. D.D.C. Feb. 27, 2009).

[93] *Zook*, 2009 WL 512436, at *4. *See also, e.g.*, Educ. Credit Mgmt. Corp. v. Waterhouse, 333 B.R. 103, 111 (W.D.N.C. 2005) ("*Brunner*'s 'minimal standard of living' does not require a debtor to live in squalor."); *McLaney*, 375 B.R. at 674 ("A 'minimal standard of living' is not such that debtors must live a life of abject poverty."); White v. U.S. Dep't of Educ. (*In re* White), 243 B.R. 498, 508 n.8 (Bankr. N.D. Ala. 1999) ("Poverty, of course, is not a prerequisite to . . . dischargeability.").

[94] *Zook*, 2009 WL 512436, at *4; Douglas v. Educ. Credit Mgmt. Corp. (*In re* Douglas), 366 B.R. 241, 252 (Bankr. M.D. Ga. 2007); Ivory v. United States (*In re* Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001).

3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
4. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.
5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.[95]

On the other hand, even though the debtor need not live an ascetic lifestyle to obtain an undue hardship discharge, the debtor is nonetheless not "sheltered from making some personal and financial sacrifices in order to repay the debt."[96] Many courts have therefore denied undue hardship discharges in cases in which the debtor's expenses were excessive,[97] such as where the debtor lived in an "unnecessarily large" home,[98] dined too frequently in restaurants instead of cooking at home,[99] or spent money on inessential items like recreational boats.[100]

[95] *Ivory*, 269 B.R. at 899. *See also, e.g.*, Doernte v. Educ. Credit Mgmt. Corp. (*In re* Doernte), Bankr. No. 10-24280-JAD, Adv. No. 15-2080-JAD, 2017 WL 2312226, at *5 (Bankr. W.D. Pa. May 25, 2017) (adopting the *Ivory* elements); Cleveland v. Educ. Credit Mgmt. Corp. (*In re* Cleveland), 559 B.R. 265, 272 (Bankr. N.D. Ga. 2016) (same); Murray v. ECMC (*In re* Murray), 563 B.R. 52, 58-59 (Bankr. D. Kan.), *aff'd*, Case No. 16-2838, 2017 WL 4222980 (D. Kan. Sept. 22, 2017) (same).

[96] *Zook*, 2009 WL 512436, at *4. *See also, e.g.*, Halatek v. William D. Ford Fed. Direct Loan (Direct Loan) Program/U.S. Dep't of Educ. (*In re* Halatek), 592 B.R. 86, 97 (Bankr. E.D.N.C. 2018) (explaining that the first prong of the *Brunner* test "does not mean . . . that the debtor is 'entitled to maintain whatever standard of living she has previously attained . . . "Minimal" does not mean preexisting, and it does not mean comfortable.'") (quoting Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 339 (Bankr. S.D. Fla. 2013)).

[97] *See, e.g.*, Evans-Lambert v. Sallie Mae Servicing Corp. (*In re* Evans-Lambert), Bankr. No. 07-40014-MGD, Adv. No. 07-5001-MGD, 2008 WL 1734123, at *5 (Bankr. N.D. Ga. Mar. 25, 2008) ("The Court finds Debtor's reported $250-$295 per month expense for phone service to be above a 'minimal' standard of living."); Mandala v. Educ. Credit Mgmt. Corp. (*In re* Mandala), 310 B.R. 213, 218-19, 221-23 (Bankr. D. Kan. 2004) (denying undue hardship discharge where debtors spent "excessive" amounts of money on food, vitamins, and long distance telephone costs); Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 311, 317-18 (Bankr. S.D.N.Y. 2002) (holding that debtor's monthly telephone, beeper, and cable expenses were "excessive" and denying undue hardship discharge).

[98] *See* Miller v. Sallie Mae (*In re* Miller), 409 B.R. 299, 320-21 (Bankr. E.D. Pa. 2009).

[99] *See* Lozada v. Educ. Credit Mgmt. Corp. (*In re* Lozada), 594 B.R. 212, 225 (Bankr. S.D.N.Y. 2018) ("A debtor is not required to abstain entirely from dining out to satisfy the first prong of the *Brunner* test, but the Plaintiff's practice of frequently dining out is problematic."); Richardson v. Educ. Credit Mgmt. Corp. (*In re* Richardson), No. 16-11197, Adv. No. 17-01014, 2018 WL 4719083, at *5 (Bankr. S.D. Ga. Sept. 28, 2018) ("Debtor's projected budget clearly includes expenses exceeding the 'minimal standard of living' contemplated by the *Brunner* test . . . Debtor's budget . . . reflects he eats out almost every day . . . ."); Gibson v. ECMC (*In re* Gibson), 428 B.R. 385, 390 (Bankr. W.D. Mich. 2010) ("The number and variety of restaurant charges . . . undercuts Ms. Gibson's testimony that she is minimizing unnecessary expenses. Eating out is a luxury, in the court's view.").

[100] *See* Campton v. U.S. Dep't of Educ. (*In re* Campton), 405 B.R. 887, 892 (Bankr. N.D. Ohio 2009) (denying undue hardship discharge where debtor "continu[ed] to pay for amenities such as boats, cable television and cigarettes").

Judicial Disagreements Regarding the Reasonableness of Various Categories of Expenses

To "determine whether someone's expenses are unnecessary or unreasonable, whether someone is paying for something that is not needed, or whether someone is paying too much for something that is needed," courts often rely on "common sense, knowledge gained from ordinary observations in daily life, and general experience."[101] As explained below, however, courts frequently disagree regarding what categories of expenses are unnecessary to maintain a minimal standard of living for the purposes of the first *Brunner* prong.

For example, courts have reached divergent conclusions regarding whether a debtor seeking an undue hardship discharge is permitted to tithe a portion of his income to a religious institution that could otherwise go toward repaying his educational debt.[102] As one court has observed, "when [a debtor] elects to tithe rather than pay his nondischargeable debt, he is" effectively "making donations using someone else's money."[103] Some courts have therefore categorically held that "tithing may not be done at the expense of student loan creditors."[104] These courts reason that "if Congress intended to allow tithing . . . when determining undue hardship under § 523(a)(8) . . . Congress could have and would have drafted § 523(a)(8) to include a specific provision allowing charitable giving as it did" when enacting several other sections of the Bankruptcy Code.[105] Other courts, by contrast, have held that "a bankruptcy judge should not override a debtor's commitment to tithing" when evaluating the reasonableness of a debtor's expenditures for the purposes of the *Brunner* test.[106] The predominant approach, however, is to neither treat religious tithing as *per se* allowable nor *per se* prohibited, but instead to examine "bona fide tithing or charitable contributions . . . under the same reasonableness standard as other reasonable and necessary expenses under a § 523(a)(8) undue hardship analysis."[107]

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[101] Ivory v. United States (*In re* Ivory), 269 B.R. 890, 899-900 (Bankr. N.D. Ala. 2001). *See also, e.g.*, McLaney v. Ky. Higher Educ. Assistance Auth., 375 B.R. 666, 674 (M.D. Ala. 2007); McCafferty v. U.S. Dep't of Educ. (*In re* McCafferty), Case No. 14-04545-FPC7, Adv. No. 15-80015-FPC, 2015 WL 6445185, at *4 (Bankr. E.D. Wash. Oct. 23, 2015); *Miller*, 409 B.R. at 320.

[102] *See McCafferty*, 2015 WL 6445185, at *4-6 (describing three different approaches taken by courts); *Lozada*, 594 B.R. at 223 ("There is a split of authority as to whether Congress intended religious and charitable donations to be permissible expenses in determining undue hardship under § 523(a)(8).") (quoting Educ. Credit Mgmt. Corp. v. Savage (*In re* Savage), 311 B.R. 835, 842 (B.A.P. 1st Cir. 2004)); Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 923-924 (W.D. Wash. 2012) ("Courts have come to differing conclusions as to whether charitable or religious donations should be considered necessary expenses for the purpose of evaluating 'undue hardship.'"); Fulbright v. U.S. Dep't of Educ. (*In re* Fulbright), 319 B.R. 650, 657-60 (Bankr. D. Mont. 2005) (discussing the "split of authority . . . on the issue of whether charitable contributions such as tithing are reasonable expenses for purposes of determining undue hardship under § 523(a)(8)"). *See generally* Theresa J. Pulley Radwan, *Sword or Shield: Use of Tithing to Establish Nondischargeability of Debt Following Enactment of the Religious Liberties and Charitable Donation Protection Act*, 19 AM. BANKR. INST. L. REV. 471 (2011) [hereinafter Radwan, *Sword or Shield*].

[103] *Lozada*, 594 B.R. at 224.

[104] Allen v. Am. Educ. Servs. (*In re* Allen), 329 B.R. 544, 552 & nn.4-5 (Bankr. W.D. Pa. 2005). *See also, e.g.*, *Fulbright*, 319 B.R. at 660 ("Religious . . . donations are *per se* not proper expenses in determining whether discharging student loan debt would result in undue hardship under § 523(a)(8).").

[105] *E.g.*, *Fulbright*, 319 B.R. at 660.

[106] *E.g.*, Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 504 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005).

[107] *McLaney*, 375 B.R. at 682. *See also, e.g.*, *Lozada*, 594 B.R. at 223-24 ("[C]haritable giving expenses, such as . . . tithes, must be evaluated on a case-by-case basis, 'considering factors such as the amount and the debtor's history in order to determine whether, for that particular debtor, tithing constitutes a reasonably necessary expenditure.'") (quoting *McCafferty*, 2015 WL 6445185, at *6).

Courts have likewise "split on whether cigarette expenses may be counted toward a minimal standard of living" for the purposes of the *Brunner* test.[108] A few courts have categorically held that a debtor may not "discharge a student-loan obligation, thereby placing liability for the debt upon the taxpayers, while continuing to pay for . . . cigarettes."[109] The predominant approach, however, is to consider a debtor's cigarette expenses on a case-by-case basis, instead of "holding that cigarette expenses are per se unreasonable."[110]

Similarly, courts have disagreed regarding whether a debtor seeking an undue hardship discharge may contribute money to a retirement account that could otherwise go toward repaying the student loan. Most courts have held that retirement contributions are not "reasonably necessary for the support or maintenance of a debtor and thus may be considered as available income from which a debtor seeking a § 523(a)(8) undue hardship discharge could use to repay an educational loan."[111] A few other courts, however, have held that expenses "for retirement contributions" are "allowable within the context of an 'undue hardship' analysis under § 523(a)(8)," at least "where a debtor is fairly close to retirement, has not thus far saved anything for retirement, and is not likely to improve his or her earnings ability such that he or she could otherwise save for retirement."[112]

Nor have courts agreed regarding *who* may receive money that might otherwise go toward repaying the student loan. For instance, most courts have held that "a debtor seeking to discharge her educational loans under § 523(a)(8) is . . . not permitted to support emancipated children or other independent family members at the expense of her creditors."[113] These courts reason that it is "unreasonable to expect creditors holding legitimate claims to remain unpaid to any extent while the Debtor is supporting any adult children" or other nondependent adults "in her home."[114]

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[108] Rendelman & Weingart, *supra* note 28, at 281 & n.469 (citing cases).

[109] *E.g.*, Campton v. U.S. Dep't of Educ. (*In re* Campton), 405 B.R. 887, 892 (Bankr. N.D. Ohio 2009).

[110] *See* Gharavi v. U.S. Dep't of Educ. (*In re* Gharavi), 335 B.R. 492, 499-500 (Bankr. D. Mass. 2006) (listing cases). *See also, e.g.*, Metz v. Navient Educ. Loan Corp. (*In re* Metz), 589 B.R. 750, 758 (Bankr. D. Kan. 2018) (granting partial discharge to debtor despite regular cigarette purchases).

[111] Perkins v. Pa. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 306-08 (Bankr. M.D.N.C. 2004) (listing cases). *See also, e.g.*, Richardson v. Educ. Credit Mgmt. Corp. (*In re* Richardson), No. 16-11197, Adv. No. 17-01014, 2018 WL 4719083, at *5 (Bankr. S.D. Ga. Sept. 28, 2018) ("Debtor currently contributes $372 towards his retirement plan. This deduction is clearly admirable, but it is not required to provide for Debtor's basic necessities or to maintain a minimal standard of living while paying his student loan debt."); Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 341, 345 (Bankr. S.D. Fla. 2013) ("Voluntary contributions to retirement plans . . . are not necessary to maintain a minimal standard of living."); Pobiner v. Educ. Credit Mgmt. Corp. (*In re* Pobiner), 309 B.R. 405, 417-18 (Bankr. E.D.N.Y. 2004) (finding that debtors who voluntarily contributed to 401(k) plan could not prove they were unable to "maintain a minimal standard of living if forced to repay the student loans").

[112] Allen v. Am. Educ. Servs. (*In re* Allen), 329 B.R. 544, 551-52 & n.3 (Bankr. W.D. Pa. 2005). *See also* Williams v. Educ. Credit Mgmt. Corp. (*In re* Williams), 301 B.R. 62, 75 (Bankr. N.D. Cal. 2003) ("Debtors' current expenses include no contributions to a retirement account or pension plan. That should be reflected in even a minimal standard of living for a middle-aged couple who lack savings.").

[113] *Perkins*, 318 B.R. at 306, 308. *See also, e.g.*, Manion v. Modeen (*In re* Modeen), 586 B.R. 298, 307 (Bankr. W.D. Wis. 2018) ("Courts criticize debtors who claim expenses for adult live-in children in the context of student loan dischargeability."); Gill v. Nelnet Loan Servs., Inc. (*In re* Gill), 326 B.R. 611, 633-34 (Bankr. E.D. Va. 2005) ("Creditors should not be placed behind emancipated children and independent adults in the line for payment from a debtor."); *Williams*, 301 B.R. at 73 (finding "no support for the notion that a minimal standard of living under the first prong of the *Brunner* test should include voluntary assumption of non-dependent family members' expenses without a legal obligation to do so" and eliminating expense for adult son's health care from debtors' monthly expense budget accordingly).

[114] Logan v. N.C. State Educ. Assistance Auth. (*In re* Logan), 263 B.R. 796, 800 (Bankr. W.D. Ky. 2000). *See also* Educ. Credit Mgmt. Corp. v. Buchanan, 276 B.R. 744, 752 (N.D. W. Va. 2002) ("If given the choice between giving money to their creditors or their legally independent children . . . most debtors would choose their children. Were this

A few other courts, however, have held that there is no "hard and fast rule" prohibiting a debtor seeking an undue hardship discharge from making "voluntary payments on behalf of adult children."[115] These courts reason that "one's 'standard of living' may sometimes be affected more by the safety of one's children—grown or not—than by such things as the quality of one's residence."[116] Importantly, however, the rule forbidding debtors from prioritizing their children over their creditors applies only to nondependent *adult* children; a debtor's obligation "to support his *minor* children certainly must be considered" as a necessary expense "when determining the [debtor's] ability to repay his debts."[117]

Courts have likewise split on whether a debtor may argue that his monthly expenses prevent him from maintaining a minimal standard of living when the debtor expends a share of his income caring for a *disabled* parent. Some courts have denied an undue hardship discharge to debtors who chose to care for their disabled parents instead of seeking gainful employment, reasoning that a "moral obligation to a family member . . . does not take priority over [the debtor's] legal obligation to repay her educational loans."[118] Several other courts, by contrast, have discharged student debt even where the debtor quit a profitable job or allocated a portion of his income in order to care for a disabled parent.[119]

Consideration of the Debtor's Spouse's Income

When conducting the first step of the *Brunner* analysis, most courts consider the debtor's spouse's income in addition to the debtor's income alone,[120] even when the spouse has not

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allowed, few debtors would be adjudged capable of repaying their debts."); *Manion*, 586 B.R. at 307 (agreeing with *Logan*); *Gill*, 326 B.R. at 633-34 ("Creditors should not be placed behind emancipated children and independent adults in the line for payment from a debtor.").

[115] Educ. Credit Mgmt. Corp. v. Stanley, 300 B.R. 813, 818 (N.D. Fla. 2003). *See also, e.g.*, Wilkinson-Bell v. Educ. Credit Mgmt. Corp. (*In re* Wilkinson-Bell), Bankr. No. 03-80321, Adv. No. 06-8108, 2007 WL 1021969, at *5 (Bankr. C.D. Ill. Apr. 2, 2007) ("This Court will not construe providing shelter, food and clothing to immediate family members, a common, if voluntary, benevolence, as something for which the [debtor] is to be blamed for causing her own hardship.").

[116] *See, e.g.*, *Stanley*, 300 B.R. at 818.

[117] *Buchanan*, 276 B.R. at 752 (emphasis added). *See also* 11 U.S.C. § 523(a)(8) (requiring the court to inquire whether excepting a student loan from discharge "would impose an undue hardship on the debtor *and the debtor's dependents*" (emphasis added)).

[118] Coveney v. Costep Servicing Agent (*In re* Coveney), 192 B.R. 140, 144 (Bankr. W.D. Tex. 1996). *See also* Perkins v. Pa. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 308 (Bankr. M.D.N.C. 2004) (holding that expense that debtor "allocate[d] to the care of her mother" was not a proper expense for the purposes of *Brunner*'s first prong).

[119] *See* Rutherford v. William D. Ford Direct Loan Program (*In re* Rutherford), 317 B.R. 865, 875, 879, 881-85 (Bankr. N.D. Ala. 2004) (granting undue hardship discharge even though debtor left job to care for disabled mother); Sequeira v. Sallie Mae Servicing Corp. (*In re* Sequeira), 278 B.R. 861, 862, 866-67 (Bankr. D. Or. 2001) (granting partial discharge even though debtor spent "$200 per month . . . for the care of her 83 year old mother"); Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 70 (Bankr. W.D.N.Y. 2012) (granting undue hardship discharge even though debtor opted "to terminate educational opportunities in order to care for parents more than 20 years before filing for bankruptcy relief").

[120] Educ. Credit Mgmt. Corp. v. Waterhouse, 333 B.R. 103, 109 (W.D.N.C. 2005) ("A majority of courts have determined that it is proper to consider the economics of the debtor and the debtor's spouse, as a family unit, when determining ability to pay."). *See also, e.g.*, White v. U.S. Dep't of Educ. (*In re* White), 243 B.R. 498, 509 n.9 (Bankr. N.D. Ala. 1999) (listing numerous cases); Rosen v. Att'y Registration & Disciplinary Comm'n (*In re* Rosen), Bankr. Case No. 15-0897 (DRC), Civil Case No. 16 C 10686, 2017 WL 4340167, at *8 (N.D. Ill. Sept. 29, 2017) ("Since the standard-of-living inquiry is judged on a household basis, it is appropriate to consider a non-debtor spouse's income when determining whether a debtor can service his loans.").

declared bankruptcy as a co-debtor.[121] Many courts likewise consider the income of a "live-in companion, life partner, [or] contributing co-habitant" when "conducting th[e] minimal standard of living analysis."[122] Courts have therefore generally denied an undue hardship discharge where the debtor was married to a spouse "who could easily support them both, without any contribution from" the debtor.[123]

The Second Requirement: Future Inability to Repay

If the debtor satisfies the first prong of *Brunner*, he must then prove that his inability to maintain a minimal standard of living if forced to repay the loans is likely to persist into the future.[124] To make this showing, the debtor must show that "additional circumstances exist that illustrate he will not be able to repay the loans for a substantial part of the repayment period."[125] Some courts describe this requirement as "the heart of the *Brunner* test. It most clearly reflects the congressional imperative that the debtor's hardship must be more than the normal hardship that accompanies any bankruptcy."[126] As is the case with the first prong of the *Brunner* test, courts have applied different legal standards and considered various factors when conducting the second inquiry, as illustrated below.

The "Certainty of Hopelessness" and "Exceptional Circumstances" Requirements

For instance, to determine whether the debtor's inability to repay the loan while maintaining a minimal standard of living is likely to persist into the future, most courts have required the debtor to prove "that there is a 'certainty of hopelessness' that the debtor will be able to repay the loans within the repayment period."[127] By contrast, a small number of courts have concluded that it is inappropriate to require debtors to demonstrate a "certainty of hopelessness" in order to obtain an undue hardship discharge.[128] As one bankruptcy judge colorfully remarked,

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[121] *See, e.g.*, Augustin v. U.S. Dep't of Educ. (*In re* Augustin), 588 B.R. 141, 150 (Bankr. D. Md. 2018) ("Family income, *even that of non-debtor spouses*, should be included in the analysis. In fact, the majority of courts have considered the earnings of both the debtor and spouse for evaluating the debtor's lifestyle.") (emphasis added, internal citations omitted).

[122] Davis v. Educ. Credit Mgmt. Corp. (*In re* Davis), 373 B.R. 241, 248 (W.D.N.Y. 2007) (listing cases). *But see* Coplin v. U.S. Dep't of Educ. (*In re* Coplin), Case No. 13-46108, Adv. No. 16-04122, 2017 WL 6061580, at *7 (Bankr. W.D. Wash. Dec. 6, 2017) (considering only a portion of the debtor's fiancé's income for the purpose of the *Brunner* step one analysis because the debtor and her fiancé had not yet "fully commingled their respective households").

[123] *E.g.*, White v. U.S. Dep't of Educ. (*In re* White), 243 B.R. 498, 508, 514 (Bankr. N.D. Ala. 1999).

[124] *E.g.*, Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). For analysis of how far into the future a bankruptcy court should look when evaluating whether the debtor's inability to maintain a minimal standard of living is likely to persist, *see, e.g.*, Zook v. Edfinancial Corp. (*In re* Zook), Bankr. No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *2 (Bankr. D.D.C. Feb. 27, 2009).

[125] Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 401 (4th Cir. 2005). *See also, e.g.*, *Brunner*, 831 F.2d at 396; Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 759 (7th Cir. 2015); Craig v. Educ. Credit Mgmt. Corp. (*In re* Craig), 579 F.3d 1040, 1044 (9th Cir. 2009).

[126] *Frushour*, 433 F.3d at 401. *See also, e.g.*, Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 342 (Bankr. S.D. Fla. 2013).

[127] Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1326 (11th Cir. 2007). *See also, e.g.*, *Tetzlaff*, 794 F.3d at 759; Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544 (4th Cir. 2008); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 359 (6th Cir. 2007).

[128] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004); Jackson v. Educ. Res. Inst. (*In re* Jackson), Bankr. No. 05-15085 (PCB), Adv. No. 06-01433, 2007 WL 2295585, at *6 n.11 (Bankr. S.D.N.Y. Aug. 9, 2007) (criticizing the "certainty of hopelessness standard" as "vague, speculative and completely subjective").

> If Congress ever were to require this writer to instruct a student loan debtor that he or she must carry the burden of proving that he or she has a "certainty of hopelessness," this writer would retire. There would be no way to reconcile such a command with the notion of a "fresh start" for honest debtors. Some debtors, faced with such a standard, would not seek bankruptcy relief at all, but rather would choose to be discharged by the Highest Authority.[129]

Courts that reject the "certainty of hopelessness" standard instead make "a realistic look . . . into [the] debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like" when determining whether the debtor's inability to repay is likely to persist into the future.[130] Although at least one debtor has asked the Supreme Court to grant *certiorari* to determine whether the *Brunner* test requires debtors to demonstrate "a 'certainty of hopelessness,'"[131] the Supreme Court has thus far declined the invitation.[132]

Similarly, whereas most courts require the debtor to demonstrate "exceptional," "unique," "extraordinary," "extreme," or "rare" circumstances in order to satisfy the second *Brunner* prong,[133] the Ninth Circuit has held that "'undue hardship' does not require an exceptional circumstance beyond the inability to pay now and for a substantial portion of the loan's repayment period."[134]

Multifactor Standards

Some courts have developed lists of factors to consider when determining whether a debtor's inability to repay a student loan is likely to persist into the future. For instance, the Ninth Circuit has enumerated the following twelve nonexhaustive factors, which several courts outside the Ninth Circuit have also adopted:

- serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement;
- the debtor's obligations to care for dependents;
- lack of, or severely limited education;
- poor quality of education;
- lack of usable or marketable job skills;
- underemployment;
- maximized income potential in the chosen educational field, and no other more lucrative job skills;

[129] Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 63 n.7 (Bankr. W.D.N.Y. 2012).

[130] *E.g.*, *Polleys*, 356 F.3d at 1310; Demmons v. R3 Educ., Inc. (*In re* Demmons), Case No. 14-11638, Adv.P. No. 15-1024, 2016 WL 5874831, at *5 (Bankr. E.D. La. Oct. 7, 2016).

[131] *See* Petition for Writ of Certiorari, Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S. Ct. 803 (No. 15-485), at I.

[132] *See Tetzlaff*, 136 S. Ct. 803 (denying petition for writ of *certiorari*).

[133] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 396, 401, 404 (4th Cir. 2005); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993); McLaney v. Ky. Higher Educ. Assistance Auth., 375 B.R. 666, 673 (M.D. Ala. 2007).

[134] Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 941 (9th Cir. 2006). *See also* Douglas v. Educ. Credit Mgmt. Corp. (*In re* Douglas), 366 B.R. 241, 256 (Bankr. M.D. Ga. 2007) ("The debtor is *not* required to prove that her financial situation will persist due only to a serious illness, psychological problem, disability, *or other exceptional circumstance* . . . ." (emphasis added)).

- limited number of years remaining in the debtor's work life to allow payment of the loan;
- age or other factors that prevent retraining or relocation as a means for payment of the loan;
- lack of assets, whether or not exempt from creditors in bankruptcy, which could be used to pay the loan;
- potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; and
- lack of better financial options elsewhere.[135]

Other bankruptcy courts, by contrast, consider the following five factors:

- the debt amount;
- the interest rate;
- whether the debtor has attempted to minimize expenses;
- the debtor's income, earning ability, health, education, dependents, age, wealth, and professional degree; and
- whether the debtor has attempted to maximize income by seeking or obtaining employment commensurate with his education and abilities.[136]

Still other courts reject some or all of these factors.[137]

Medical Condition/Disability

Although many debtors who successfully satisfy the second *Brunner* prong suffer from a medical condition that renders them unable to repay their student loans,[138] "the existence of a debilitating medical condition is not a prerequisite to establishing the existence of 'undue hardship' under § 523(a)(8)."[139] But just as a medical disability is not a *necessary* condition to obtain an undue

[135] *Nys*, 446 F.3d 938, 947 (9th Cir. 2006); Wright v. RBS Citizens Bank (*In re* Wright), Bankr. No. 12-05206-TOM-7, Adv. No. 13-00025-TOM, 2014 WL 1330276, at *5 (Bankr. N.D. Ala. Apr. 2, 2014); Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (*In re* Crawley), 460 B.R. 421, 438 n. 20 (Bankr. E.D. Pa. 2011); *In re* Hamilton, No. 07-68258-MHM, 2009 WL 6499258, at *1-2 (Bankr. N.D. Ga. Mar. 23, 2009).

[136] *See, e.g.*, Pietras v. U.S. Dep't of Educ. (*In re* Pietras), Bankr. No. 09-38083, Adv. No. 10-3124, 2012 WL 466432, at *4 (Bankr. N.D. Ohio Feb. 13, 2012); Looper v. U.S. Dep't of Educ. (*In re* Looper), Bankr. No. 05-38187, Adv. No. 06-3042, 2007 WL 1231700, at *4 (Bankr. E.D. Tenn. Apr. 25, 2007).

[137] *See* Jones v. Bank One Tex., 376 B.R. 130, 136-40 & n.6 (W.D. Tex. 2007) (concluding that the Ninth Circuit's twelve-factor test was inconsistent with Fifth Circuit precedent); Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 873 n.33 (Bankr. E.D. Va. 2006) ("This Court declines to adopt the type of framework set forth by the [Ninth Circuit] in *Nys* . . . .").

[138] Pardo & Lacey, *Scandal*, *supra* note 72, at 216 (empirical study suggesting that a debtor who suffers from a medical condition (or whose dependent suffers from a medical condition) is more likely to successfully discharge a larger percentage of her student loans); Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 505 (2008) [hereinafter Pardo, *Illness*] ("A medical condition increased a debtor's odds of being granted a discharge by 140%."); Iuliano, *supra* note 10, at 525 (empirical study finding that debtors who successfully obtained an undue hardship discharge "were more likely to have a medical hardship").

[139] White v. Educ. Credit Mgmt. Corp. (*In re* White), Bankr. No. 07-41509, Adv. No. 07-4157, 2008 WL 5272508, at *5 (Bankr. E.D. Tex. Dec. 17, 2008); Chime v. Suntech Student Loan (*In re* Chime), 296 B.R. 439, 445 (Bankr. N.D. Ohio 2003). *See also, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1311 (10th Cir. 2004); *Douglas*, 366 B.R. at 256 ("The debtor is not required to prove that her financial situation will persist due only to a serious illness,

hardship discharge, nor is it a *sufficient* condition for satisfying the second *Brunner* prong; many courts have held that a medical condition will not support an undue hardship discharge unless it "impairs [the debtor's] ability to work."[140] In these jurisdictions, "the debtor must precisely identify her problems and explain how her condition would impair her ability to work in the future" before she may receive an undue hardship discharge.[141] The debtor must also establish that her "condition will likely persist for a significant portion of the repayment period of the student loans."[142]

Courts have disagreed regarding the quantum of proof a debtor must introduce in order to establish that his medical condition renders him unable to pay his student loans. Some courts have held that the debtor is not required "to submit independent medical evidence to corroborate his testimony that his" medical condition "render[s] him unable to repay his student loans"; as long as the debtor's testimony regarding his medical condition is credible and sufficiently detailed, then the debtor's testimony alone can be sufficient to satisfy the second prong of the *Brunner* test.[143] Courts that reach this conclusion reason that

> requiring that [debtors] provide corroborative medical evidence beyond their own testimony in order to sustain the evidentiary burden for a hardship discharge of a student loan on medical grounds is likely to prevent . . . debtors from receiving the relief to which they are entitled because they "cannot afford to hire medical experts to testify to the effect of their disease on their earning capacity."[144]

Other courts, by contrast, have held that although the debtor need not necessarily hire a medical *expert* to testify regarding the extent and severity of the debtor's disability, the debtor does need to introduce some form of corroborating medical evidence, such as medical records, or a letter from a treating physician.[145] In these jurisdictions, the "debtor's testimony alone cannot establish

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psychological problem, disability, or other exceptional circumstance; other types of circumstances could apply as well.").

[140] Perkins v. Pa. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 310 (Bankr. M.D.N.C. 2004) (listing cases). *See also, e.g.*, Tirch v. Penn. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 681 (6th Cir. 2005) (requiring the debtor to "explain how her condition would impair her ability to work in the future"); Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 330 (3d Cir. 2001) (holding that debtor bore "the burden of demonstrating how" her "emotional and psychiatric problems . . . impair[ed] her ability to work"); Duval v. IRS (*In re* Duval), Bankr. No. 10-10450 (JMP), Adv. No. 11-02263 (JMP), 2012 WL 1123041, at *4 (Bankr. S.D.N.Y. Apr. 3, 2012) ("Even in cases where a plaintiff can show a medical disability, courts continue to recognize the heavy burden of requiring a showing that the disability is likely to pose a persistent obstacle to employment.").

[141] *E.g.*, *Tirch*, 409 F.3d at 681.

[142] *E.g.*, Triplett v. ACS/PNC Educ. Loan Ctr. (*In re* Triplett), 357 B.R. 739, 743 (Bankr. E.D. Va. 2006); Hoskins v. Educ. Credit Mgmt. Corp. (*In re* Hoskins), 292 B.R. 883, 888 (Bankr. C.D. Ill. 2003). A debtor who is totally and permanently disabled may also be able to obtain an "administrative discharge" of her student loans outside the bankruptcy process. This report discusses the administrative discharge option in a subsequent section. *See infra* "Administrative Discharge."

[143] Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1325-26 (11th Cir. 2007). *See also, e.g.*, *White*, 2008 WL 5272508, at *5 ("A debtor is not required to present expert testimony to corroborate her own testimony about her health."); Benjumen v. AES/Charter Bank (*In re* Benjumen), 408 B.R. 9, 17-18 (Bankr. E.D.N.Y. 2009); Jackson v. Educ. Res. Inst. (*In re* Jackson), Bankr. No. 05-15085 (PCB), Adv. No. 06-01433, 2007 WL 2295585, at *6 (Bankr. S.D.N.Y. Aug. 9, 2007).

[144] *Jackson*, 2007 WL 2295585, at *6. *See also* Doherty v. United Student Aid Funds, Inc. (*In re* Doherty), 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998).

[145] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 360-61 (6th Cir. 2007); Pobiner v. Educ. Credit Mgmt. Corp. (*In re* Pobiner), 309 B.R. 405, 419 (Bankr. E.D.N.Y. 2004) ("Student loan debtors claiming undue hardship as a result of a medical condition must provide evidence to corroborate their claims . . . As Plaintiff did not provide corroborating evidence from his physician or psychotherapist, this Court cannot make a finding that Plaintiff suffers from any medical condition which would impact his ability to earn a living over a significant portion of the

prong two of the *Brunner* test if the debtor's health is at issue."[146] These courts reason that, as laypersons, neither judges nor debtors "have a reliable basis to render" the "medical diagnosis and prognosis" necessary "to determine the nature, extent and likely duration of a disability" as contemplated by the second prong of *Brunner*.[147]

Employment Opportunities Outside the Debtor's Chosen Field

Another issue that has divided the lower courts is whether a debtor may support his showing on the second *Brunner* element by demonstrating that he cannot obtain more lucrative employment in the field in which he received his degree, or if the debtor must instead attempt to maximize his income by pursuing a career outside his chosen field. A few courts, most notably the Ninth Circuit, have held that "a person who has chosen to go into a certain field and who, despite her best efforts, has topped out in her career with no possibility of future advancement," need not necessarily "switch careers to try to obtain a higher paying job" in order to satisfy the second *Brunner* prong.[148] The majority of courts, however, have instead held that a debtor "who completed an education in a low-paying field may not be heard to complain on that basis alone that the field is too low-paying to permit repayment of the debts."[149] If the debtor cannot maximize his income in the field in which he completed his education, most courts have required the debtor to pursue more profitable employment opportunities outside his chosen field.[150]

Relatedly, most courts have held that a debtor cannot purposefully opt to work *outside* his area of expertise if he would make more money working in the field in which he has been trained.[151] For example, a debtor with a medical degree generally cannot leave a lucrative medical practice to

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repayment period of the student loans."); Brosnan v. Am. Educ. Servs. (*In re* Brosnan), 323 B.R. 533, 538 (Bankr. M.D. Fla. 2005) (holding that a debtor "need not" introduce "extensive expert testimony," but the debtor "must present evidence which corroborates her own testimony regarding her medical difficulties"); Chime v. Suntech Student Loan (*In re* Chime), 296 B.R. 439, 445 (Bankr. N.D. Ohio 2003) ("For example, if properly authenticated, letters from a treating physician could be utilized.").

[146] *Brosnan*, 323 B.R. at 538. *See also, e.g.*, Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 343 n.13 (Bankr. S.D. Fla. 2013); Triplett v. ACS/PNC Educ. Loan Ctr. (*In re* Triplett), 357 B.R. 739, 744 (Bankr. E.D. Va. 2006); Hoskins v. Educ. Credit Mgmt. Corp. (*In re* Hoskins), 292 B.R. 883, 888 (Bankr. C.D. Ill. 2003).

[147] Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 875-77 (Bankr. E.D. Va. 2006). *See also, e.g.*, Lozada v. Educ. Credit Mgmt. Corp. (*In re* Lozada), 594 B.R. 212, 226-27 (Bankr. S.D.N.Y. 2018) ("A judge can observe the witness and hear him describe his symptoms, but a judge cannot make a diagnosis or determine the severity of the impairment based on that alone.") (quoting Norasteh v. Boston Univ. (*In re* Norasteh), 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004)).

[148] *E.g.*, Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 945 n.6 (9th Cir. 2006).

[149] *E.g.*, Kraft v. N.Y. State Higher Educ. Servs. Corp. (*In re* Kraft), 161 B.R. 82, 85-86 (Bankr. W.D.N.Y. 1993).

[150] *See, e.g.*, U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 93 (5th Cir. 2003) ("Nothing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim that it would be an undue hardship to repay his student loans."); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 401 (4th Cir. 2005) ("Nor has [the debtor] indicated any specific steps she has taken to seek higher-paying employment in other fields. Instead, she appears to be content with her present employment as a decorative painter because it was her original goal to work in the arts, the area in which she initially studied at Coastal Carolina. Having a low-paying job, however, does not in itself provide undue hardship . . . ."); *Kraft*, 161 B.R. at 85 ("The *Brunner* test does not permit a Debtor to work at less than a fully productive level while 'holding out' for a job in the Debtor's chosen field.").

[151] *See, e.g.*, Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 58 (Bankr. W.D.N.Y. 2012) ("A skilled physician who chooses to remain a missionary after bankruptcy will not prevail under *Brunner*."); Nixon v. Key Educ. Res. (*In re* Nixon), 453 B.R. 311, 331 (Bankr. S.D. Ohio 2011) ("Elisabeth has not applied for teaching positions or other positions in her fields of expertise. Yet she cannot fully satisfy the additional-circumstances prong without doing so.").

pursue less profitable work as a missionary and then argue that he lacks the ability to repay his loans.[152] If "by education and experience" the debtor "qualifies for higher-paying work," most courts require the debtor "to seek work that would allow debt repayment before he can claim undue hardship."[153]

Educational Value

Courts have likewise disagreed regarding whether the value of the education that the student loan financed should affect the debtor's ability to discharge the loan. Some courts have held that "it is not appropriate . . . to consider the 'value' of a debtor's chosen education" when determining "whether the three prongs of *Brunner* have been satisfied."[154] According to these courts, considering whether

> the education for which the loan paid has been of little use to [the debtor] is antithetical to the spirit of the guaranteed loan program . . . Consideration of the 'value' of the education in making a decision to discharge turns the government into an insurer of educational value. Those students who make wise choices prosper; those who do not seek to discharge their loans in bankruptcy. This is wholly improper.[155]

These courts have therefore concluded that "the *Brunner* test . . . does not permit discharge of a student loan on the basis that the [d]ebtor made a poor career choice . . . in selecting the curriculum that the loan financed."[156] These courts have likewise ruled that "a 'debtor is not entitled to an undue-hardship discharge by virtue of selecting an education that failed to return economic rewards.'"[157]

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[152] *See, e.g.*, *Bene*, 474 B.R. at 58 (Bankr. W.D.N.Y. 2012) ("A skilled physician who chooses to remain a missionary after bankruptcy will not prevail under *Brunner*."); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) ("Oyler's choice to work as a pastor of a small start-up church cannot excuse his failure to supplement his income so that he can meet knowingly and voluntarily incurred financial obligations. By education and experience he qualifies for higher-paying work and is obliged to seek work that would allow debt repayment before he can claim undue hardship."); Educ. Credit Mgmt. Corp. v. Waterhouse, 333 B.R. 103, 106, 112 (W.D.N.C. 2005) (denying undue hardship discharge to debtor with Ph.D in organizational psychology who "decided to enter the ministry").

[153] *Oyler*, 397 F.3d at 386. *See also, e.g.*, Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 923 (W.D. Wash. 2012) (denying undue hardship discharge where debtor was "employable as a librarian or as an IT professional," but had "focused his job search on home assistance work, which is markedly less lucrative"); *Waterhouse*, 333 B.R. at 112 ("Many courts have held that making the choice to take a low-paying job—regardless of how noble the profession—cannot merit undue hardship relief."); Evans-Lambert v. Sallie Mae Servicing Corp. (*In re* Evans-Lambert), Bankr. No. 07-40014-MGD, Adv. No. 07-5001-MGD, 2008 WL 1734123, at *6 (Bankr. N.D. Ga. Mar. 25, 2008) (denying undue hardship discharge to federal public defender who had "the credentials and experience to obtain employment in the private sector which could lead to higher levels of responsibility and a higher monthly salary").

[154] Gill v. Nelnet Loan Servs., Inc. (*In re* Gill), 326 B.R. 611, 638 n.16 (Bankr. E.D. Va. 2005). *See also, e.g.*, *Bene*, 474 B.R. at 64 (deeming it "wholly improper" to consider "the 'value' of the education in making a decision to discharge"); Pace v. Educ. Credit Mgmt. Corp. (*In re* Pace), 288 B.R. 788, 792 (Bankr. S.D. Ohio 2003) ("Courts should not consider the lack of value or benefit of the education as a mitigating factor."); Mathews v. Higher Educ. Assistance Found. (*In re* Mathews), 166 B.R. 940, 943-44 n.3 & n.5 (Bankr. D. Kan. 1994) ("It is not relevant to dischargeability for a court to determine that a student's education . . . is of little value to the student or is in a field where earning potential is limited and discharge loans on that basis.").

[155] *Bene*, 474 B.R. at 64. *See also, e.g.*, Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 331 (3d Cir. 2001) ("Federal student loan programs were not designed to turn the government into an insurer of educational value."); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) ("Consideration of the 'value' of the education in making a decision to discharge turns the government into an insurer of educational value.").

[156] Kraft v. N.Y. State Higher Educ. Servs. Corp. (*In re* Kraft), 161 B.R. 82, 85 (Bankr. W.D.N.Y. 1993). *See also* Norasteh v. Boston Univ. (*In re* Norasteh), 311 B.R. 671, 677 (Bankr. S.D.N.Y. 2004).

[157] Educ. Credit Mgmt. Corp. v. Buchanan, 276 B.R. 744, 751 (N.D. W. Va. 2002). *See also, e.g.*, Tuttle v. Educ. Credit

Several of these courts have further held that "the *Brunner* test . . . does not permit discharge of a student loan on the basis that" the school misled "the [d]ebtor . . . in selecting the curriculum that the loan financed."[158] Some courts have accordingly denied undue hardship discharges even where the debtor contended that the school defrauded him out of his tuition payments.[159] These courts justify their refusal to consider the educational value a debtor received on the ground that it is "ineffectual" to discharge a student's loans with the objective to "punish institutions for forcing on students loans which are not in their best interests" because the adverse economic consequences of the discharge are "borne not by the institution but by taxpayers, who absorb the cost of the default."[160]

Other courts, by contrast, have held that it is proper to consider the quality of the debtor's education when determining whether to grant an undue hardship discharge.[161] These courts have emphasized that, where a "school fails to educate the borrower properly, if at all," the debtor may be left "with no benefit from his 'education'" and therefore "no ability to repay."[162] For instance, in one notable case, the bankruptcy court granted the debtor a discharge in part because "the actual course work offered by the" school that provided the debtor's education was "of dubious value."[163] In support of this conclusion, the court noted that "in the 'marketing' course [the debtor] took 'the instructor showed films of "Batman" the whole class.'"[164] Similarly, some jurisdictions consider whether the school closed before the debtor was able to complete the education that the student loan financed when determining whether the debtor is entitled to an undue hardship discharge.[165]

Mgmt. Corp. (*In re* Tuttle), Case No. 16-28259-beh, Adv. No. 17-02116, 2019 WL 1472949, at *15 (Bankr. E.D. Wis. Mar. 31, 2019) ("[T]he debtor must accept the consequences of his decision to borrow. 'If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.'") (quoting *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993)); Wright v. RBS Citizens Bank (*In re* Wright), Bankr. No. 12-05206-TOM-7, Adv. No. 13-00025-TOM, 2014 WL 1330276, at *5 (Bankr. N.D. Ala. Apr. 2, 2014); Coveney v. Costep Servicing Agent (*In re* Coveney), 192 B.R. 140, 143 (Bankr. W.D. Tex. 1996).

[158] *Kraft*, 161 B.R. at 85. *See also Norasteh*, 311 B.R. at 677. *See generally* Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 214-216 (2012) (criticizing some for-profit educational institutions for providing prospective students with "deceptive" information "related to graduation rates, costs, and post-[graduation] employment prospects and salaries" "in order to encourage enrollment and, in the process, secure federal financial aid funds").

[159] *See, e.g.*, Gregory v. U.S. Dep't of Educ. (*In re* Gregory), 387 B.R. 182, 188-90 (Bankr. N.D. Ohio 2008).

[160] *Bene*, 474 B.R. at 64.

[161] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006); *Wright*, 2014 WL 1330276, at *5; *In re* Hamilton, No. 07-68258-MHM, 2009 WL 6499258, at *1 (Bankr. N.D. Ga. Mar. 23, 2009); Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 418-19 (Bankr. D. Ariz. 2003) (granting undue hardship discharge where debtor obtained "substandard education" that failed to provide him with any "economic benefit" because it "did not qualify him for the work").

[162] *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 192 (Bankr. W.D. Tex. 2001).

[163] Hurley v. Student Loan Acquisition Auth. of Ariz. (*In re* Hurley), 258 B.R. 15, 18 n.5 (Bankr. D. Mont. 2001).

[164] *Id*.

[165] *See* Gregory v. U.S. Dep't of Educ. (*In re* Gregory), 387 B.R. 182, 189 (Bankr. N.D. Ohio 2008) (holding that "the untimely closure of a debtor's educational institution" is relevant to (but not dispositive of) the debtor's entitlement to an undue hardship discharge); Kidd v. Student Loan Xpress, Inc. (*In re* Kidd), 472 B.R. 857, 864 (Bankr. N.D. Ga. 2012) ("The premature closure of a debtor's school is but one factor for a court to consider."). A student misled by an educational institution or harmed by an institution's premature closure may potentially have recourse outside the bankruptcy system. A separate CRS product analyzes nonbankruptcy options available to such students. *See generally* CRS Report R44737, *The Closure of Institutions of Higher Education: Student Options, Borrower Relief, and Implications*, by Alexandra Hegji [hereinafter Hegji, *Closure*].

The Debtor's Age

Nor have courts agreed whether a debtor's advanced age constitutes an "additional circumstance" that can support a finding of undue hardship. Some courts have held that a debtor's advanced age can support an undue hardship finding, emphasizing that a debtor's age can affect "not only her job prospects, but also the number of years she will be able to remain in the work force."[166] Other courts, however, have concluded that the debtor's age does not constitute "an additional circumstance to support the second prong under *Brunner*, at least where the age is standing alone unaccompanied by serious illness or disability."[167] In particular, when a debtor incurs student loans later in life, these courts have ruled that the fact that the debtor must continue to pay his loans into advanced age is not sufficient in and of itself to satisfy *Brunner*'s second prong.[168]

Whether the "Additional Circumstances" Must Predate the Issuance of the Loans

A small minority of courts have held that "the 'additional circumstances' required to meet the second element" of the *Brunner* test "must be those that were not present at the time the debtor applied for the loans or were exacerbated since that time."[169] These courts reason that, if the debtor "experienced an illness, developed a disability, or became responsible for a large number of dependents" *before* incurring the educational debt, he could have "calculated that factor into his cost-benefit analysis" when deciding whether to take out the student loan.[170]

However, most courts do not explicitly impose any requirement that the requisite "additional circumstances" postdate the issuance of the loan. Indeed, a few courts have explicitly rejected any "distinction between pre-existing and later-arising 'additional circumstances,'"[171] opining that

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[166] *See* Bumps v. Wells Fargo Educ. Fin. Servs. (*In re* Bumps), Case No. 6:11-bk-06677-ABB, Adv. No. 6:12-ap-00107-ABB, 2014 WL 185336, at *3 (Bankr. M.D. Fla. Jan. 15, 2014). *See also, e.g.*, *Nys*, 446 F.3d at 947 ("The factors a court may consider include . . . limited number of years remaining in the debtor's work life to allow payment of the loan . . . age or other factors that prevent retraining or relocation as a means for payment of the loan . . . ."); Newman v. Educ. Credit Mgmt. Corp. (*In re* Newman), 304 B.R. 188, 197 (Bankr. E.D. Pa. 2002) (noting that "a reasonable fact finder may consider the debtor's age" when determining whether the debtor is entitled to an undue hardship discharge); Allen v. Am. Educ. Servs. (*In re* Allen), 329 B.R. 544, 552-53 (Bankr. W.D. Pa. 2005) (emphasizing debtor's "relatively advanced age" and concluding "that the Debtor's employment prospects and earning ability will not improve, at least appreciably, during the balance of the repayment period").

[167] Goforth v. U.S. Dep't of Educ. (*In re* Goforth), 466 B.R. 328, 339 (Bankr. W.D. Pa. 2012). *See also, e.g.*, Bukovics v. Navient (*In re* Bukovics), 587 B.R. 695, 707 (Bankr. N.D. Ill. 2018) ("Plaintiff's age is . . . not particularly relevant to the question of whether her circumstances represent a 'certainty of hopelessness.'").

[168] *See* Conner v. U.S. Dep't of Educ., Case No. 15-10541, 2016 WL 1178264, at *3 (E.D. Mich. Mar. 28, 2016) ("One's age cannot form the bases of a favorable finding for a debtor who chooses to pursue an education later in life."); Fabrizio v. U.S. Dep't of Educ. Borrower Servs. Dep't Direct Loans (*In re* Fabrizio), 369 B.R. 238, 249 (Bankr. W.D. Pa. 2007) ("Nor can the Debtor rely on his age of 51 years as a discharge basis. The simple fact that the Debtor will have to pay his educational loans later into life is merely a consequence of his decision to incur debt for educational purposes during his thirties."); Rosen v. Att'y Registration & Disciplinary Comm'n (*In re* Rosen), Bankr. Case No. 15-0897 (DRC), Civil Case No. 16 C 10686, 2017 WL 4340167, at *9 (N.D. Ill. Sept. 29, 2017) ("Courts nationwide have reached the same conclusion: repayment into advanced age is a consequence of taking out loans late in life.").

[169] *See* Teague v. Tex. Guaranteed Student Loan Corp. (*In re* Teague), Case No. 15-34296-hdh7, Adv. No. 16-03007-hdh, 2017 WL 187557, at *2 (Bankr. N.D. Tex. Jan. 17, 2017). *See also, e.g.*, Hoffman v. Tex. Guaranteed Student Loan Corp. (*In re* Williams), Case No. 15-41814, Adv. No. 16-4006, 2017 WL 2303498, at *6 (Bankr. E.D. Tex. May 25, 2017); Thoms v. Educ. Credit Mgmt. Corp. (*In re* Thoms), 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001).

[170] *See Thoms*, 257 B.R. at 149.

[171] Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 883 (9th Cir. 2006). *See also, e.g.*, Wilkinson-Bell v. Educ. Credit Mgmt. Corp. (*In re* Wilkinson-Bell), Bankr. No. 03-80321, Adv. No. 06-8108, 2007 WL 1021969, at

"Congress could have easily stated that, in determining the existence of 'undue hardship,' a court must ignore any conditions a debtor might have had at the time she took out the loan she later seeks to discharge."[172]

The Third Requirement: Good Faith Efforts to Repay

Finally, *Brunner*'s third prong requires the debtor to demonstrate "good faith efforts to repay the loans."[173] Most courts agree that "good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses."[174] "The court may also consider whether the debtor has tried to make some payments when he or she could, or has sought to defer the loan or renegotiate the payment plan."[175]

History of Payments

"In determining whether a debtor has made a good faith effort to repay a student loan obligation, a primary consideration is whether the debtor actually made any payments on the obligation, and if so, the total amount of payments."[176] Nevertheless, "a debtor's 'failure to make a payment, standing alone, does not establish a lack of good faith,'"[177] especially "where the debtor has no funds to make any repayments."[178]

Length of Time Elapsed Before the Debtor Sought Discharge

As explained above, Congress enacted Section 523(a)(8) partly to address the concern that students "would file for bankruptcy relief immediately upon graduation."[179] For that reason,

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*4 (Bankr. C.D. Ill. Apr. 2, 2007).

[172] *Wilkinson-Bell*, 2007 WL 1021969, at *4 (Bankr. C.D. Ill. Apr. 2, 2007).

[173] *E.g.*, Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

[174] Hedlund v. Educ. Res. Inst. Inc. (*In re* Hedlund), 718 F.3d 848, 852 (9th Cir. 2013); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007). *See also, e.g.*, Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 760 (7th Cir. 2015); Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544 (4th Cir. 2008).

[175] *E.g.*, Zook v. Edfinancial Corp. (*In re* Zook), Bankr. No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *11 (Bankr. D.D.C. Feb. 27, 2009).

[176] Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 882 (Bankr. E.D. Va. 2006). *See also, e.g.*, Augustin v. U.S. Dep't of Educ. (*In re* Augustin), 588 B.R. 141, 153 (Bankr. D. Md. 2018) ("Continual deferments without making a payment or seeking out other payment options does not show good faith."); Wright v. RBS Citizens Bank (*In re* Wright), Bankr. No. 12-05206-TOM-7, Adv. No. 13-00025-TOM, 2014 WL 1330276, at *6 (Bankr. N.D. Ala. Apr. 2, 2014) ("Courts are generally reluctant to find good faith where a debtor made minimal or no payments on his or her student loans."); Perkins v. Pa. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 312 (Bankr. M.D.N.C. 2004) (denying undue hardship discharge where debtor "had the ability over the years to make regular payments on her educational loan indebtedness" yet "chose not to do so").

[177] *E.g.*, *Mosley*, 494 F.3d at 1327 (quoting Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1311 (10th Cir. 2004)); Todd v. Access Grp., Inc. (*In re* Todd), 473 B.R. 676, 693 (Bankr. D. Md. 2012); McMullin v. U.S. Dep't of Educ. (*In re* McMullin), 316 B.R. 70, 81 (Bankr. E.D. La. 2004).

[178] *Burton*, 339 B.R. at 882. *See also, e.g.*, Uhrman v. U.S. Dep't of Educ. (*In re* Uhrman), Bankr. No. 11-34511, Adv. No. 11-3261, 2013 WL 268634, at *7 (Bankr. N.D. Ohio Jan. 24, 2013) ("The good faith requirement does not mandate that payments must have been made when the debtor's circumstances made such payment impossible."); *Perkins*, 318 B.R. at 312 ("Failure to make payments will not preclude a finding of good faith if the debtor had no funds available for payment toward the loan."); Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 197 (Bankr. W.D. Tex. 2001) ("Mere failure to make a minimal payment does not prevent a finding of good faith where a debtor has never had the resources to make a payment.").

[179] Wetzel v. N.Y. State Higher Educ. Servs. Corp. (*In re* Wetzel), 213 B.R. 220, 224 (Bankr. N.D.N.Y. 1996). *See also supra* "The Enactment of the Bankruptcy Code."

"some courts have looked to the length of time between when the loan first became due and when the debtor sought discharge of the debt" when evaluating the debtor's good faith.[180] The less time that has passed since the student loan first became due, the less likely it is that a court will conclude that the debtor is seeking to discharge the loan in good faith.[181]

Ratio of Student Loan Debt to Total Indebtedness

Because Congress also sought to combat "consumer bankruptcies of former students motivated primarily to avoid payment of education loan debts" when enacting Section 523(a)(8),[182] many courts also examine "the amount of the student loan debt as a percentage of the debtor's total indebtedness" when evaluating whether a debtor has satisfied *Brunner*'s good faith requirement.[183] "Where a debtor's student loan debt constitutes a high percentage of the debtor's total debt," many "courts have found that the debtor has not made a good faith effort to repay the loan."[184]

Other courts, while noting that the ratio of student loan debt to total indebtedness "may be relevant" to the debtor's good faith, nonetheless warn against "placing a substantial emphasis" on the percentage of student loan debt, especially when "the [d]ebtor is not seeking to have his student loans discharged prior to beginning a lucrative career."[185] Some courts consequently advise against establishing a "bright-line percentage" above which "discharge of student-loan debt should be deemed to be the motivating factor for bankruptcy."[186]

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[180] Goforth v. United States of Am. Dep't of Educ. (*In re* Goforth), 466 B.R. 328, 341 (Bankr. W.D. Pa. 2012). *See also, e.g.*, Aaron v. U.S. Dep't of Educ. (*In re* Aaron), Case No. 13-62693, Adv. No. 14-6009, 2016 WL 3483208, at *5 (Bankr. N.D. Ohio June 20, 2016) ("Factors speaking to [the good faith] prong include . . . the length of time between incurrence of the debt and the attempt to discharge it . . . .").

[181] *See, e.g.*, Jackson v. Educ. Credit Mgmt. Corp., No. 3:03CV7692, 2004 WL 952882, at *7 (N.D. Ohio Apr. 30, 2004) (concluding that the fact that "very little time ha[d] passed since" the debtor "obtained her degree" "cut against a finding of good faith").

[182] 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). *See also supra* "The Enactment of the Bankruptcy Code."

[183] Wright v. RBS Citizens Bank (*In re* Wright), Bankr. No. 12-05206-TOM-7, Adv. No. 13-00025-TOM, 2014 WL 1330276, at *6 (Bankr. N.D. Ala. Apr. 2, 2014). *See also, e.g.*, Gleason v. U.S. Dep't of Educ. (*In re* Gleason), Case No. 15-31254, Adv. No. 16-50007, 2017 WL 4508844, at *5 (Bankr. N.D.N.Y. Oct. 6, 2017); Stephenson v. United States (*In re* Stephenson), Case No. 6:14-bk-08607-CCJ, Adv. Case No. 6:14-ap-00152-CCJ, 2017 WL 4404265, at *4 (Bankr. M.D. Fla. Oct. 2, 2017); Kidd v. Student Loan Xpress, Inc. (*In re* Kidd), 472 B.R. 857, 863 (Bankr. N.D. Ga. 2012).

[184] *Kidd*, 472 B.R. at 863. *See also Stephenson*, 2017 WL 4404265, at *4; Greene v. U.S. Dep't of Educ. (*In re* Greene), 484 B.R. 98, 132 (Bankr. E.D. Va. 2012), *aff'd*, No. 4:13cv79, 2013 WL 5503086 (E.D. Va. Oct. 2, 2013), *aff'd*, 573 F. App'x 300 (4th Cir. 2014) ("Courts have usually refused to discharge student loans when they are the bulk of the debtor's debt or when student debt is the first or second largest single type of debt.").

[185] Jackson v. Educ. Res. Inst. (*In re* Jackson), Bankr. No. 05-15085 (PCB), Adv. No. 06-01433, 2007 WL 2295585, at *9 (Bankr. S.D.N.Y. Aug. 9, 2007). *See also* Hill v. Educ. Credit Mgmt. Corp. (*In re* Hill), Case No. 17-56656-SMS, Adv. No. 17-05131-SMS, 2019 WL 1472957, at *10 (Bankr. N.D. Ga. Apr. 1, 2019) ("The fact that Debtor's student loan balances happen to constitute a large percentage of her total debt is not determinative. Here, Debtor had a legitimate basis for seeking bankruptcy relief separate and apart from seeking a hardship discharge of her student loan debt."); *Goforth*, 466 B.R. at 341 ("While the Court does not believe that in isolation the ratio of student debt to overall debt in the present case compels a finding of a lack of good faith, it is yet a further negative factor for the Debtors' position."); Wallace v. Educ. Credit Mgmt. Corp. (*In re* Wallace), 443 B.R. 781, 792-93 (Bankr. S.D. Ohio 2010) ("In some cases, such a high percentage of student-loan debt might demonstrate that the motivating factor in the debtor's filing for bankruptcy was the discharge of the student-loan debt. The Court finds that this is not the case here.").

[186] *Wallace*, 443 B.R. at 792.

Maximizing Income by Pursuing Full-Time Employment

As part of the inquiry into whether the debtor is acting in good faith by "maximiz[ing] income,"[187] some courts evaluate whether the debtor has pursued opportunities for full-time employment.[188] If a debtor is capable of obtaining full-time employment, yet is only working part-time because he has failed to seek full-time employment or a second part-time job, a court may deny him an undue hardship discharge.[189] However, if the debtor is already working a full-time job, courts will generally not require the debtor to also secure additional part-time employment in order to qualify for an undue hardship discharge.[190]

Self-Imposed Inability to Repay

Generally speaking, in order to obtain an undue hardship discharge, the debtor's inability to repay his loans must "result[] not from his choices, but from factors beyond his reasonable control."[191] To illustrate, some courts have refused to discharge student loans owed by debtors whose criminal histories rendered them unable to obtain gainful employment, reasoning that those debtors' inability to repay their loans was a problem of their own making.[192]

Notwithstanding the general rule that a debtor's "default should result, not from his choices, but from factors beyond his reasonable control,"[193] however, courts have overwhelmingly rejected arguments raised by creditors that a debtor's decision to have children constitutes a self-imposed lack of good faith, even if the concomitant increase in child care costs will ultimately hamper the debtor's ability to repay his student loans.[194] In other words, courts will not require a debtor to abstain from having children as a prerequisite for obtaining an undue hardship discharge.

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[187] *E.g.*, Hedlund v. Educ. Res. Inst. Inc. (*In re* Hedlund), 718 F.3d 848, 852 (9th Cir. 2013).

[188] *See, e.g.*, Penn. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 499-500 (B.A.P. 9th Cir. 2002).

[189] *See, e.g.*, *id*. ("Birrane is not working full time. There was no evidence that she explored the possibility, or was even willing, to take a second job outside her field that would allow her to meet her student loan obligations.").

[190] *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 196 (Bankr. W.D. Tex. 2001) ("The court believes it is unreasonable to require Mr. Speer to seek part-time employment, in addition to his current full time job.").

[191] Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007). *See also, e.g.*, Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544 (4th Cir. 2008); Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 917 (B.A.P. 9th Cir. 2013); Tuttle v. Educ. Credit Mgmt. Corp. (*In re* Tuttle), Case No. 16-28259-beh, Adv. No. 17-02116, 2019 WL 1472949, at *15 (Bankr. E.D. Wis. Mar. 31, 2019) ("What matters for the good faith prong is that the debtor was not willful or negligent in bringing about his unfortunate financial condition."). *But see* Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 61 (Bankr. W.D.N.Y. 2012) (holding that *Brunner* test should not penalize debtor for making voluntary decision 24 years ago to leave school in order to care for her infirm parents).

[192] *See* Chenault v. Great Lakes Higher Educ. Corp. (*In re* Chenault), 586 B.R. 414, 420 (B.A.P. 6th Cir. 2018) ("The only 'circumstances' the Debtor submitted to the bankruptcy court was proof of the terms of his parole . . . The Debtor's circumstance as a parolee is of his own making."); Looper v. U.S. Dep't of Educ. (*In re* Looper), Bankr. No. 05-38187, Adv. No. 06-3042, 2007 WL 1231700, at *7 (Bankr. E.D. Tenn. Apr. 25, 2007) ("While the Debtor's earning potential is decidedly limited by his incarceration, his current and future state of financial affairs is directly attributable to his actions, and he cannot escape the responsibility therefor.").

[193] *E.g.*, *Mosley*, 494 F.3d at 1327.

[194] *See, e.g.*, Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 417-18 (Bankr. D. Ariz. 2003); Myers v. Fifth Third Bank (*In re* Myers), 280 B.R. 416, 422-23 (Bankr. S.D. Ohio 2002); Ivory v. United States (*In re* Ivory), 269 B.R. 890, 910-12 (Bankr. N.D. Ala. 2001).

The "Totality-of-the-Circumstances" Test

Whereas the vast majority of courts apply the *Brunner* test to determine whether excepting a student loan from discharge would impose an undue hardship upon the debtor, two circuits have explicitly declined to adopt the *Brunner* standard.

The Eighth Circuit

The Eighth Circuit, for instance, has concluded that "requiring . . . bankruptcy courts to adhere to the strict parameters of a particular test" such as the *Brunner* standard "would diminish the inherent discretion contained" in the Bankruptcy Code to decide whether a particular student loan debt should be discharged.[195] The Eighth Circuit has therefore explicitly declined to adopt *Brunner*.[196] Instead, the Eighth Circuit applies an alternative standard known as "the totality-of-the-circumstances test"[197] or the "*Andrews*[198] standard."[199] Under this test, a bankruptcy court considers

- the debtor's past, present, and reasonably reliable future financial resources;
- the debtor's and his dependents' reasonable necessary living expenses; and
- any other relevant facts and circumstances.[200]

The third "other relevant facts and circumstances" factor in turn permits evaluation of a wide range of facts and issues that may be relevant to determining undue hardship, including

- total present and future incapacity to pay debts for reasons not within the debtor's control;
- whether the debtor has made a good faith effort to negotiate deferment or forbearance of the payment;
- whether the hardship will be long-term;
- whether the debtor has made payments on the student loan;
- whether the debtor suffers from a permanent or long-term disability;
- the debtor's ability to obtain gainful employment in his respective area of study;
- whether the debtor has made a good faith effort to maximize income and minimize expenses;
- whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and
- the ratio of student loan debt to total indebtedness.[201]

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[195] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

[196] *Id*. at 553.

[197] *Id*.

[198] Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702 (8th Cir. 1981).

[199] *Long*, 322 F.3d at 555.

[200] *Id*. at 553. *See generally* Swedback & Prettner, *supra* note 52, at 1679-1702 (discussing the Eighth Circuit's approach to undue hardship determinations).

[201] *E.g.*, Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 4 (B.A.P. 8th Cir. 2017). Notably, many of these factors are also relevant to the *Brunner* inquiry applied by the majority of other circuits, as outlined above.

"These numerous factors do not provide an exclusive list of items that courts may consider and also do not require a court to address each and every one in a particular case."[202] According to the Eighth Circuit,

> Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of 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.[203]

The First Circuit

While the First Circuit has explicitly declined to adopt any specific test for evaluating undue hardship,[204] the U.S. Bankruptcy Appellate Panel (BAP) for the First Circuit[205] has rejected the *Brunner* test in favor of the totality-of-the-circumstances test.[206] According to the BAP, the Bankruptcy Code's text does not support the *Brunner* test's requirements that the debtor demonstrate both "'unique' or 'extraordinary' circumstances" and "good faith" in order to obtain an undue hardship discharge.[207] Bankruptcy courts within the First Circuit have also justified the totality-of-the-circumstances approach "on the grounds that a case-by-case approach that is fact sensitive . . . ensures an appropriate, equitable balance between concern for cases involving extreme abuse and concern for the overall fresh start policy" of the Bankruptcy Code.[208]

Thus, when determining whether to discharge a student loan on undue hardship grounds, bankruptcy courts in the First Circuit consider "all relevant evidence," including (but not limited to)[209]

- the debtor's income and expenses;
- the debtor's health, age, education, number of dependents, and other personal or family circumstances;
- the amount of the monthly payment required;
- the impact of the discharge that the debtor will receive in the bankruptcy case;
- the debtor's ability to find a higher-paying job; and

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[202] Piccinino v. U.S. Dep't of Educ. (*In re* Piccinino), 577 B.R. 560, 566 (B.A.P. 8th Cir. 2017).

[203] *Long*, 322 F.3d at 554-55.

[204] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 190 (1st Cir. 2006) (analyzing both the *Brunner* and totality-of-the-circumstances tests, but ultimately declining to "pronounce our views of a preferred method for identifying a case of 'undue hardship'"). *See also* Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010) ("Although the First Circuit acknowledged the two approaches in *Nash*, it declined to adopt formally a particular test for determining undue hardship, and it remains an undecided issue in this circuit.").

[205] The BAP consists of panels of bankruptcy judges that hear appeals from the bankruptcy courts within the Circuit. *See* 28 U.S.C. § 158(b). Although "there is no law definitively establishing that the decisions of" the BAP of the First Circuit "are binding on bankruptcy courts within the First Circuit," the BAP's decisions nonetheless "must be given consideration as significant and persuasive authority." *In re* Smith, 573 B.R. 298, 301 (Bankr. D. Me. 2017).

[206] *Bronsdon*, 435 B.R. at 799-800.

[207] *Id*.

[208] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 24 (Bankr. D. Mass. 2005).

[209] *See, e.g.*, Schatz v. U.S. Dep't of Educ. (*In re* Schatz), 584 B.R. 1, 7-9 (Bankr. D. Mass. 2018) (denying undue hardship discharge due to "the existence of substantial equity in" certain real property owned by the debtor "that c[ould] be used to pay [the debtor's] student loans in full").

- the debtor's ability to reduce living expenses.[210]

Comparing the Totality-of-the-Circumstances Test to *Brunner*

The central difference between the totality-of-the-circumstances test and the *Brunner* test concerns their relative flexibility. Whereas the totality-of-the-circumstances test is a more open-ended standard that permits the court to consider a wide variety of factors, the *Brunner* test is somewhat less malleable in that if a debtor fails to satisfy any one of the three separate prongs of *Brunner*, he cannot obtain a discharge.[211] In particular, as one court has noted, "[t]he significant difference between the *Brunner* approach and the totality of the circumstances test is the requirement in *Brunner* that a debtor demonstrate that she has made good faith efforts to repay the educational loans at issue."[212] This additional good faith requirement potentially makes the *Brunner* test "more restrictive" than the totality-of-the-circumstances standard[213] because it affirmatively requires the court to scrutinize the debtor's conduct in addition to the debtor's economic circumstances.[214]

Because "the totality of the circumstances test is a 'less restrictive approach' than the *Brunner* test," supporters of the *Brunner* test have opined that the totality-of-the-circumstances test is insufficiently predictable and affords judges too much discretion in determining whether any particular debtor qualifies for an undue hardship discharge.[215] Opponents of *Brunner* respond that, in their view, the totality-of-the-circumstances test is more faithful to the text of the Bankruptcy Code.[216]

Courts and commentators disagree, however, regarding the extent to which the *Brunner* test actually varies from the totality-of-the-circumstances test as a practical matter. On the one hand, several courts have noted that "the distinctions between the two tests are modest, with many overlapping considerations."[217] Perhaps for that reason, some statistical evidence suggests that student loan debtors do not fare systematically better or worse in *Brunner* jurisdictions than in

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[210] Lorenz v. Am. Educ. Servs./Pa. Higher Educ. Assistance Agency (*In re* Lorenz), 337 B.R. 423, 431 (B.A.P. 1st Cir. 2006).

[211] *See, e.g.*, *Hicks*, 331 B.R. at 26 ("While under the totality of the circumstances approach, the court may also consider 'any additional facts and circumstances unique to the case' that are relevant . . . the *Brunner* test imposes two additional requirements on the debtor that *must* be met if the student loans are to be discharged.").

[212] *E.g.*, Educ. Credit Mgmt. Corp. v. Kelly (*In re* Kelly), 312 B.R. 200, 206 (B.A.P. 1st Cir. 2004). *But see* Erkson v. U.S. Dep't of Educ. (*In re* Erkson), 582 B.R. 542, 550-51 (Bankr. D. Me. 2018) (concluding that even though "the 'totality of the circumstances' test" does not include "a '*good* faith' requirement, . . . if a party opposing discharge can establish *bad* faith, such bad faith may constitute a disqualifying factor") (emphasis added).

[213] *See, e.g.*, Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 (Bankr. C.D. Ill. Dec. 27, 2011).

[214] *See, e.g.*, *Hicks*, 331 B.R. at 28-30.

[215] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1308-09 (10th Cir. 2004) (opining that the totality-of-the-circumstances test "has an unfortunate tendency to generate lists of factors that should be considered—lists that grow ever longer as the case law develops. 'Legal rules have value only to the extent they guide primary conduct or the exercise of judicial discretion. Laundry lists, which may show ingenuity in imagining what *could* be relevant but do not assign weights of consequences to the factors, flunk the test of utility.'") (quoting *In re* Plunkett, 82 F.3d 738, 741 (7th Cir. 1996)).

[216] *See, e.g.*, *Hicks*, 331 B.R. at 28-30.

[217] Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 798 (B.A.P. 1st Cir. 2010). *See also Polleys*, 356 F.3d at 1309 ("As a practical matter, . . . the two tests will often consider similar information—the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment.").

totality-of-the-circumstances jurisdictions.[218] On the other hand, however, the differences between the two tests are occasionally outcome-determinative,[219] and there is some competing statistical evidence that suggests that it is in fact easier to obtain an undue hardship in totality-of-the-circumstances jurisdictions than in *Brunner* jurisdictions.[220]

To that end, litigants have disputed whether the Supreme Court should grant *certiorari* to decide whether the *Brunner* test, the totality-of-the-circumstances test, or some other legal standard should govern undue hardship determinations under Section 523. Some litigants contend "that the differences between *Brunner* and the 'totality of the circumstances' tests" create "a gross inconsistency because some debtors may be discharged in" courts that apply the totality-of-the-circumstances test "when similarly situated debtors elsewhere will not be."[221] Their opponents, by contrast, maintain that "despite the different verbal formulations" of the two tests, "there is no substantive split between the circuits on how to analyze undue hardship cases," as "both the *Brunner* test and the 'totality-of-the-circumstances' test use similar information and typically will lead to similar results."[222] To date, the Supreme Court has not granted *certiorari* to resolve this dispute.[223]

Additional Doctrinal Considerations

In addition to disagreeing over the proper legal standard to apply when deciding whether to discharge a student loan, courts have also disagreed regarding other issues that commonly arise in the undue hardship context. What follows is a survey of several issues that are frequently litigated in the student loan context that have divided the federal courts. These issues are equally relevant in both *Brunner* jurisdictions and totality-of-the-circumstances jurisdictions.

Partial Discharge

For one, courts have divided regarding whether a bankruptcy court possesses the authority to discharge only a portion of a student loan while declaring the remainder of the loan nondischargeable.[224] Some courts have decided that the Bankruptcy Code "does not permit a

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[218] Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1141 (2016) [hereinafter Pardo, *Bankruptcy Rights*] ("The data reveal that debtors experienced litigation success 38.8% of the time in *Brunner* jurisdictions and 40.6% of the time in totality jurisdictions . . . . The difference . . . is not statistically significant."); Anne E. Wells, *Replacing Undue Hardship With Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy*, 33 CAL. BANKR. J. 313, 331 (2016).

[219] *See* Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 (Bankr. C.D. Ill. Dec. 27, 2011) ("Under the totality of circumstances test, it could be concluded that these circumstances constitute a hardship that is undue. However, the more restrictive *Brunner* test does not clearly admit such an exception.").

[220] *See* Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief it (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 319, 331 (2016) (finding that "judges granted undue hardship discharges at a much higher rate in the First Circuit" (which is a totality-of-the-circumstances jurisdiction) "than in the Third [Circuit]" (which is a *Brunner* jurisdiction), and suggesting that "a primary culprit behind the disparate rates of undue hardship discharge between the circuits could very well be the different undue hardship tests applied in the circuits").

[221] *E.g.*, Petition for Writ of Certiorari, Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S. Ct. 803 (No. 15-485), at 27-28.

[222] *E.g.*, Brief in Opposition, *Tetzlaff*, 136 S. Ct. 803 (No. 15-485), at 10.

[223] *See Tetzlaff*, 136 S. Ct. 803 (denying petition for writ of *certiorari*).

[224] *See* Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 870-74 (Bankr. D.N.H. 2000) (opining that "the issue of whether partial discharge is available under § 523(a)(8) has proved vexing to the judiciary," and outlining three different approaches courts have taken).

court to discharge in part a single student loan obligation"; rather, the court must either discharge all of student loan debt or none of it.[225] These courts conclude that Section 523(a)(8) contains no statutory language that would authorize a partial discharge of a student loan.[226] These courts have further opined that authorizing partial discharges results in "'unpredictability,' 'lack of uniformity of outcomes,' and potential inequities inherent in the subjective application of § 523(a)(8)."[227]

Other courts, by contrast, have concluded that if a debtor is able to repay some but not all of a student loan, then the bankruptcy court may discharge only a portion of the outstanding educational debt, rather than discharging the whole debt in its entirety.[228] These courts reason that an "all-or-nothing approach"—whereby a student loan must either be discharged in its entirety or not discharged at all—"reward[s] 'irresponsible borrowing' and conversely punish[es] debtors who either borrow less or pay down their student loans before filing their bankruptcy petition."[229] Importantly, however, most (though not all) of the jurisdictions that do allow partial discharges have concluded that the court may grant a partial discharge only if the debtor has otherwise satisfied the undue hardship standard with respect to the discharged portion of the loan.[230] In other words, in order to obtain a partial discharge, the debtor must generally satisfy the *Brunner* standard (or, in jurisdictions that have rejected *Brunner*, the totality-of-the-circumstances standard) as to the portion of the loan to be discharged, but not as to the portion that will remain after the court closes the bankruptcy case.[231]

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[225] Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 311, 314 (Bankr. S.D.N.Y. 2002). *See also, e.g.*, Educ. Credit Mgmt. Corp. v. Carter, 279 B.R. 872, 876-77 (M.D. Ga. 2002); Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 n.12 (Bankr. C.D. Ill. Dec. 27, 2011); Bender v. Van Ru Credit Corp. (*In re* Bender), 338 B.R. 62, 69 (Bankr. W.D. Mo. 2006).

[226] *See* Educ. Credit Mgmt. Corp. v. Carter, 279 B.R. 872, 876-877 (M.D. Ga. 2002). *See also* Martin v. Great Lakes Higher Educ. Grp. (*In re* Martin), 584 B.R. 886, 891 (Bankr. N.D. Iowa 2018) (opining that there is "little support for the proposition that Congress intended § 523(a)(8) to allow for partial discharge").

[227] Conway v. Nat'l Collegiate Tr. (*In re* Conway), 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013), *aff'd*, 559 F. App'x 610 (8th Cir. 2014) (quoting Andresen v. Neb. Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127 (B.A.P. 8th Cir. 1999), *abrogated by* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549 (8th Cir. 2003)).

[228] *See, e.g.*, Miller v. Pa. Higher Educ. 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 . . . contemplate granting . . . a partial discharge of the debtor's student loans."); Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168, 1170 (9th Cir. 2003); Metz v. Navient Educ. Loan Corp. (*In re* Metz), 589 B.R. 750, 753, 759-60 (Bankr. D. Kan. 2018) (discharging interest on student loan without discharging principal balance). *See also* Kapinos v. Graduate Loan Ctr., 243 B.R. 271, 275, 277 & n.1 (W.D. Va. 2000) (listing cases permitting a partial discharge).

[229] Carnduff v. U.S. Dep't of Educ., 367 B.R. 120, 123 (B.A.P. 9th Cir. 2007).

[230] *See, e.g.*, Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200, 1206-07 (10th Cir. 2005); Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616, 620-22 (6th Cir. 2004); *Saxman*, 325 F.3d at 1174-75; Educ. Credit Mgmt. Corp. v. Waterhouse, 333 B.R. 103, 114 (W.D.N.C. 2005) ("No student loan debt subject to § 523(a)(8) may be discharged in whole or in part without a showing of undue hardship by the debtor."). *But see* Shirzadi v. U.S.A. Grp. Loan Servs. (*In re* Shirzadi), 269 B.R. 664, 672 n.7 (Bankr. S.D. Ind. 2001) (observing that a few jurisdictions "have granted partial discharges even where the debtor has failed to otherwise satisfy the undue hardship test"). *See also* Manion v. Modeen (*In re* Modeen), 586 B.R. 298, 305-08 (Bankr. W.D. Wis. 2018) (granting partial discharge even though debtor "failed to meet all the elements of *Brunner*").

[231] *E.g.*, *Carnduff*, 367 B.R. at 133 (holding that the debtor bears "the burden to prove all three prongs of *Brunner* 'as to the portion of the debt to be discharged,'" but not as to the portion that will remain after the court closes the bankruptcy case) (quoting *Saxman*, 325 F.3d at 1174 (9th Cir. 2003)); Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222, 230 (Bankr. S.D. Ind. 2002) ("At a minimum, the Debtor would have had to establish all the elements of 'undue hardship' for the Court to consider [granting a partial discharge]."); Davis v. Educ. Credit Mgmt. Corp. (*In re* Davis), 373 B.R. 241, 251-52 (W.D.N.Y. 2007).

Still other courts forbid the partial discharge of a portion of a *single* student loan, yet allow debtors who hold *multiple* student loans to discharge some of those loans but not others.[232] In other words, these courts "appl[y] § 523(a)(8) to a debtor's educational debt on a loan-by-loan basis, with the result that some of a debtor's student loans may be discharged while others may be found nondischargeable."[233] According to its proponents, this approach "remains true to § 523(a)(8)'s statutory language"—which does not explicitly authorize partial discharges—"while reaching results that comport with Congress's underlying purpose" of "creat[ing] a higher dischargeability threshold for student loans vis-a-vis other debts."[234]

Income-Driven Repayment Plans

Whether a debtor is eligible for flexible repayment programs, as well as whether the debtor takes advantage of those programs, may also influence whether a court discharges a particular student loan debt. "To enable student borrowers to repay federal student loans, the federal government offers several income-driven repayment" (IDR) plans.[235] IDR plans are nonbankruptcy programs "designed to make the student loan debt more manageable."[236] They afford "borrowers who experience prolonged periods of low income the prospect of debt forgiveness" by offering those "borrowers the opportunity to make monthly payment amounts based on the relationship between their student loan debt and their incomes."[237] If the debtor makes the required monthly payments over the course of a set repayment period, "the outstanding balance of a borrower's loans is then forgiven," and the debtor is "no longer responsible for payments on his loans."[238]

Because the IDR plans are designed to alleviate the burden of student loan debt, a debtor's eligibility for an IDR plan can potentially affect whether the student loan imposes an undue hardship upon the debtor.[239] The majority of courts have held that, although there is no per se rule requiring a debtor to participate in an IDR plan as a prerequisite to obtaining an undue hardship discharge,[240] participation in an IDR plan (or the lack thereof) is nonetheless relevant to whether

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[232] Conway v. Nat'l Collegiate Tr. (*In re* Conway), 495 B.R. 416, 423-24 (B.A.P. 8th Cir. 2013), *aff'd*, 559 F. App'x 610 (8th Cir. 2014); Allen v. Am. Educ. Servs. (*In re* Allen), 329 B.R. 544, 549-50 (Bankr. W.D. Pa. 2005); Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 873 (Bankr. D.N.H. 2000).

[233] *Grigas*, 252 B.R. at 873. *See also, e.g.*, *Conway*, 495 B.R. at 423 ("Although partial discharge of a single loan is unavailable, . . . a bankruptcy court can find that some loans are discharged while repayment of one or more others does not constitute an undue hardship."); *Allen*, 329 B.R. at 550 ("The Court can view each one of those two loans separately for nondischargeability purposes under § 523(a)(8); the only thing that the Court is precluded from doing is breaking up for nondischargeability purposes either or both of said consolidation loans.").

[234] *Grigas*, 252 B.R. at 871, 873-74.

[235] Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1695 (2017).

[236] Wells, *supra* note 218, at 321. These programs include the "Income-Based Repayment" (IBR) plan, the "Income-Contingent Repayment" (ICR) plan, the "Pay As You Earn (PAYE) Repayment" plan, the "Revised Pay As You Earn (REPAYE) Repayment" plan, and the "Income-Sensitive Repayment" (ISR) plan. Hegji, *Forgiveness and Loan Repayment*, *supra* note 4, at 13-14; Smole, *supra* note 4, at 23-27. The precise details of each of these programs and the distinctions between them are outside the scope of this report. *See generally* Hegji *et al*., *supra* note 4, at 13-14; Smole, *supra* note 4, at 23-27.

[237] Smole, *supra* note 4, at 23-27.

[238] Hegji, *Forgiveness and Loan Repayment*, *supra* note 4, at 14.

[239] *See generally* Smith, *supra* note 63, at 603-59; Michael & Phelps, *supra* note 77, at 73-106.

[240] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007) ("Courts have rejected a per se rule that a debtor cannot show good faith where he or she has not enrolled in [an IDR plan]."); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 364 (6th Cir. 2007) ("Barrett's decision to forgo the [IDR plan] is not a per se indication of a lack of good faith."); Jones v. Bank One Tex., 376 B.R. 130, 142 (W.D. Tex. 2007)

the debtor qualifies for a discharge.[241] Many courts have therefore denied a debtor an undue hardship where the debtor could have taken advantage of an IDR plan yet failed to do so.[242]

Critically, a debtor who participates in an IDR plan may potentially be subject to adverse tax consequences. Some courts have noted that "[f]orgiveness of any unpaid debt under" an IDR plan "may result in a taxable event" for the debtor,[243] and "many tax obligations are," like student loans, generally "nondischargeable in bankruptcy."[244] Consequently, there is a risk that some debtors who participate in an IDR plan may be merely "exchang[ing] a nondischargeable student loan debt for a nondischargeable tax debt," which may "provide[] little or no relief."[245] As a result, participation in an IDR plan

> may not be appropriate for some debtors because of . . . the tax implications arising after the debt is cancelled . . . [An IDR plan] may 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.[246]

(holding that a debtor's "decision not to take advantage of" an IDR Plan is "not a *per se* indication of a lack of good faith"); Zook v. Edfinancial Corp. (*In re* Zook), Bankr. No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *10-12 (Bankr. D.D.C. Feb. 27, 2009) ("There is no per se rule that failure to agree to an [IDR] plan establishes bad faith.").

However, a very small minority of courts have held that in order "to meet the 'good faith' test" for the purposes of obtaining an undue hardship discharge, the debtor "*must* take advantage of" an available IDR plan "if and when she is able to do so." *See* Bard-Prinzing v. Higher Educ. Assistance Found. (*In re* Bard-Prinzing), 311 B.R. 219, 229 (Bankr. N.D. Ill. 2004) (emphasis added). *See also* Hunt, *supra* note 37, at 1327 (describing the view that "a debtor should never get a discharge if she can enroll in IDR" as "a distinctly minority position" among federal courts).

[241] *See, e.g.*, *Barrett*, 487 F.3d at 364 (holding that debtor's "decision to forgo" participation in an IDR plan was "probative of his intent to repay his loans"); Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200, 1206 (10th Cir. 2005) (reaching same holding); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 403 (4th Cir. 2005) (same); Benjumen v. AES/Charter Bank (*In re* Benjumen), 408 B.R. 9, 24 (Bankr. E.D.N.Y. 2009) ("A debtor's failure to take advantage of alternative repayment plans may be a significant factor in determining whether or not the debtor made a good faith effort to repay his or her loans.").

[242] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 885 (9th Cir. 2006) (denying undue hardship discharge where debtor "could have attempted renegotiation of his debt under [an IDR plan], but failed to pursue this option with diligence"); *Alderete*, 412 F.3d at 1206 & n.1 (denying undue hardship discharge where the debtors "did not consider applying for" an IDR plan "which would have greatly reduced their monthly loan payments"); *Frushour*, 433 F.3d at 403 (denying undue hardship discharge where debtor "could have taken advantage of" an IDR plan but "did not seriously consider" it); Tirch v. Penn. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 683 (6th Cir. 2005) ("Because Tirch declined to take advantage of an [IDR plan] that would have been advantageous, she failed to sustain the heavy burden of proving that she made a good faith effort to repay her loans."). *See generally* Michael & Phelps, *supra* note 77, at 94-96.

[243] Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010). *See also, e.g.*, Murphy v. United States (*In re* Murphy), No. 15-11240-j7, 2018 WL 2670455, at *6 (Bankr. D.N.M. June 1, 2018) (noting that "debt forgiveness results in taxable income"); Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005).

[244] *E.g.*, Dillard v. United States (*In re* Dillard), 118 B.R. 89, 93 n.5 (N.D. Ill. 1990); West v. U.S. Dep't of Educ. (*In re* West), Case No. 17-20506-K, Adv. Proc. No. 17-00078-K, 2018 WL 846539, at *4 (Bankr. W.D. Tenn. Feb. 6, 2018) ("When the loan is forgiven, Debtor will suddenly find himself with a nondischargeable tax liability in the tens of thousands of dollars. There is no provision in the Bankruptcy Code that will allow Debtor to discharge such a tax liability.") (citing 11 U.S.C. § 523(a)(1)). *See also* Hunt, *supra* note 37, at 1340-42 (describing the legal framework governing the taxability of debts cancelled pursuant to an IDR plan).

[245] *Bronsdon*, 435 B.R. at 802. *See also, e.g.*, *Mosley*, 494 F.3d at 1327; Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013).

[246] *Bronsdon*, 435 B.R. at 802. *See also* Wilkinson-Bell v. Educ. Credit Mgmt. Corp. (*In re* Wilkinson-Bell), Bankr. No. 03-80321, Adv. No. 06-8108, 2007 WL 1021969, at *5 (Bankr. C.D. Ill. Apr. 2, 2007) (concluding that an IDR plan "is particularly inappropriate for someone who is permanently disabled").

"Such potential for disastrous tax consequences" may be "particularly acute with respect to student loan debtors who are at or near retirement age when they commence a payment plan" under the IDR program because "such debtors have relatively little time left to substantially pay down their debt, which means that such debtors will likely have a substantial amount of debt that will then be discharged, with a consequentially large, nondischargeable tax obligation."[247] Thus, if participation in an IDR plan would cause the debtor to incur a large tax bill at the end of the repayment period, many courts have concluded that the debtor's refusal or failure to participate in the plan does not prevent the debtor from obtaining an undue hardship discharge.[248]

Other courts, however, dispute the premise that participating in an IDR plan will frequently result in a substantial taxable event. Many of these courts cite exceptions in the Internal Revenue Code that exclude canceled debt from taxable income if the debt is canceled while the debtor is insolvent, which may prevent some debtors from incurring a large tax liability at the end of the IDR repayment period.[249] Some courts, emphasizing that the repayment period under an IDR plan may extend for decades, reason that it would be too "speculative" to consider any potential tax liability a debtor might incur once the student loan is forgiven at the conclusion of the repayment period.[250] Some courts have also disputed the notion that a debtor who participates in an IDR plan is merely exchanging one nondischargeable debt for another, as the debtor "would clearly not have to pay a tax equal to the entire amount cancelled—at most, it would be the amount cancelled multiplied by her applicable tax rate."[251] Courts that are skeptical that participation in an IDR plan will frequently result in an adverse taxable event tend to place greater weight on a debtor's failure or refusal to participate in the IDR plan when evaluating whether a debtor is entitled to an undue hardship discharge.[252]

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[247] Allen v. Am. Educ. Servs. (*In re* Allen), 324 B.R. 278, 282 (Bankr. W.D. Pa. 2005). *See also, e.g.*, Martin v. Great Lakes Higher Educ. Grp. (*In re* Martin), 584 B.R. 886, 894 (Bankr. N.D. Iowa 2018) ("If [the debtor] were to sign up for an [IDR], she would be 70 or 75 when her debt was ultimately canceled. The tax liability could wipe out all of Debtor's assets . . . as she is in the midst of [retirement].").

[248] *See, e.g.*, *Durrani*, 311 B.R. at 508; Williams v. Educ. Credit Mgmt. Corp. (*In re* Williams), 301 B.R. 62, 78-79 (Bankr. N.D. Cal. 2003); Thomsen v. Dep't of Educ. (*In re* Thomsen), 234 B.R. 506, 514 (Bankr. D. Mont. 1999).

[249] *See* Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 782 (8th Cir. 2009) ("Cancellation results in taxable income only if the borrower has assets exceeding the amount of debt being cancelled."); Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 346 (Bankr. S.D. Fla. 2013); Arroyo v. U.S. Dep't of Educ. (*In re* Arroyo), 470 B.R. 18, 30-31 (Bankr. D. Mass. 2012) ("Tax liability is . . . not certain to flow from discharge of liability under an [IDR plan]. Rather, a participant in an [IDR plan] will realize taxable income only to the extent that, immediately before the discharge, her assets exceed her liabilities."); Gibson v. ECMC (*In re* Gibson), 428 B.R. 385, 392 (Bankr. W.D. Mich. 2010).

At least one court has attempted to eliminate the potentially adverse tax consequences of participation in an IDR plan by prospectively granting the debtor "a partial discharge of any student loan debt still owing at the end of the" IDR plan's repayment period, so that the forgiveness of the remaining debt would not "creat[e] a tax liability for the debtor." *See* Grove v. Educ. Credit Mgmt. Corp. (*In re* Grove), 323 B.R. 216, 230 (Bankr. N.D. Ohio 2005).

[250] *See, e.g.*, Jones v. Bank One Tex., 376 B.R. 130, 142 n.11 (W.D. Tex. 2007) ("Forecasting such tax liability under whatever tax laws will be in effect in 25 years is sheer speculation. Further, forecasting the effect any such liability would have on the Debtor's actual standard of living at that time would be ever more speculative."); Guilfoyle v. Educ. Credit Mgmt. Corp., No. 1:13-CV-01330 AWI, 2015 WL 1442689, at *6 (E.D. Cal. Mar. 27, 2015) ("It would be far too speculative to make a determination as to the potential tax consequences of loan forgiveness years if not decades later."); Educ. Credit Mgmt. Corp. v. Stanley, 300 B.R. 813, 818 n.8 (N.D. Fla. 2003) ("It seems a stretch to assert that payment of student loans for 25 years under a federally approved program would create such a tax liability, even under today's tax laws. Forecasting such a tax liability under whatever tax laws will be in effect in 25 years would be sheer speculation. Forecasting the effect any such liability would have on Ms. Stanley's actual standard of living at that time would be even more speculative.").

[251] Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222, 229 (Bankr. S.D. Ind. 2002).

[252] *See, e.g.*, *Jones*, 376 B.R. at 142-143 & n.11 (denying undue hardship discharge to debtor who "did not seriously

Nor have courts agreed on whether a debtor may obtain an undue hardship discharge if his monthly payment under an IDR plan would be zero. In such a situation, an IDR plan would effectively relieve the debtor from the obligation to make any monthly student loan payments at all, thereby raising the question of whether the debtor can still plausibly claim that the debt nonetheless imposes an undue hardship.[253] A few courts have held that "excluding the student loans from discharge" in such circumstances would not "impose any hardship" on the debtor "since, by virtue of the" IDR plan, the debtor is "not required to make any payments at all."[254]

The prevailing approach, however, is that a $0.00 monthly payment under an IDR plan does not necessarily preclude the debtor from receiving a discharge.[255] These courts emphasize that, because the discharge of a student loan at the end of the IDR plan's repayment period may result in a significant taxable event, and because a debtor who makes zero loan payments over a series of many years will necessarily "be burdened by a huge and growing obligation that remains on her credit record," a student loan may impose an undue hardship even if the debtor is eligible to participate in a repayment option that would not require her to make monthly payments.[256] Several courts adopting this approach have further reasoned that "[t]hose debtors whose incomes

consider" an IDR plan); *Gibson*, 428 B.R. at 392-93 (denying undue hardship discharge where debtor "unreasonabl[y] refus[ed] to pursue" an IDR plan); *Jesperson*, 571 F.3d at 782 ("Jesperson is a paradigmatic example of a student loan debtor for whom [eligibility for an IDR plan] combined with his other circumstances require a conclusion of no undue hardship."); *Stanley*, 300 B.R. at 818 & n.8 (denying undue hardship discharge and doubting that IDR plan would impose undue tax liability on debtor).

[253] *See generally* Michael & Phelps, *supra* note 77, at 96-100.

[254] Geyer v. U.S. Dep't of Educ. (*In re* Geyer), 344 B.R. 129, 133 (S.D. Cal. 2006). *See also* Munch v. Educ. Credit Mgmt. Corp., No. CV 18-868-R, 2018 WL 4636173, at *6 (C.D. Cal. Sept. 25, 2018) ("Appellant's refusal to participate in the [IDR] program, particularly when his payment would be zero until he secures gainful employment, weighs heavily against a finding of good faith."); Greene v. U.S. Dep't of Educ. (*In re* Greene), 484 B.R. 98, 120 (Bankr. E.D. Va. 2012), *aff'd*, No. 4:13cv79, 2013 WL 5503086 (E.D. Va. Oct. 2, 2013), *aff'd*, 573 F. App'x 300 (4th Cir. 2014) ("By virtue of her participation in [an IDR plan], Ms. Greene's contractual payments on her Student Loan are presently zero. The resulting mathematic reality is that the present required monthly payment of zero on the Student Loan does not impact Ms. Greene's ability to maintain a minimal standard of living. Thus, the Court must conclude she has failed to prove by a preponderance of the evidence that she cannot maintain a minimal standard of living . . . if she is required to repay the Student Loan."); *Gibson*, 428 B.R. at 392 (denying undue hardship discharge where debtor's monthly payment under an IDR plan would have been zero).

[255] *See* Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (listing "numerous published cases where a debtor's monthly payment under [an IDR plan] would be $0.00—obviously an amount that any debtor can pay while maintaining a minimal standard of living—yet the court found the existence of undue hardship and determined that the student loan was dischargeable"). *See also, e.g.*, Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 5 (B.A.P. 8th Cir. 2017) ("We do not interpret [Eighth Circuit precedent] to stand for the proposition that a monthly payment obligation in the amount of zero automatically constitutes an ability to pay."); Todd v. Access Grp., Inc. (*In re* Todd), 473 B.R. 676, 694 (Bankr. D. Md. 2012) ("To hold that good faith will only be found if she agrees to a repayment program that will not require her to make any payments—$0.00 'monthly payments' for twenty-five years—would be the height of Kafka-esque logic."); Fahrenz v. Educ. Credit Mgmt. Corp. (*In re* Fahrenz), Bankr. No. 05-24660-WCH, Adv.No. 05-1657, 2008 WL 4330312, at *10 (Bankr. D. Mass. Sept. 17, 2008) ("I also agree that the existence of a zero payment under [an IDR plan] does not generally obviate the need for undue hardship discharges in bankruptcy.").

[256] *Durrani*, 311 B.R. at 508. *See also, e.g.*, West v. U.S. Dep't of Educ. (*In re* West), Case No. 17-20506-K, Adv. Proc. No. 17-00078-K, 2018 WL 846539, at *4 (Bankr. W.D. Tenn. Feb. 6, 2018) ("While Debtor will have no problem making a $0 per month payment during the lifetime of the student loan, when the loan is forgiven, Debtor will suddenly find himself with a nondischargeable tax liability in the tens of thousands of dollars."); Gregoryk v. United States (*In re* Gregoryk), No. 00-31050, 00-7056, 2001 WL 1891469, at *3 (Bankr. D.N.D. Mar. 30, 2001); Hunt, *supra* note 37, at 1339 (explaining that when "IDR payments are insufficient to cover the interest on the debt," the debtor's "debt balance [may] rise[] while the borrower is in IDR").

are low enough to qualify for income-based repayments of $0.00 likely are the very individuals the undue hardship exception for student loans is meant to assist."[257]

Administrative Discharge

ED regulations also allow a debtor to administratively discharge some types of student loans outside of the bankruptcy process under certain circumstances,[258] such as when the debtor suffers from a total and permanent disability[259] or when the debtor's school closes before the debtor could complete the program of study that the loan financed.[260] As with participation in an IDR plan, the majority position is that a debtor need not necessarily seek an administrative discharge of his student loans as a mandatory prerequisite for obtaining an undue hardship discharge in bankruptcy.[261] Nonetheless, a debtor's failure to pursue available remedies, including an administrative discharge, may still evince a lack of good faith for the purposes of the *Brunner* test.[262]

Cosigner Liability for Student Loans

Student loan lenders sometimes "seek the security of a non-student co-signer . . . because there is a commercial risk in looking only to the student for credit assurance."[263] Courts have disagreed regarding whether a debtor who agrees to be liable for another person's student loan—such as when a parent cosigns a student loan to pay for his child's college education,[264] or when a fiancé cosigns a student loan with his future spouse[265]—must satisfy the heightened undue hardship standard in order to discharge his obligation for the debt in his own bankruptcy case, even though he did not personally directly benefit from the education the student loan financed.

Most courts[266] have held that a nonstudent debtor may not discharge a student loan for which he is obligated unless he demonstrates that excepting the loan from discharge would impose an

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[257] *E.g.*, Reagan v. Educ. Credit Mgmt. Corp. (*In re* Reagan), 587 B.R. 296, 301 (Bankr. W.D. Pa. 2018) (quoting Nightingale v. N.C. State Educ. Assistance Auth. (*In re* Nightingale), 529 B.R. 641, 650 (Bankr. M.D.N.C. 2015)).

[258] *See, e.g.*, Grove v. Educ. Credit Mgmt. Corp. (*In re* Grove), 323 B.R. 216, 221 (Bankr. N.D. Ohio 2005) (describing the "administrative disability discharge" as "unrelated to bankruptcy").

[259] 34 C.F.R. § 682.402(c).

[260] *Id.* § 682.402(d). *See generally* Hegji, *Closure*, *supra* note 165.

[261] Dorsey v. U.S. Dep't of Educ., 528 B.R. 137, 143-47 (E.D. La. 2015); Cagle v. Educ. Credit Mgmt. Corp. (*In re* Cagle), 462 B.R. 829, 832 (Bankr. D. Kan. 2011). *But see* Brosnan v. Am. Educ. Servs. (*In re* Brosnan), 323 B.R. 533, 539 & n.2 (Bankr. M.D. Fla. 2005) (denying undue hardship discharge where, *inter alia*, the debtor "did not seek a loan discharge due to total and permanent disability . . . prior to seeking a discharge").

[262] *Dorsey*, 528 B.R. at 146-47; *Cagle*, 462 B.R. at 832; Gregory v. U.S. Dep't of Educ. (*In re* Gregory), 387 B.R. 182, 189 (Bankr. N.D. Ohio 2008); *Brosnan*, 323 B.R. at 539 & n.2.

[263] *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993). Cosigners of certain types of federal student loans are called "endorsers." *See* Kamille Wolff Dean, *Foreclosures and Financial Aid: Mind Over Mortgages in Closing the PLUS Loan Gap*, 4 COLUM. J. RACE & L. 129, 153 (2014).

[264] *See* Educ. Res. Inst., Inc. v. Garelli (*In re* Garelli), 162 B.R. 552, 553 (Bankr. D. Or. 1994).

[265] *See* Cockels v. Sallie Mae, 414 B.R. 149, 153-54 (E.D. Mich. 2009).

[266] *See* Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *4 (Bankr. C.D. Ill. Dec. 27, 2011) ("Under the majority view, [§ 523(a)(8)] applies regardless of whether the debtor, as obligor on an educational loan, is the person who received the benefit of the loan."); Ky. Higher Educ. Assistance Auth. v. Norris (*In re* Norris), 239 B.R. 247, 251 (M.D. Ala. 1999) ("The majority of courts that have considered this issue agree that § 523(a)(8) excepts from discharge a guaranteed educational loan debt even if the debtor is not the beneficiary of the loan.").

undue hardship upon him.[267] In other words, most courts have ruled that "Section 523(a)(8) . . . applies to all types of debtors responsible for student loan debt, be they maker, co-maker, student, or parent of a student."[268] In reaching this conclusion, these courts emphasize that "the statutory language" of Section 523(a)(8) "is unambiguous and draws no distinction whatsoever between student and nonstudent obligors."[269] These courts justify subjecting nonstudents to the undue hardship requirement—even though they did not personally directly benefit from the student's education—on the ground that "limiting the circumstances under which student loan obligations can be discharged in bankruptcy helps preserve the financial integrity of the student loan program," as "an unrepaid loan will adversely affect the financial integrity of the educational loan program equally whether the defaulting debtor is the student or the student's co-obligor."[270]

A minority of courts, by contrast, have reached the opposite conclusion that parties who do not receive any direct educational benefit from student loans, such as parents who sign loans for their student children, may freely discharge such loans in bankruptcy without proving an undue hardship.[271] These courts reason that the purpose of Section 523(a)(8)

> is to except educational loans to students from discharge, and not to parents who are in a different economic position and period of their lives. The co-maker does not have the same motivations as a student fresh out of college with nothing to lose but student loan debt. The parent/co-maker generally has many other debt obligations besides being liable on an educational loan. It is unlikely that a parent will want or be able to exact the same sort of abuses on the educational system as a student recently finished with college or graduate studies.[272]

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[267] *See, e.g.*, Hamblin v. Educ. Credit Mgmt. Corp. (*In re* Hamblin), 277 B.R. 676, 679-80 (Bankr. S.D. Miss. 2002) (listing cases); *Norris*, 239 B.R. at 251-52 (listing additional cases); *In re* Pelkowski, 990 F.2d 737, 740-41 (3d Cir. 1993); Bumps v. Wells Fargo Educ. Fin. Servs. (*In re* Bumps), Case No. 6:11-bk-06677-ABB, Adv. No. 6:12-ap-00107-ABB, 2014 WL 185336, at *2 (Bankr. M.D. Fla. Jan. 15, 2014) ("The *Brunner* test is applicable to co-signers, guarantors or non-students, even though they did not receive an education benefit from the student loan.").

[268] *E.g.*, Law v. Educ. Res. Inst., Inc. (*In re* Law), 159 B.R. 287, 291 (Bankr. D.S.D. 1993). Section 523(a)(8) is equally applicable regardless of whether the nonstudent debtor is the sole obligor on the student's loans or instead cosigns the loan with the student. Stein v. Bank of New England, N.A. (*In re* Stein), 218 B.R. 281, 286 (Bankr. D. Conn. 1998) ("Nor does the statutory language distinguish between non-student *co-makers* and non-student *sole makers*."); *Hamblin*, 277 B.R. at 682; Prouty v. JP Morgan Chase & Co. (*In re* Prouty), Bankr. No. 08-11757, Adv. No. 08-5233, 2010 WL 3294337, at *9 (Bankr. D. Kan. Aug. 19, 2010); *Pelkowski*, 990 F.2d at 741-44 (holding that Section 523(a)(8) applies "to non-student co-makers of educational loan debt," and rejecting argument that only "primary makers of notes" are subject to the undue hardship requirement).

[269] *Stein*, 218 B.R. at 286. *See also, e.g.*, *Pelkowski*, 990 F.2d at 741 ("The language and structure of" the undue hardship requirement "reveal no intent to restrict its reach to student debtors for expenses for their own education."); Wells v. Sallie Mae (*In re* Wells), 380 B.R. 652, 659 (Bankr. N.D.N.Y. 2007) ("§ 523(a)(8) makes no distinction between an individual debtor's status as a borrower, whether he/she be student, spouse of a student or parent of a student."); Palmer v. Student Loan Fin. Corp. (*In re* Palmer), 153 B.R. 888, 895 (Bankr. D.S.D. 1993) ("Without question, the focus of Section 523(a)(8) is on the particular type of debt, not the type of debtor.").

[270] *Pelkowski*, 990 F.2d at 743-44. *See also, e.g.*, *Norris*, 239 B.R. at 253 ("A loan program is affected just as much when a parent discharges a loan as when a student discharges a loan."); *Stein*, 218 B.R. at 286 ("The intended beneficiaries of this dischargeability exception were future student loan recipients, not present student loan obligors. The continued viability and affordability of student loan programs is served by the statute's application to non-student obligors."); *Palmer*, 153 B.R. at 896.

[271] *See, e.g.*, Kirkish v. Meritor Sav. Bank (*In re* Kirkish), 144 B.R. 367, 368 (Bankr. W.D. Mich. 1992) (listing cases); Pryor v. H & W Recruiting Servs. (*In re* Pryor), 234 B.R. 716, 717 (Bankr. W.D. Tenn. 1999).

[272] *Kirkish*, 144 B.R. at 369.

Legal Issues Congress Could Consider

Some commentators and litigants maintain that the doctrinal splits described above are not consequential as a practical matter.[273] Relatedly, given that at least one Member of the Congress that enacted Section 523(a)(8) believed that bankruptcy judges should be free to interpret undue hardship in a fact-specific, case-by-case fashion, the fact that different courts have reached varying conclusions when presented with a specific petition may in fact be consistent with congressional intent.[274] More broadly, some studies have suggested that debtors who truly need an undue hardship discharge of their student loans are generally able to obtain one under the existing legal regime.[275] If Congress agrees with these assessments, then it may leave the current treatment of student loans in bankruptcy unchanged.

Others, however, contend that Congress should enact legislation to either clarify or modify the undue hardship standard or otherwise change the way student loans are treated in bankruptcy.[276] If Congress seeks to modify the existing legal framework for discharging student loans in bankruptcy, it has several options available to it.[277]

Modifying the "Undue Hardship" Standard

Defining "Undue Hardship" in the Text of the Bankruptcy Code

First, Congress could codify a definition of "undue hardship" in the text of the Bankruptcy Code itself. As noted above, the Bankruptcy Code does not define the term "undue hardship,"[278] and to date the Supreme Court has not supplied a controlling judicial definition of that phrase.[279] For that reason, some commentators argue that neither the text nor the legislative history of Section 523(a)(8) provides litigants and courts with sufficient guidance regarding how to properly apply the "undue hardship" standard.[280] According to some courts and scholars, this lack of interpretive

[273] *See, e.g.*, Brief in Opposition, Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S. Ct. 803 (No. 15-485), at 10 ("Despite the different verbal formulations, there is no substantive split between the circuits on how to analyze undue hardship cases."); Iuliano, *supra* note 10, at 495.

[274] *See* 124 CONG. REC. 1795 (1978) (statement of Rep. Erlenborn) (suggesting it would be "preferable" to "allow the judge in bankruptcy, exercising his power in equity, to determine in each case what is truly hardship, rather than define it in . . . percentage terms").

[275] *See, e.g.*, Iuliano, *supra* note 10, at 501, 525 (empirical study concluding that "debtors in bad economic positions are more likely to get relief" under the existing legal standards).

[276] *See, e.g.*, Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 n.13 (Bankr. C.D. Ill. Dec. 27, 2011) ("The student loan market has changed dramatically and section 523(a)(8) is in need of updating."); C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 107 (2007) (recommending that Congress "establish a universally accepted test of 'undue hardship'"); Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 607 (2010) ("§ 523(a)(8) should be amended to provide for the dischargeability of both government and private educational-loan debt after some time period (e.g., five years) with a good-faith attempt to repay the debt.").

[277] This report focuses only on the legal aspects of proposed modifications to Section 523(a)(8); it does not address the economic or policy implications of altering the treatment of student loans in bankruptcy.

[278] *E.g.*, Iuliano, *supra* note 10, at 496; Pardo & Lacey, *Scandal*, *supra* note 72, at 190.

[279] *See* Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S. Ct. 803 (2016) (denying *certiorari* in case that would have required the U.S. Supreme Court to interpret the term "undue hardship").

[280] *See* Taylor, *supra* note 158, at 185 ("Undue hardship is an undefined concept, flummoxing debtors, creditors, and judges alike."); Pardo & Lacey, *Scandal*, *supra* note 72, at 197.

guidance has led courts to apply Section 523(a)(8) in an inconsistent, nonuniform fashion, such that whether any given debtor receives an undue hardship discharge depends more on the identity of the judge deciding the case and the debtor's geographic location than on the debtor's personal and financial circumstances.[281] For instance, one commentator has opined that the "ambiguous contours" of the undue hardship standards have created

> rampant inconsistency. Judges define the standard differently, they impose different conceptual tests on debtors, and when undue hardship is found, relief is often dependent upon judicial philosophy rather than the merits of the case. In the end, similarly-situated debtors (and creditors) are treated differently based on the courts in which they find themselves, leaving an irony where inconsistency is the most consistent aspect of the standard's application.[282]

Several commentators have therefore advocated codifying a definition of "undue hardship" in the Bankruptcy Code itself, which would allow Congress to explicitly specify which legal standards courts should use when determining whether debtors may discharge their student loans.[283] Defining "undue hardship" would also allow Congress to resolve one or more of the aforementioned doctrinal splits that currently exist in the federal courts, such as

- whether undue hardship determinations should be governed by the *Brunner* test, the totality-of-the-circumstances test, or some other legal standard;[284]
- whether a debtor seeking an undue hardship discharge may tithe a portion of her income that might otherwise go toward repaying her student loans to a religious institution;[285]
- whether a debtor must demonstrate "exceptional circumstances"[286] or a "certainty of hopelessness"[287] in order to obtain an undue hardship discharge;

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[281] *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("The application of [the undue hardship] standard requires each court to apply its own intuitive sense of what 'undue hardship' means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied."); *Armstrong*, 2011 WL 6779326, at *9 n.13 ("The vagueness of section 523(a)(8) fosters litigation and inconsistency of results."); Pardo & Lacey, *Empirical Assessment*, *supra* note 14, at 406, 411-12, 433 (empirical study suggesting that "Congress's failure to define undue hardship" has resulted in "inconsistent and unprincipled application of the standard by bankruptcy courts," such that differences in "legal outcome[s]" in undue hardship cases are "best explained by differing judicial perceptions of how the same standard applies to similarly situated debtors" rather than by differences in those debtors' economic or personal circumstances); Salvin, *supra* note 77, at 170. *But see* Iuliano, *supra* note 10, at 501, 522-523 (empirical study challenging the premise that courts apply the undue hardship standard inconsistently).

[282] Taylor, *supra* note 158, at 185.

[283] *See, e.g.*, LeMay & Cloud, *supra* note 276, at 107 (recommending that Congress "establish a universally accepted test of 'undue hardship'").

[284] *Compare, e.g.*, Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (establishing the *Brunner* test), *with, e.g.*, Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (rejecting the *Brunner* test). *See also* Smith v. U.S. Dep't of Educ. (*In re* Smith), 582 B.R. 556, 565 (Bankr. D. Mass. 2018) (opining that both the *Brunner* test and the totality-of-the-circumstances test are "hard-hearted" and "have no place in [the] bankruptcy system").

[285] *See generally* Radwan, *Sword or Shield*, *supra* note 102.

[286] *Compare, e.g.*, Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 401 (4th Cir. 2005) (imposing an "exceptional circumstances" requirement), *with, e.g.*, Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 941 (9th Cir. 2006) ("'Undue hardship' does not require an exceptional circumstance beyond the inability to pay now and for a substantial portion of the loan's repayment period.").

[287] *Compare, e.g.*, Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1326 (11th Cir. 2007) (imposing a "certainty of hopelessness" requirement), *with, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302,

- whether a debtor seeking an undue hardship discharge on the grounds of a medical disability must introduce corroborating medical evidence;[288]
- whether the Bankruptcy Code authorizes the partial discharge of a student loan;[289]
- whether, and to what extent, a debtor's eligibility for and participation in an IDR plan affects the debtor's eligibility for an undue hardship discharge;[290]
- whether a cosigner of a student loan who does not directly obtain an educational benefit from the loan must demonstrate an undue hardship in order to discharge his own obligation for the loan in his own bankruptcy case;[291] and
- whether courts should consider the value of the education that the loan financed when evaluating whether the debtor is entitled to an undue hardship discharge.[292]

Advocates of supplying a textual definition of "undue hardship" argue that congressional guidance would engender greater doctrinal consistency and uniformity.[293] Others, however, question whether "a congressional definition of undue hardship" would "give judges adequate guidance so that disparities in interpretation . . . do not occur."[294] Given that each debtor's personal and financial circumstances may be unique, some have expressed concern that cabining the term "undue hardship" to "an 'inflexible dictionary definition' would defeat the discretionary interpretation of the facts in each case."[295] To that end, at least one Member of the Congress that enacted Section 523(a)(8) in 1978 appeared to agree that Congress should grant bankruptcy judges freedom "to determine in each case what is truly hardship, rather than define it" in a potentially restrictive manner.[296]

1310 (10th Cir. 2004) (rejecting such a requirement).

[288] *See, e.g.*, Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 878 (Bankr. E.D. Va. 2006).

[289] *Compare, e.g.*, Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616, 620 (6th Cir. 2004) (yes), *with, e.g.*, Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 311, 314 (Bankr. S.D.N.Y. 2002) (no).

[290] *Compare, e.g.*, Bard-Prinzing v. Higher Educ. Assistance Found. (*In re* Bard-Prinzing), 311 B.R. 219, 229 (Bankr. N.D. Ill. 2004) (holding that a debtor "*must* take advantage of" an available IDR plan "if and when she is able to do so" (emphasis added)), *with, e.g.*, Zook v. Edfinancial Corp. (*In re* Zook), Bankr. No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *10-12 (Bankr. D.D.C. Feb. 27, 2009) ("There is no per se rule that failure to agree to an [IDR] plan establishes bad faith.").

[291] *Compare, e.g.*, Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *4 (Bankr. C.D. Ill. Dec. 27, 2011) ("Under the majority view, [§ 523(a)(8)] applies regardless of whether the debtor, as obligor on an educational loan, is the person who received the benefit of the loan."), *with, e.g.*, Kirkish v. Meritor Sav. Bank (*In re* Kirkish), 144 B.R. 367, 368 (Bankr. W.D. Mich. 1992) (reaching the opposite conclusion).

[292] *Compare, e.g.*, Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 64 (Bankr. W.D.N.Y. 2012) (deeming it "wholly improper" to consider "the 'value' of the education in making a decision to discharge"), *with, e.g.*, Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006) (holding that a court should consider the "quality" of the debtor's education when determining whether the debtor is entitled to an undue hardship discharge).

[293] *E.g.*, Emily S. Kimmelman, *Student Loans: Path to Success or Road to the Abyss? An Argument to Reform the Student Loan Discharge*, 89 TEMP. L. REV. 155, 184 (2016) ("Imposing a national definition for undue hardship ensures that bankruptcy courts are able to decide dischargeability of student loans in a uniform manner.").

[294] *See* Atkinson, *Race*, *supra* note 60, at 40.

[295] Law v. Educ. Res. Inst., Inc. (*In re* Law), 159 B.R. 287, 291 (Bankr. D.S.D. 1993). *See also* Johnson v. Educ. Credit Mgmt. Corp. (*In re* Johnson), 299 B.R. 676, 680 n.4 (Bankr. M.D. Ga. 2003) ("Regretfully, it seems there is no way to fairly consider the diverse circumstances of debtors and apply an objective standard.").

[296] 124 CONG. REC. 1795 (1978) (statement of Rep. Erlenborn).

Whether the Undue Hardship Standard Is Too Rigorous

Congress could also consider making the undue hardship standard easier for debtors to satisfy. On one hand, some commentators maintain that debtors who truly need an undue hardship discharge are generally able to receive one under the existing legal standards.[297] Others, by contrast, believe it is currently too difficult for debtors experiencing severe financial stress to discharge their student loans in bankruptcy, and that Congress should therefore amend Section 523(a)(8) to make the standard for discharging a student loan less demanding.[298]

If Congress decides to make the undue hardship standard more lenient, it could do so in several ways. For instance, some have advocated relaxing the second prong of the *Brunner* test so that a debtor seeking an undue hardship discharge would not need to prove that his inability to repay his loans will likely persist into the future.[299] Alternatively, Congress could eliminate the requirement imposed by most courts that the debtor demonstrate a "certainty of hopelessness" and "exceptional circumstances" in order to discharge a student loan.[300]

Updating the Undue Hardship Standard in Response to Changed Conditions

Congress may also consider whether the *Brunner* test—which first originated in 1987[301]—is now outdated or obsolete in light of legislative, economic, and regulatory developments that have occurred in the past thirty years. The Bankruptcy Code and the student loan market have undergone several significant changes since 1987, including

- the development of loan repayment and forgiveness programs, including IDR plans;[302]
- Congress's elimination of the temporal discharge option, pursuant to which a debtor could discharge certain student loans without demonstrating an undue hardship simply by waiting a sufficient number of years before filing bankruptcy;[303]

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[297] *See, e.g.*, Iuliano, *supra* note 10, at 495 (empirical study finding that "judges grant a hardship discharge to nearly forty percent of the debtors who seek one," and therefore concluding that the undue hardship standard is not "unduly burdensome").

[298] *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 193 (Bankr. W.D. Tex. 2001) (arguing that the *Brunner* test inappropriately "make[s] it as tough as humanly possible to discharge a student loan"); Salvin, *supra* note 77, at 178 ("Hardship tests limiting the discharge of educational loans to debtors in dire circumstances are too stringent to protect a debtor's fresh start."); Pardo & Lacey, *Scandal*, *supra* note 72, at 235 (advocating "congressional reform efforts" to "giv[e] student-loan debtors in bankruptcy unfettered access to a fresh start").

[299] *See* Smith, *supra* note 63, at 647 ("The second prong of the *Brunner* test needs to be changed . . . . The only consideration should be whether current conditions prohibit borrowers from repaying their federal student loans.").

[300] *See* Salvin, *supra* note 77, at 197 ("In no event should debtors ever be required to prove unique or extraordinary circumstances.").

[301] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[302] *See, e.g.*, Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 59 (Bankr. W.D.N.Y. 2012) ("The latest incarnation of the Ford [student loan] Program offers [the debtor] debt-forgiveness if she completes a 25-year program of affordable payments. That was not available when *Brunner* was decided."); Erbschloe v. U.S. Dep't of Educ. (*In re* Erbschloe), 502 B.R. 470, 480 (Bankr. W.D. Va. 2013) (noting that, at the time the Second Circuit decided *Brunner*, "Congress had yet to create" IDR plans).

[303] *See, e.g.*, Smith v. U.S. Dep't of Educ. (*In re* Smith), 582 B.R. 556, 565 (Bankr. D. Mass. 2018) ("When the *Brunner* case was decided, student loans were nondischargeable only for five years after they first came due, and proof of undue hardship was needed only for the discharge to occur earlier than the five-year point. The concern stated in the *Brunner* case was that a debtor might obtain a degree and immediately seek a discharge without so much as trying for five years. It is not surprising that courts drew a hard line when it came to proving undue hardship under that statutory

- Congress's 2005 amendment to the Bankruptcy Code that made private education loans presumptively nondischargeable like their federal counterparts;[304]
- the precipitous increase in the magnitude of debt carried by individual student loan borrowers, as well as total outstanding student loan debt in the United States overall;[305] and
- the increase in aggregate borrowing limits for certain types of federal loans.[306]

Some courts and commentators have therefore advocated updating the undue hardship standard to better reflect the current state of the bankruptcy system and the student loan market.[307] For instance, Congress could amend Section 523(a)(8) to explicitly specify how a debtor's eligibility for and participation in an IDR plan affect the debtor's ability to obtain bankruptcy relief.[308]

Repealing Section 523(a)(8)

Some commentators, instead of proposing modifications to Section 523(a)(8), have advocated repealing Section 523(a)(8) entirely and thereby making student loans freely dischargeable in bankruptcy.[309] To that end, several Members of the 116th Congress have introduced bills that would completely repeal Section 523(a)(8), such as the Discharge Student Loans in Bankruptcy Act of 2019,[310] the Student Borrower Bankruptcy Relief Act of 2019,[311] the Student Loan

regime . . . But the statutory circumstances that gave rise to such a test are no longer present and have not been present for many years."); Coplin v. U.S. Dep't of Educ. (*In re* Coplin), Case No. 13-46108, Adv. No. 16-04122, 2017 WL 6061580, at *6 (Bankr. W.D. Wash. Dec. 6, 2017) (arguing that the elimination of the temporal discharge option, among other developments, resulted in a "drastically different landscape for student loan debtor[s] from the time when *Brunner* was decided").

[304] *See, e.g.*, Wolfe v. U.S. Dep't of Educ. (*In re* Wolfe), 501 B.R. 426, 434 (Bankr. M.D. Fla. 2013).

[305] *See, e.g.*, Smith, *supra* note 63, at 608-09.

[306] *See* Smole, *supra* note 4, at 49-52.

[307] *See, e.g.*, Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 n.13 (Bankr. C.D. Ill. Dec. 27, 2011) ("The student loan market has changed dramatically and section 523(a)(8) is in need of updating."); *Wolfe*, 501 B.R. at 434 (Bankr. M.D. Fla. 2013) (emphasizing the need to "focus on the contemporary world of student loan debt, not circumstances that existed thirty or more years ago"); Smith, *supra* note 63, at 638, 648, 652, 657 (opining that the availability of IDR plans and "the increase in student loan debt" have rendered the *Brunner* test "obsolete").

[308] *Cf., e.g.*, Hunt, *supra* note 37, at 1293-94, 1328-51 (offering suggestions regarding how courts should analyze the availability of IDR programs under various factual scenarios when determining whether a debtor has proved an undue hardship); Smith, *supra* note 63, at 648, 652, 657 (opining that the availability of IDR plans renders the *Brunner* test "obsolete").

[309] *See, e.g.*, Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 491 n.16, 513 (1997) (favorably citing the 1997 National Bankruptcy Review Commission's proposal to repeal Section 523(a)(8)); Col. Bryan D. Watson, *Preserving the Promise of Higher Education: Ensuring Access to the "American Dream" Through Student Debt Reform*, 25 U. FLA. J.L. & PUB. POL'Y 315, 329 (2014) ("Repealing § 523(a)(8) is the perfect place to start."); Robert C. Cloud & Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 467, 497 (2014) ("First and foremost, we believe the 'undue hardship' provision in the Bankruptcy Code should be repealed, which would allow insolvent student-loan debtors to discharge their student loans in bankruptcy like any other non-secured debt.").

[310] H.R. 770, 116th Cong. (1st Sess. 2019).

[311] H.R. 2648, 116th Cong. (1st Sess. 2019); S. 1414, 116th Cong. (1st Sess. 2019).

Borrowers' Bill of Rights Act of 2019,[312] and the Helping Individuals Get a Higher Education While Reducing Education Debt Act.[313]

Amending the Bankruptcy Code to Make Private Education Loans Freely Dischargeable

Rather than making *all* student loans freely dischargeable in bankruptcy, Congress could also consider making *private* education loans freely dischargeable, while leaving *federal* student loans unaffected. As noted above, whereas discharging a federal student loan will shift the cost of the debtor's default to American taxpayers,[314] taxpayers generally do not directly "foot[] the bill for private loan defaults."[315] Nevertheless, Congress amended Section 523(a)(8) in 2005 to make most private education loans presumptively nondischargeable like their federal counterparts.[316] A number of commentators have therefore advocated reverting to the pre-2005 version of Section 523(a)(8) and thereby making private nonfederal student loans presumptively dischargeable without requiring the debtor to demonstrate an undue hardship.[317] The Private Student Loan Bankruptcy Fairness Act of 2019, for instance, would replace the current text of Section 523(a)(8) with text similar (but not identical) to the version of Section 523(a)(8) that existed immediately prior to the 2005 amendments to the Bankruptcy Code.[318]

Reinstating the Temporal Discharge Option

As noted above, the pre-1998 versions of Section 523(a)(8) allowed a debtor to discharge a student loan—even in the absence of an undue hardship—if the loan first became due a certain number of years before the debtor filed bankruptcy. Congress eliminated this "temporal discharge" option in 1998,[319] with the consequence that demonstrating an undue hardship is

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[312] H.R. 3027, § 101, 116th Cong. (1st Sess. 2019).

[313] H.R. 3102, § 102, 116th Cong. (1st Sess. 2019).

[314] *E.g.*, *In re* Engen, 561 B.R. 523, 546 (Bankr. D. Kan. 2016); Campton v. U.S. Dep't of Educ. (*In re* Campton), 405 B.R. 887, 892 (Bankr. N.D. Ohio 2009).

[315] Iuliano, *supra* note 10, at 524 n.92.

[316] Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, P.L. 109-8, § 220, 119 Stat. 23 (2005); Smith, *supra* note 63, at 642; Braucher, *supra* note 52, at 473; Swedback & Prettner, *supra* note 52, at 1681 n.9.

[317] *See*, *e.g.*, Braucher, *supra* note 52, at 474 ("With rising student loan defaults in the current prolonged high unemployment period, . . . private student loans might be an appropriate first target for reform to provide debt relief by making them dischargeable again as they were until 2005."); Taylor, *supra* note 158, at 234 ("The author believes that private loans should be dischargeable to the same extent as other unsecured debt."); Iuliano, *supra* note 10, at 524 n.92 ("Since taxpayers are not footing the bill for private loan defaults, it makes little sense to grant them special status. Debtors should be able to discharge private student loans via normal bankruptcy procedures.").

[318] *Compare* H.R. 885, 116th Cong. (1st Sess. 2019) (proposing to amend Section 523(a)(8) to read: "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—(A) 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 *any program for which substantially all of the funds are provided by* a nonprofit institution; or (B) an obligation to repay funds received as an educational benefit, scholarship, or stipend") (emphasis added), *with* 11 U.S.C. § 523(a)(8) (2002) (pre-2005 version of Section 523(a)(8) that read: "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit *or nonprofit institution*, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents") (emphasis added).

[319] Higher Education Amendments of 1998, P.L. 105-244, § 971(a), 112 Stat. 1581 (1998).

presently the only way a debtor may discharge a student loan in bankruptcy.[320] Some commentators have advocated reinstating the temporal discharge option to allow debtors to discharge older student loans without proving an undue hardship.[321] These commentators argue that a student who waits several years after graduation to file for bankruptcy is less likely to be abusing the student loan program than a recent graduate who strategically declares bankruptcy immediately after obtaining his degree.[322] To that end, several Members of the previous Congress introduced a bill that, if enacted, would have permitted debtors to discharge student loans after a particular number of years without showing an undue hardship.[323]

Procedural Changes to Obtaining an Undue Hardship Discharge

As discussed above, a debtor may generally not obtain a discharge of student loan debt without filing a separate full-fledged "lawsuit within the umbrella of the bankruptcy case."[324] Some commentators have described this procedure as "an expensive venture, dependent as it is on elaborate factual proof that many debtors, particularly some of the worst off, have no hope of funding."[325] Undue hardship litigation may be especially expensive in jurisdictions that require debtors to introduce corroborating medical evidence to demonstrate that they suffer from a medical condition that prevents them from paying their student loans.[326]

If Congress seeks to alter the procedures for obtaining an undue hardship discharge, it could consider "shift[ing] the burden of bringing" a suit to determine the dischargeability of a student

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[320] 11 U.S.C. § 523(a)(8); Smith, *supra* note 63, at 642; Atkinson, *Race*, *supra* note 60, at 36; Swedback & Prettner, *supra* note 52, at 1681 n.9.

[321] *See, e.g.*, Braucher, *supra* note 52, at 474 ("Reinstating a five-year or seven-year waiting period for a discharge of even federal student loans would also be desirable."); Sousa, *supra* note 276, at 607 ("§ 523(a)(8) should be amended to provide for the dischargeability of both government and private educational-loan debt after some time period (e.g., five years) with a good-faith attempt to repay the debt."); Rendleman & Weingart, *supra* note 29, at 294-295 ("Congress can return to the law between 1976 and 1998 when student debts were dischargeable after five or seven years.").

[322] *See* Salvin, *supra* note 77, at 157 n.111 ("The policy against abuse of the student-loan program diminishe[s] the longer a student [i]s out of school."); Rendleman & Weingart, *supra* note 29, at 295 ("This would adequately address concerns about the hypothetical student loan debtor who graduates on Tuesday and files for bankruptcy on Wednesday.").

[323] *See* Student Loan Bankruptcy Act of 2018 § 2, H.R. 6588, 115th Cong. (2d Sess. 2018) ("Section 523(a)(8) of title 11 of the United States Code is amended by inserting 'that first became due more than 5 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition, or' after '(8)'."). If Congress ultimately pursues this option, it may consider defining when a loan "first bec[o]me[s] due" in order to specify when the temporal discharge period begins. As noted above, not all courts interpreted the phrase "first became due" in an identical fashion in the years preceding Congress's elimination of the temporal discharge option. *See supra* note 56.

[324] *E.g.*, Braucher, *supra* note 52, at 472.

[325] *Id*. *See also, e.g.*, Taylor & Sheffner, *supra* note 220, at 333 ("A 523(a)(8) . . . proceeding is essentially a trial within the larger bankruptcy case. The evidentiary and fact-finding burdens render these proceedings daunting for most debtor-plaintiffs. Legal representation in these proceedings can be costly, especially for people already experiencing financial distress."); Pardo & Lacey, *Scandal*, *supra* note 72, at 191 (arguing that "those debtors who are in the most dire need of relief" from student loan debt—namely, "those for whom repayment will certainly impose an undue hardship—will likely lack the resources to pursue such relief in the first instance"); Austin, *Student Loan Debt*, *supra* note 6, at 582 ("Bankruptcy litigation is sufficiently expensive, and the undue hardship test so demanding, that debtors rarely even try to have student loan debt discharged.").

[326] *See, e.g.*, Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 878 (Bankr. E.D. Va. 2006) (acknowledging the "conflict between the need for corroborating evidence and some debtors' limited resources" and noting the argument "that due to the nature of the dischargeability litigation, the testimony of medical experts is a luxury most debtors cannot afford").

loan "from the debtor to the creditor."[327] For instance, one scholar has suggested that Congress amend the Bankruptcy Code "to treat student loan debt obligations as presumptively *dischargeable* in bankruptcy unless the *creditor* can show a lack of good faith on the part of the debtor with respect to the obligation."[328] The burden would then rest upon the creditor, rather than the debtor, to initiate a lawsuit to declare a student loan debt nondischargeable.[329] Shifting the burden in this way would not be unprecedented, as creditors generally bear the burden to prove that debts other than student loans are nondischargeable pursuant to other subsections of Section 523(a).[330]

Another potential procedural change that could reduce the financial burden of obtaining an undue hardship discharge would be to "provide for the payment of a debtor's attorney's fees where a creditor unsuccessfully challenges dischargeability without substantial justification."[331] According to proponents of this approach, this amendment could potentially (1) "make representation by counsel more accessible to debtors in dischargeability actions by shifting the fee burden off debtors and onto the lender in actions where the challenge is not substantially justified" and (2) "protect debtors from overreaching or overaggressive litigation tactics by student loan lenders."[332] Authorizing fee-shifting in such circumstances would not be unprecedented either, as the Bankruptcy Code already provides for fee-shifting in some proceedings to determine the dischargeability of certain types of nonstudent loan debt.[333]

Some Members of the previous Congress introduced legislation that would have implemented these proposed reforms. The Stopping Abusive Student Loan Collection Practices in Bankruptcy Act of 2017 would have allowed a debtor who receives an undue hardship discharge to recover court costs and attorney's fees from the creditor if the creditor's opposition to the discharge was not substantially justified.[334] Significantly, however, "because the federal government . . . holds the vast majority of student loan debt,"[335] in many cases the creditor potentially subject to penalties under this proposal would have been the federal government itself.

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[327] Rendleman & Weingart, *supra* note 29, at 295. *See also* Wells, *supra* note 218, at 316-317 (arguing that "shifting the burden to creditors to prove a debtor's lack of good faith in dealing with student loan debt . . . would make discharge more accessible to debtors without entirely eliminating the possibility that student loans may be deemed nondischargeable").

[328] Wells, *supra* note 218, at 316 (emphasis added).

[329] *Id*. at 339.

[330] *See, e.g.*, Heide v. Juve (*In re* Juve), 761 F.3d 847, 851 (8th Cir. 2014) ("The creditor bears the burden of proving, by a preponderance of the evidence, that a debt should be nondischargeable under § 523."); Okla. Dep't of Sec. *ex rel.* Faught v. Wilcox, 691 F.3d 1171, 1174 (10th Cir. 2012) ("The burden is on the creditor to show a debt is nondischargeable under § 523(a).").

[331] Wells, *supra* note 218, at 340, 342-43.

[332] *Id*. at 343. *But see* Pardo, *Bankruptcy Rights*, *supra* note 218, at 1160-65 (opining that fee-shifting "may not be a promising avenue for increasing debtor representation in discharge litigation").

[333] *See* 11 U.S.C. § 523(d) ("If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified . . . ."). *See also* Wells, *supra* note 218, at 342-43 (arguing that "§ 523(d) should be revised to include subsection (a)(8)").

[334] H.R. 137, 115th Cong. (1st Sess. 2017).

[335] *E.g.*, Jamie P. Hopkins & Katherine A. Pustizzi, *A Blast From the Past: Are the Robo-Signing Issues That Plagued the Mortgage Crisis Set to Engulf the Student Loan Industry?*, 45 U. TOL. L. REV. 239, 262 (2014).

Other Potential Amendments to the U.S. Code

Repealing or modifying 11 U.S.C. § 523(a)(8) may affect statutory provisions outside of the Bankruptcy Code. For instance, 20 U.S.C. § 1087(b)—which requires the Secretary to repay the unpaid balance of principal and interest owed on certain types of student loans to the loan holder when the borrower seeks bankruptcy relief—contains multiple cross-references to Section 523(a)(8).[336] Amending Section 523(a)(8) might therefore alter the operation of Section 1087(b) unless Congress makes conforming amendments to account for the changes to Section 523(a)(8).

In addition, amending Section 523(a)(8) to make it easier for debtors to discharge student loans may require modifications to other federal statutes that restrict debtors from discharging certain types of educational loans that fall outside Section 523(a)(8)'s scope. For example, 42 U.S.C. § 292f(g) limits the circumstances in which a debtor may validly discharge Health Education Assistance Loans (HEAL loans) through the bankruptcy process.[337] Modifying Section 523(a)(8) to make it easier to discharge non-HEAL loans without making further changes to the U.S. Code could lead to an arguably anomalous result in which debtors carrying non-HEAL loans are treated more favorably than debtors carrying HEAL loans.

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[336] *See* 20 U.S.C. § 1087(b) ("The Secretary shall pay to the holder of a loan described in section 1078(a)(1)(A) or (B), 1078-1, 1078-2, 1078-3, or 1078-8 of this title, the amount of the unpaid balance of principal and interest owed on such loan—(1) when the borrower files for relief under chapter 12 or chapter 13 of Title 11; (2) when the borrower who has filed for relief under chapter 7 or 11 of such title commences an action for *a determination of dischargeability under section 523(a)(8)(B)* of such title; or (3) for loans *described in section 523(a)(8)(A)* of such title, when the borrower files for relief under chapter 7 or 11 of such title.") (emphasis added).

[337] *See* 42 U.S.C. § 292f(g) ("Notwithstanding any other provision of Federal or State law, a debt that is a loan insured under the authority of this subpart may be released by a discharge in bankruptcy under any chapter of Title 11, only if such discharge is granted—(1) after the expiration of the seven-year period beginning on the first date when repayment of such loan is required, exclusive of any period after such date in which the obligation to pay installments on the loan is suspended; (2) upon a finding by the Bankruptcy Court that the nondischarge of such debt would be unconscionable; and (3) upon the condition that the Secretary shall not have waived the Secretary's rights to apply subsection (f) to the borrower and the discharged debt."). *See also* Woody v. U.S. Dep't of Justice (*In re* Woody), 494 F.3d 939, 945-46 (10th Cir. 2007) (describing the differences between 11 U.S.C. § 523(a)(8) and 42 U.S.C. § 292f(g)).

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