THE PITFALLS OF PROVIDING A FRESH START TO THE HONEST BUT UNFORTUNATE STUDENT DEBTOR

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Presented by:

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Student debt is on a roll. According to the Federal Reserve, the amount of student loan debt recently surpassed 1.5 trillion dollars,[1] making it the second largest category of consumer debt – behind only mortgages.[2] The average college graduate is more than $28,000.00 in debt.[3] Moreover, approximately eleven percent of student loan accounts are more than ninety days delinquent or in default.[4]

Given the increase in the number of borrowers and the availability and cost of higher education, commentators have begun to question whether higher education is an economic bubble and what the consequences will be if that bubble bursts.[5] This has led some to question whether the traditional economic doctrine – that more education leads to a higher income – still holds true.[6] Indeed, the return on investment of education has begun to fall, which is attributable, in part, to an increase in the number of college graduates in the market and the

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[1] *See* Board of Governors of the Federal Reserve System, Consumer Credit – G.19 (Dec. 7, 2018), https://www.federalreserve.gov/releases/g19/current/default.htm.

[2] *See* Fed. Reserve Bank of N.Y., Quarterly Report on Household Debt and Credit, at 5 (Nov. 2018), https://www. newyorkfed.org/microeconomics/hhdc.html

[3] The Institute for College Access & Success, Student Debt and the Class of 2017, at 4 (Sept. 2018), https://ticas. org/posd/home

[4] *See* Fed. Reserve Bank of N.Y., *supra* note 2, at 2.

[5] *See* Andrew Woodman, *The Student Loan Bubble: How the Mortgage Crisis Can Inform the Bankruptcy Courts*, 6 ALB. GOV'T L. REV. 179, 184 (2013) (drawing parallels between the subprime mortgage crisis and the current state of lending for higher education); Sheryl Nance Nash, *5 Ways the Student Loan Bubble Mirrors the Housing Crisis*, THE FISCAL TIMES (Oct. 25, 2012), http://www.thefiscaltimes.com/Articles/2012/10/25/5-Ways-the-Student-Loan-Bubble-Mirrors-the-Housing-Crisis.

[6] Andrew A. Sexton, *The Education Loan Bubble: How the Discharge Student Loans in Bankruptcy Act of 2017 and Legislation Alike Is the Only Answer to the Student Loan Crisis*, 54 CAL. W. L. REV. 323, 338 (2018).

proliferation of for-profit colleges, whose graduates tend to have higher unemployment and default rates.[7]

Despite the gravity of this problem, there has been no legislative response to student loans.[8] With no other recourse, student loan debtors have turned to bankruptcy courts for relief. Yet, under the current version of 11 U.S.C. § 523(a)(8), educational loans are nondischargeable unless the debtor can prove that such loans "would impose an undue hardship on the debtor and the debtor's dependents."[9] The Bankruptcy Code does not define what constitutes an "undue hardship," and finding an appropriate standard has left the circuits split. While most courts rely on a test that was adopted by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987), a minority relies on a "totality of circumstances" approach, adopted in *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702 (8th Cir. 1981).

The onerous task of proving undue hardship, coupled with the presence of increasingly desperate student loan debtors, has pushed some bankruptcy courts to use their equitable powers to provide debtors with a partial discharge.[10] While proponents claim this solution is a better balance of deterring discharge abuse and providing a fresh start, it has made the courts more

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[7] *See* Woodman, *supra* note 5, at 188-90; Judith Scott-Clayton, *The looming student loan default crisis is worse than we thought*, 2 ECON. STUDIES AT BROOKINGS 34, 39 (2018).

[8] *See* Matt Carter, "Divided Congress means no quick fixes for ailing student loan system," Credible News (Nov. 7, 2018), https://www.credible.com/news/student-loans/divided-congress-means-no-quick-fixes-for-ailing-student-loan-system/.

[9] 11 U.S.C. § 523(a)(8).

[10] *See, e.g.*, *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1174 (9th Cir. 2003); *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 440 (6th Cir. 1998); *Heckathorn v. United States ex rel. U.S. Department of Education (In re Heckathorn)*, 199 B.R. 188, 194 (Bankr. N.D. Okla. 1996) (finding that a partial discharge was an appropriate mechanism to balance the debtor's fresh start with the continued integrity of the student loan program).

unpredictable. The honest debtor's ability to find relief may be more dependent on the fortune of where she files rather than her individual circumstances.

This paper examines the dischargeability of student loans through bankruptcy and consists of three parts. Part I will discuss the legislative history of § 523(a)(8)'s prohibition on discharging student loans. Part II will introduce the two leading standards for interpreting undue hardship: the *Brunner* test and *Andrews*' totality of circumstances test. Part III will discuss how the harshness of the undue hardship standard, especially under *Brunner*, has encouraged courts to grant a partial discharge and the inconsistent manner in which that relief has been applied. Finally, Part IV will examine the possibility of addressing student loans outside of the §523(a)(8) context.

I. THE LEGISLATIVE HISTORY OF AND POLICY BEHIND § 523(A)(8)

A. The Evolution of the Educational Loan Discharge Exception

Although today the non-dischargeability of student loans seems like a fundamental principle of consumer bankruptcy, for much of the twentieth century student loans were treated like any other unsecured debt.[11] During the late 1970s, however, as the number of borrowers increased, Congress became concerned that borrowers might abuse the student loan program by declaring bankruptcy.[12] That concern was amplified after the media began reporting of rumors that recently graduated doctors and lawyers were using bankruptcy to discharge their student debt before beginning lucrative careers.[13] Congress responded by enacting a prohibition on

[11] *See* Frank T. Bayuk, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(a)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. U. L. REV. 1091, 1094 (2004).
[12] *Id.*
[13] *Id.*

discharging student loans that came due within five years of filing bankruptcy.[14] Under the 1976 amendment, a debtor could not discharge his student loans within that term unless he could show that repayment of such loans would impose an undue hardship.[15]

Of course, that is not the end of the story. First, in 1998, the duration of the prohibition on discharging student loans was extended from five to seven years.[16] That same year, Congress replaced the seven-year waiting period with a complete exception absent undue hardship.[17] Second, originally, only public loans were excepted from discharge but in 2005, non-dischargeability protection was expanded to include private lenders.[18]

B. Policy Reasons for Excepting Student Loans

Beyond the possibly exaggerated reports of bankruptcy abuse,[19] there are sound policy reasons against discharging student loans. Maybe the most convincing argument is based on the nature of the Stafford Loan Program ("Stafford loans"), which was the source of more than sixty percent of student loans issued between 2017 and 2018. [20] Unlike traditional private loans, Stafford loans provide funding to student borrowers regardless of their income or credit

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[14] *Id.*; *see also* Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976) (repealed 1978)).

[15] Education Amendments of 1976 § 439A.

[16] *See* Higher Education Amendments of 1998, Pub. L. No. 104-140, 110 Stat. 1327 (1998) (codified as amended at 11 U.S.C. § 523(a)(8) (2000)).

[17] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1837 (1998) (codified as amended at 11 U.S.C. § 523(a)(8) (2000)).

[18] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005) (codified as amended at 11 U.S.C. § 523(a)(8)(B) (2012)); *see also* Andrew A. Sexton, *The Education Loan Bubble: How the Discharge Student Loans in Bankruptcy Act of 2017 and Legislation Alike Is the Only Answer to the Student Loan Crisis*, 54 CAL. W. L. REV. 323, 331 (2018)

[19] Richard Fossey, *"the Certainty of Hopelessness:" Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 34 (1997) (finding that from 1969-75, only 0.3% of student loans were discharged in bankruptcy and there was no evidence that these filings were made in bad faith).

[20] College Bd., *Trends in Student Aid 2018*, TRENDS IN HIGHER EDUC. at 17 (2018), https://trends.collegeboard.org/student-aid.

history.[21] The federal government essentially enters into a lending agreement with a stranger on the hope that the stranger will obtain an education and that education will provide enough income to pay the government back.

Considering the increased risk involved in public lending, proponents of § 523(a)(8) contend that public student loans deserve additional protection from discharge. That sentiment was reflected in a 1978 House Report that discussed the dischargeability of student loans,

> [E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and rely [ ] for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future.[22]

Protections like § 523(a)(8) are also necessary to make public lending sustainable. With the dramatic rise in student debt within the past decades, going from 345 billion dollars in 2004 to 1.5 trillion dollars in 2018, [23] concerns about sustainability have been amplified.[24] Collecting student loan payments can be challenging, and the default rate has generally been on the rise since 2003.[25] Nonpayment, whether through default or discharge, reduces the pool of money

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[21] Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 338 (2013). Although other federal loans, like the PLUS loan, are based on an element of creditworthiness, there is a cap on interest rates at 10.5%. *See* 20 U.S.C. § 1087e(b)(8).

[22] H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094.

[23] *See* Peter G. Peterson Foundation, *Student Debt Continues to Rise* (July 18, 2018), https://www.pgpf.org/blog/2018/07/the-facts-about-student-debt; Board of Governors, *supra* note 1.

[24] Mohamed A. El-Erian, Does the US have a student loan problem?, World Economic Forum (Nov. 10, 2015) (discussing how the increasing cost and decreasing return on investment of higher education may impact lending sustainability), https://www.weforum.org/agenda/2015/11/does-the-us-have-a-student-loan-problem/.

[25] U.S. Dep't of Educ., Federal Student Aid, *National Student Loan Two-year Default Rates*, https://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html (last visited Jan. 13, 2019). However, the default rate did drop slightly between 2014 and 2015, from 11.5% to 10.8%. U.S. Dep't of Educ., Press Office, *National Student Loan Cohort Default Rate Falls*, https://www.ed.gov/news/press-releases/national-student-loan-cohort-default-rate-falls (last visited Jan. 15, 2019).

available for future generations, which is often replenished through additional taxes.[26] Section 523(a)(8) helps mitigate these effects by making student loans more recoverable. According to a 2007 survey, § 523(a)(8) saves taxpayers more than four billion dollars each year.[27]

Sustainability also provides justification for protecting private lenders. Proponents of the 2005 amendments, which expanded protection to private lenders, insisted that private capital could take some of the financial burden off of the government but that such lenders needed to be given assurances about collectability.[28] Additionally, by improving the collectability of private loans, Congress made private loans more affordable and widely available.[29]

Whether the reasons are persuasive in hindsight, the nature of public lending and the need for sustainable financing of higher education helped bring § 523(a)(8) to its current form, where both public and private student loans are nondischargeable unless the debtor shows that paying such loans would impose an undue hardship.

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[26] The Congressional Budget Office anticipates that the federal student loan program will cost taxpayers more than $170 billion dollars over the next ten years. Cong. Budget Office, Baseline Projections for the Student Loan Program (Apr. 2018).

[27] *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 524 (2012).

[28] In a 1999 debate arguing for the protection of private lenders, then Representative Lindsey Graham commented:

> There is a growing industry in the private sector. There is a $1.25 billion loan volume for where private lenders who will loan money to students for their college expenses as the federally guaranteed program does not in every occasion meet the needs of the student, and we are trying to give the private lender the same protection under bankruptcy that the federally guaranteed loan program has and nonprofit organizations have.

145 Cong. Rec. 65, 2711 (1999).

[29] *Id.*; *see also* John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 262 (2006) ([N[ondischargeability could be justified as an attempt to make private loans 'cheaper' for students.").

II. DEFINING AN UNDUE HARDSHIP

Recognizing that it could not account for all factors that might influence whether discharging a student loan was appropriate, Congress did not define or provide any guidance for determining undue hardship.[30] Accordingly, the courts were left to fashion an appropriate standard for discharging student loans. Although the courts generally agree that undue hardship must mean something more than an "unpleasantness associated with the repayment of a just debt,"[31] there is a circuit split about the proper standard. Two methods have come to dominate the discussion: the three-prong test adopted in *Brunner* and the *Andrews* totality of circumstances test.[32]

A. The *Brunner* Test

The *Brunner* test is the standard adopted by most circuit courts, including the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.[33] Courts that have adopted *Brunner* have cited its consistency, providing a predictable method for determining

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[30] A commission report suggests that the drafters intended this determination was to be made on a case-by-case basis. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, pt. II at 140.

[31] *Ballard v. Virginia ex rel. State Educ. Assistance Auth. (In re Ballard)*, 60 B.R. 673, 674 (Bankr. W.D. Va. 1986).

[32] *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005) (collecting cases).

[33] *See Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005) (rejecting the "hybrid-*Brunner*" model in favor of a pure *Brunner* test); *Frushour*, 433 F.3d at 400; *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *U.S. Dep't. of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1241 (11th Cir. 2003) (adopting the *Brunner* test); *Pa. Higher Educ. Assistance Agency v. Brightful (In re Brightful)*, 267 F.3d 324, 325 (3d Cir. 2001); *Rifino v. N.W. Educ. Loan Ass'n (In re Rifino)*, 245 F.3d 1083, 1085 (9th Cir. 2001); *Ill. Student Assistance Comm'n v. Roberson (In re Roberson)*, 999 F.2d 1132, 1133 (7th Cir. 1993)

whether repayment would impose an undue hardship.[34] Additionally, *Brunner* is generally regarded as the more difficult standard to satisfy, which proponents claim comports with Congress's intent to make student loans generally nondischargeable.[35]

Under *Brunner*, undue hardship requires showing:

> (1) [T]hat the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[36]

To establish the first prong, that the debtor would not be able to maintain a minimal standard of living for herself and her dependents, courts look at the debtor's income, expenses, and lifestyle.[37] Although courts stop short of requiring that the debtor subject herself to abject poverty, a minimal standard of living should require the debtor to make major personal and financial sacrifices.[38]

A minimal standard of living usually accounts for bare necessities such as food, clothing, and shelter.[39] In differentiating between necessities and luxuries, the court "must apply its common-sense knowledge gained from ordinary observations in daily life and general experience to determine whether [a debtor's] expenses are reasonable and necessary."[40] In *Ivory*

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[34] *See Polleys*, 356 F.3d at 1309 ("Legal rules have value only to the extent they guide primary conduct or the exercise of judicial discretion.") (internal quotation and citation omitted).
[35] *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111 (9th Cir. 1998).
[36] *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).
[37] *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306-07 (3d Cir.1995).
[38] *Id.* at 305-06.
[39] 4 COLLIER ON BANKRUPTCY, ¶ 523.14 (16th ed. 2018); *see also Conner v. U.S. Dep't of Educ. (In re Conner)*, 526 B.R. 218, 226 (Bankr. E.D. Mich. 2015) (citing *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 623–24 (6th Cir. 2004) (finding that a minimum standard of living should not include cable, internet, or cell phones)).
[40] *McLaney v. Ky. Higher Educ. Assistance Auth. (In re McLaney)*, 375 B.R. 666, 674 (Bankr. M.D. Ala. 2007).

v. United States (In re Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001), the court identified six categories of necessities: (1) shelter, including furnishing, maintenance, and climate control; (2) utilities; (3) food and hygiene products and clean clothing; (4) vehicles and the expenses that go along with maintaining and insuring those vehicles; (5) health insurance; and (6) some recreation, "even if it is just watching television or keeping a pet."[41]

Under the second *Brunner* prong, the debtor must show that there are additional circumstances suggesting that his inability to repay the student loans is likely to persist for a significant portion of the repayment period. The standard involves making a prediction regarding whether the debtor's financial hardship will continue.[42] The second prong is "the heart of the *Brunner* test and is often difficult to prove because it requires the debtor to prove that she will be unable to repay her student loan debt in the future for reasons outside her control."[43] Such circumstances might include physical or mental illness, disability, absence of usable job skills, or a large number of dependents. [44] The debtor essentially must show a "certainty of hopelessness" that she will not be able to repay her student loans.[45]

The difficulty of the second *Brunner* prong reflects the courts' understanding of "the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans

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[41] *Ivory*, 269 B.R. at 899; s*ee also Miller v. Sallie Mae, Inc. (In re Miller)*, 409 B.R. 299, 312 & n.26 (Bankr. E.D. Pa. 2009) (finding that while the list promulgated in *Ivory* is a helpful start, "the court must be prepared to depart from the list based on its own experiences, common sense, knowledge of the surrounding area and culture, and assessment of the reasonableness of what debtor claims he or she needs. In addition, what is minimal can and probably should change over time (*e.g.,* with new technology driving down the costs of things that might have previously been cost prohibitive).").

[42] 4 COLLIER ON BANKRUPTCY, ¶ 523.14 (16th ed. 2018).

[43] *Matthews-Hamad v. Educ. Credit Mgmt. Corp. (In re Matthews-Hamad)*, 377 B.R. 415, 421-22 (Bankr. M.D. Fla. 2007).

[44] *See Wolfe v. U.S. Dep't of Educ. (In re Wolfe)*, 501 B.R. 426, 436 (Bankr. M.D. Fla. 2013).

[45] *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005).

more difficult than that of other nonexcepted debt."[46] Furthermore, the focus on future inability also reflects Congress' concern that student debtors who were facing temporary financial hardships might turn to bankruptcy. "Even though in the long run a government financed education may generate substantial returns, if steady employment is not immediately forthcoming bankruptcy provides an attractive means by which the student may eliminate frustrating and burdensome student loan payments . . . . 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."[47]

The Seventh Circuit's decision in *In re Roberson,* 999 F.2d 1132 (7th Cir. 1993), is emblematic of the difficulty debtors face when trying to satisfy the second *Brunner* element. There, the debtor borrowed money to obtain a bachelor of science degree in "industrial technology."[48] Years after earning his degree, however, the debtor fell on hard times, receiving his second driving under the influence conviction, losing his driver's license and his job, and getting divorced and having to pay for child support.[49] The Seventh Circuit reversed the district court's finding of undue hardship, finding that the debtor had not satisfied the second *Brunner* prong.[50] The court maintained that while the debtor's "short-term outlook is dismal," those difficulties would not prevent the debtor from obtaining employment in the future.[51] In fact, the debtor would be eligible for a new license later that year, which the court considered to be the largest impediment to the debtor's future employment.[52]

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[46] *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111 (9th Cir. 1998)..
[47] *In re Roberson,* 999 F.2d 1132, 1137 (7th Cir. 1993)
[48] *Id.* at 1133.
[49] *Id.*
[50] *Id.* at 1137.
[51] *Id.* at 1137.
[52] *Id.*

Finally, under the third *Brunner* prong, the good faith inquiry, courts consider the efforts the debtor has made to pay her student loans, including obtaining employment, increasing income, and reducing expenses.[53] In applying this factor, courts want to ensure that the debtor did "not willfully or negligently cause his own default, but rather his condition must result from factors beyond his reasonable control."[54]

No single factor is determinative. While making payments and attempting to negotiate a repayment plan supports finding good faith, the debtor's failure to do so is not fatal.[55] In *Educ. Credit Mgmt. Corp. v. Mosley*, 494 F.3d 1320 (11th Cir. 2007), for example, the debtor had a history of "depression, anxiety, back pain and swelling, and high blood pressure."[56] Despite these ailments, the debtor made multiple attempts to reenter the workforce but was ultimately unsuccessful because of the side-effects of his medication.[57] The creditor argued that because the debtor made no payments on his loan in more than ten years and did not attempt to negotiate repayment under the Income Contingent Repayment Program ("ICRP") or seek an administrative discharge based on his disability, he could not demonstrate good faith.[58] In affirming the bankruptcy court's finding of undue hardship, the Eleventh Circuit pointed out that due to debtor's persistent inability to work, the ICRP was not a viable option. Moreover, the ICRP may have essentially placed the debtor in the position of trading one nondischargeable debt for another because any debt that is discharged under the ICRP is treated as taxable income.[59] Finally, though the debtor did not pursue repayment under the ICRP, he made numerous attempts

[53] *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007); *Roberson*, 999 F.2d at 1136.
[54] *Roberson*, 999 F.2d at 1136; *Mosley*, 494 F.3d at 1327.
[55] *Mosley*, 494 F.3d at 1327.
[56] *Id.* at 1324.
[57] *Id.*
[58] *Id.* at 1327.
[59] *Id.*

to discover how he could resolve his debt with the United States Department of Education, the Georgia Student Finance Commission, the Veteran's Administration, and his congressman.[60] Accordingly, the debtor had demonstrated that he had made a sincere effort to repay his loan before turning to bankruptcy, thereby satisfying the good faith requirement.[61]

Though *Brunner* has become a North Star for determining student loan dischargeability, some have criticized the test as outdated. *Brunner* was decided before the 1998 amendments to § 523(a)(8), when there was only a temporary prohibition against discharging student loans.[62] Indeed, the dispute in *Brunner* surrounded a debtor who was attempting to discharge student loans that came due less than a month before she filed her Chapter 7 petition.[63] Since *Brunner* was decided, there have been numerous changes to § 523(a)(8), such as permanently excepting both public and private student loans from discharge absent undue hardship.[64] Despite these changes, most courts continue to rely on *Brunner* to determine undue hardship.[65] At the same time, however, there are some signs that *Brunner's* reign may be fading.

In *Krieger v. Educ. Credit Mgmt. Corp. (In re Krieger)*, 713 F.3d 882 (7th Cir. 2013), the Seventh Circuit rejected an overly restrictive application of *Brunner*. The debtor in that case had taken loans to receive training as a paralegal but had no success in finding employment despite

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[60] *Id.*

[61] *Id.* at 1328; *see also Kelly v. Sallie Mae, Inc.*, 594 F. App'x 413, 414 (9th Cir. 2015) ("[T]hough Kelly did not pursue loan repayment options, the bankruptcy court did not clearly err in its conclusion that Kelly had a good-faith belief that she was ineligible for the program, and that applying for the program would have been futile since she could not afford the payments after consolidation.").

[62] *See* Education Amendments of 1976 § 439A.

[63] *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 397 (2d Cir. 1987).

[64] *See* Part I, *supra*.

[65] *Mosley*, 494 F.3d at 1324-25; *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005).; *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 387 (6th Cir. 2005).

applying to almost 200 different positions in over ten years.[66] Additionally, the debtor attempted to pay as much of her student loans as she could, using $4,000.00 she received in a divorce settlement to pay down her debt. With that, the bankruptcy court found that the debtor had made a showing of undue hardship under *Brunner*.[67] However, the district court reversed that decision.[68] The district court initially commented that the debtor was relatively young with no disabilities. Additionally, the court found that the debtor's refusal to seek employment outside of the legal field "casts significant doubt on the idea that her current unemployment is due to 'additional circumstances' that will necessarily persist into the future, but instead shows that it is likely due to her unwillingness to consider other types of work."[69] Regarding good faith, the district court found that the debtor's failure to enroll in an ICRP was "very strong evidence of bad faith."[70]

On appeal, the Seventh Circuit reversed and remanded with instructions to reinstate the discharge.[71] In the opinion, written by Judge Easterbrook, the court warned against allowing "judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself."[72] The court concluded by noting that the "certainty of hopelessness" term adopted in *Roberson* to describe the three *Brunner* criteria "sounds more restrictive than the statutory 'undue hardship'" and that the phrase may be "unduly pessimistic[.]"[73] A judge "asked to apply

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[66] *Krieger v. Educ. Credit Mgmt. Corp. (In re Krieger)*, 2012 WL 1155687, at *2 (Bankr. C.D. Ill. Apr. 5, 2012).
[67] *Id.* at *7.
[68] *Krieger v. Educ. Credit Mgmt. Corp. (In re Krieger)*, 482 B.R. 238, 244 (C.D. Ill. 2012).
[69] *Id.* at 244.
[70] *Id.*at 247.
[71] *Krieger v. Educ. Credit Mgmt. Corp. (In re Krieger)*, 713 F.3d 882, 885 (7th Cir. 2013).
[72] *Id.* at 884 ("It is important not to allow judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself.")
[73] *Id.* at 885.

a multi-factor standard interpreting an open-ended statute necessarily has latitude; the more vague the standard, the harder it is to find error in its application."[74]

There was also a challenge to *Brunner* in the concurring opinion of *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908 (B.A.P. 9th Cir. 2013). There, Judge Pappas remarked that the *Brunner* test "is too narrow, no longer reflects reality, and should be revised by the Ninth Circuit when it has the opportunity to do so."[75] In addition to commenting on the statutory changes to § 523(a)(8) that were adopted after the *Brunner* test's inception, Judge Pappas also commented on the increase in student borrowing. Judge Pappas remarked that due to the size of the loans, courts are being asked "to predict a debtor's potential to repay a six-digit educational obligation over his or her entire lifetime[,]" and that the benefit of such loans "may be marginal[.]"[76] Given the new landscape, Judge Pappas encouraged the Ninth Circuit to adopt a standard that would allow consideration of a wider set of factors rather than focusing on debtor's current and future ability to repay the loan while maintaining a minimum standard of living.[77]

Though the change in the tone of these opinions may suggest some future reconsideration, *Brunner* continues to be the leading test for determining undue hardship and is

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[74] *Id.* at 885.

[75] *Roth*, 490 B.R. at 920 (Pappas, J., concurring).

[76] *Id.* at 922. *See also Armstrong v. U.S. Dep't of Educ. (In re Armstrong)*, 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"); *Myhre v. U.S. Dep't of Educ. (In re Myhre)*, 503 B.R. 698, 702 (Bankr. W.D. Wisc. 2013) (commenting that when Brunner was decided, "it only applied to a small subsection of student loans")

[77] *Roth*, 490 B.R. at 923. Other than briefly reaffirming that *Brunner* is the standard for undue hardship in *Hedlund v. Educ. Resources Institute, Inc.*, 718 F.3d 848, 855 (9th Cir. 2013), the Ninth Circuit has not considered Judge Pappas' criticisms.

faithfully applied in the lower courts.[78] Indeed, in the Seventh Circuit, many courts continue to require a showing of a "certainty of hopelessness," despite Judge Easterbrook's warning.[79]

Brunner's three prongs are onerous by design, reflecting Congress' intent that only the most desperate debtors receive relief from their student loans. The focus on future inability to repay and good faith essentially requires some perpetual physical or mental disability before the debtor can obtain relief. While recent opinions suggest that some bankruptcy courts are beginning to question the continued adherence to certain aspects of *Brunner*, it remains the leading test for undue hardship.

B. Totality of the Circumstances

As an alternative to the *Brunner* test, a minority of courts follow the totality of circumstances test set forth in *Andrews*.[80] The totality of circumstances test has only been officially adopted by the Eighth Circuit. However, the test has also been accepted by most lower courts in the First Circuit.[81]

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[78] *See, e.g., Doernte v. Educ. Credit Mgmt. Corp. (In re Doernte)*, 2017 WL 2312226, at *6 (Bankr. W.D. Pa. May 25, 2017) (finding the debtor could maintain a minimal lifestyle while making loan payments); *Nightingale v. N.C. State Educ. Assistance Auth. (In re Nightingale)*, 543 B.R. 538, 545 (Bankr. M.D. N.C. 2016) ("Despite these well-founded criticisms of the *Brunner* test as mandated in this circuit by *Frushour*, this Court is bound to apply the precedent of this circuit."); *Wolfe v. U.S. Dep't of Educ. (In re Wolfe)*, 501 B.R. 426, 436 (Bankr. M.D. Fla. 2013) (finding that despite the calls for reevaluating precedent, the court was not free to disregard precedent).

[79] *See, e.g., Bukovics v. Navient (In re Bukovics)*, 587 B.R. 695, 707 (Bankr. N.D. Ill. 2018); *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, 2016 WL 360697, at *5 (C.D. Ill. Jan. 26, 2016).

[80] *Fern v. Fedloan Servicing (In re Fern)*, 563 B.R. 1, 3-4 (B.A.P. 8th Cir. 2017); *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 799-800 (B.A.P. 1st Cir. 2010).

[81] *Schatz v. U.S. Dep't of Educ. (In re Schatz)*, 584 B.R. 1, 6 n.5 (Bankr. D. Mass. 2018) (collecting cases). The First Circuit Court of Appeals has left the decision of which test to follow, *Brunner* or *Andrews*, to the lower courts. *See Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 190 (1st Cir. 2006) ("We see no need in this case to pronounce our views of a preferred method of identifying a case of 'undue hardship'").

The courts that have adopted the totality of circumstances test have cited its "less restrictive approach" to the undue hardship inquiry.[82] The Eighth Circuit interprets the absence of any undue hardship parameters or definition in § 523(a)(8) as a sign that Congress wanted the courts to use their discretion.[83] Additionally, supporters of the totality of circumstances test contend that it "ensures an appropriate, equitable balance [between] concern for cases involving extreme abuse and concern for the overall fresh start policy."[84] As one court noted:

> [W]e cannot commit the court to a policy of mechanical evaluation of comprehensive human problems. 'Undue hardship' is a concept so fraught with subjective elements that we must consider the totality of a debtor's circumstances to confirm its presence or absence. . . . Our approach is not intended to yield a general rule applicable to a broad class of cases, but remains as flexible and adaptable as the concept of equity itself. We are able to say only that the whole of a debtor's condition, in an undue hardship case, should be sufficient to strike a chord of pity in the heart of equity.[85]

Despite the amorphous name, the totality of circumstances test generally surrounds three factors: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor and her dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding that case.[86] The test requires courts to ascertain whether the debtor's reasonable future resources will be sufficient to afford a minimal standard of living.[87] Under the third catchall factor, courts have listed numerous additional factors, including (a) the duration of the hardship; (b) the debtor's effort to make payments on the loan; (c) his attempts to

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

[83] *Id.*

[84] *Phelps v. Sallie Mae Loan Serv. Ctr. (In re Phelps)*, 237 B.R. 527, 534-35 (Bankr. R.I. 1999)

[85] *Moorman v. Ky. Higher Educ. Assistance Auth. (In re Moorman)*, 44 B.R. 135, 137-38 (Bankr. W.D. Ky. 1984).

[86] *Long*, 322 F.3d at 554 ("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.").

[87] *Id.*

obtain employment in his area of study; (d) whether the dominant purpose of the bankruptcy was to discharge the student loans; and (e) the ratio of student loan debt to total indebtedness.[88]

This relaxed approach to undue hardship does not guarantee the debtor will receive more favorable treatment. In *Educ. Credit Mgmt. Corp. v. Jesperson (In re Jesperson)*, 571 F.3d 775 (8th Cir. 2009), the court found that the debtor's ability to finance an ICRP weighed heavily against discharging his student debt.[89] The court maintained that when a debtor could afford those payments "without compromising a minimal standard of living . . . . the debt should not be discharged."[90] On the other hand, such reliance on ICRP has been rejected by the courts that follow *Brunner*.[91]

While the lack of strict parameters may allow lower courts to better balance equitable considerations, the inherently subjective nature of the totality of circumstances test makes the determination less predictable.[92] Critics argue that legal rules are only helpful if they guide judicial discretion and that "'[l]aundry lists, which may show ingenuity in imagining what could be relevant but do not assign weights or consequences to the factors, flunk the test of utility.'"[93] Moreover, such an expansive list may eventually lower the standard of undue hardship and undermine the intent of § 523(a)(8).[94]

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[88] *Educ. Credit Mgmt. Corp. v. Jesperson (In re Jesperson)*, 571 F.3d 775, 783-84 (8th Cir. 2009).
[89] *Jesperson*, 571 F.3d at 781-82.
[90] *Id.* (internal quotations omitted).
[91] *See, e.g., Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 918 (B.A.P. 9th Cir. 2013); *Credit Mgmt. Corp. v. Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007). *See also Hurst v. S. Ark. Univ. (In re Hurst)*, 553 B.R. 133, 143 (Shodeen, J., dissenting).
[92] *In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996) (listing eleven factors).
[93] *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004) (quoting *In re Plunkett*, 82 F.3d 738, 741 (7th Cir.1996)).
[94] *Id*. *See also* Jeffrey L. Zackerman, *Discharging Student Loans in Bankruptcy: The Need for a Uniform "Undue Hardship" Test*, 65 U. CIN. L. REV. 691, 699 (1997).

Proponents of the totality of circumstances test have argued that Congress intended for courts to be given discretion to determine undue hardship. This has led to a test that focuses on the debtor's resources, expenses, and a litany of additional factors that might make loan repayment more difficult. Though the totality of circumstances test is a more relaxed approach than *Brunner*, the debtor still bears an onerous burden and the availability of additional considerations may work against the debtor. While the test might be a better representation of the fresh start policy, it achieves that balance by sacrificing predictability.

III. PARTIAL DISCHARGE

Given the demanding nature of the undue hardship test, especially under the *Brunner* standard, some courts are looking for ways to avoid inequitable results. One avenue that has gained some traction is the partial discharge. Courts that have adopted partial discharge contend that 11 U.S.C. § 105(a), which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title[,]" gives the court power to grant partial relief when full discharge is not appropriate. Although the intention to give debtors at least some relief is understandable, the inconsistency with which the partial discharge is applied creates more uncertainty for both debtors and lenders.

At first glance, the language of § 523(a)(8) seems to suggest that whether student loans are dischargeable is an absolute proposition. Section 523(a)(8) does not provide that student loans are dischargeable "to the extent" that repayment would impose an undue hardship on the debtor, as is seen in other exceptions to discharge.[95] While courts have equitable power, that power "does not allow the bankruptcy court to override explicit mandates of other sections of the

[95] *United Student Aid Funds Inc. v. Taylor (In re Taylor)*, 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998), overruled by *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168 (9th Cir. 2003).

Bankruptcy Code."[96] Courts that have rejected a partial discharge contend that the language in § 523(a)(8) demonstrates Congress's intent for an "all or nothing" approach to discharging student loans.[97]

Nevertheless, other courts have found that § 523(a)(8) is ambiguous regarding partial discharge. In *Erbschloe v. U.S. Dep't of Educ. (In re Erbschloe)*, 502 B.R. 470 (Bankr. W.D. Va. 2013), the court observed that the connection between "such debt" and "undue hardship" controls the discharge but not whether the amount discharged is the "entire debt or such part of it as imposes the undue hardship."[98] Some courts have found that this ambiguity gives them authority exercise their equitable power pursuant to 11 U.S.C. § 105(a).[99]

One of the first cases to utilize §105(a) to partially discharge a student loan is *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998). There, the debtors were attempting to discharge more $30,000.00 in student loans they had accumulated while attending college for "business and computers."[100] Neither debtor graduated and they had a combined monthly income of about $2,500.00.[101] The Sixth Circuit reversed the bankruptcy and district court's finding that the debtors had demonstrated undue hardship. At the same time, however, the Sixth Circuit noted that on remand, the lower court was not bound to an "all or nothing" approach to discharging student loans. Instead, the court held that "where undue hardship does not exist, but where facts and circumstances require intervention in the financial

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[96] *Law v. Siegel*, 571 U.S. 415, 421 (2014); *Taylor*, 223 B.R. at 753.
[97] *Taylor*, 223 B.R. at 753; *Roach v. United States Aid Fund (In re Roach)*, 288 B.R. 437, 448 (Bankr. E.D. La. 2003).
[98] *Erbschloe v. U.S. Dep't of Educ. (In re Erbschloe)*, 502 B.R. 470, 481-82 (Bankr. W.D. Va. 2013).
[99] *See, e.g.*, *Saxman*, 325 F.3d 1168; *England v. United States of America (In re England)*, 264 B.R. 38 (Bankr. D. Idaho 2001).
[100] *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 434 (6th Cir. 1998).
[101] *Id.* at 435.

burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act."[102] Indeed, the court even went as far as to imply that partial discharge was not dependent on a showing of undue hardship,[103] though the Sixth Circuit has since backed away from that position.[104]

In addition to disagreements about whether partial discharge is textually supportable, the courts that have adopted a partial discharge disagree about the appropriate standard for determining undue hardship in the partial discharge context. In *Manion v. Modeen (In re Modeen)*, 586 B.R. 298 (Bankr. W.D. Wisc. 2018), for example, the court found that it could grant a partial discharge under § 105(a) even when *Brunner* had not been satisfied.[105] The court found that the correct standard for a partial discharge was where "'the equities of the situation weigh distinctly in favor of the debtor.'"[106]

Other courts, however, have found that undue hardship for a partial discharge requires a finding consistent with *Brunner*.[107] While it might seem counterintuitive to not grant a debtor a full discharge when she satisfies *Brunner*, the Sixth Circuit in *Miller v. Pa. Higher Educ. Assistance Agency*, 377 F.3d 616, 623–24 (6th Cir. 2004), explained:

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[102] *Id.* at 439.

[103] *Id.* at 439.

[104] *Miller v. Pa. Higher Educ. Assistance Agency*, 377 F.3d 616, 623–24 (6th Cir. 2004) (holding that any discharge, partial or complete, requires a showing of undue hardship); *see also Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 360 (6th Cir. 2007).

[105] *Id.* at 305-06. *See also Kapinos v. Graduate Loan Ctr. (In re Kapinos)*, 243 B.R. 271 (W.D.Va.2000)

[106] *Manion v. Modeen (In re Modeen)*, 586 B.R. 298, 306 (Bankr. W.D. Wisc. 2018) (quoting *England v. United States (In re England)*, 264 B.R. 38, 52 (Bankr. D. Idaho 2001)). *See also*, *Erbschloe v. U.S. Dep't of Educ. (In re Erbschloe)*, 502 B.R. 470, 483-84 (Bankr. W.D. Va. 2013). (finding that the debtor was entitled to a partial discharge despite not being able to satisfy the second prong of *Brunner*).

[107] *See, e.g., Educ. Credit Mgmt. v. Moore,* 97 F.App'x 88, 89 (9th Cir. 2004) (reversing both the bankruptcy court and district court because the debtor had not satisfied the three-part undue hardship test, debtor was not, therefore, entitled to partial discharge); *Educ. Credit Mgmt. Corp. v. Blake (In re Blake)*, 377 B.R. 502, 512 (E.D. Tex. 2007); *Lowe v. Educ. Credit Mgmt. Corp. (In re Lowe)*, 321 B.R. 852, 863-64 (Bankr. N.D. Ohio 2004).

> [A]ssume that a debtor owes $100,000 in student loans, and repayment of the full amount would impose undue hardship on the debtor but repayment of $40,000 would not. *Hornsby* indicates that a bankruptcy court would discharge $60,000 of the debt, the amount for which repayment would impose an undue hardship.[108]

Accordingly, the courts that follow this reasoning contend that a partial discharge is only permissible to the extent to which paying the entire loan would impose an undue hardship under *Brunner*.

Courts have even used the partial discharge to give lenders an opportunity to show why a full discharge is inappropriate. In *Bossardet v. Educ. Credit Mgmt. Corp. (In re Bossardet)*, 336 B.R. 451 (Bankr. D. Ariz. 2005), the debtor had shown that she could not maintain a minimal lifestyle while paying off her loan; that her financial inability was likely to continue as she had "maxed out" her career opportunities and her age prevented retraining; and that she made a good faith effort to repay her loans by attempting to complete a repayment plan.[109] Nevertheless, the creditor maintained that this was only the start of the inquiry and that it should be allowed to prove that the debtor could pay back some of her loan without imposing an undue hardship. The court found that the solvency of the student loan program was such an important interest that "courts should, whenever asked to do so, examine whether there are grounds to discharge only a portion of an otherwise fully dischargeable loan."[110] The court ultimately decided that the debtor could lower her monthly expenses by cutting certain costs (such as calling her incarcerated son)

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[108] *Miller*, 377 F.3d at 622. *See also Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 681 (6th Cir. 2005); *Doremus v. U.S. Department of Education (In re Doremus)*, 2014 WL 1168906, *2 (Bankr. N.D. Ohio Mar. 21, 2014) (finding that before it could grant a partial discharge, debtor needed to show undue hardship under *Brunner*); *Educ. Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen)*, 479 B.R. 79, 88 (B.A.P. 9th Cir. 2012) ("[A] bankruptcy court's discretion to grant a partial discharge is not unlimited. In each case, the bankruptcy court must find that all three prongs of the *Brunner* test were satisfied as to the portion of debt discharged.").

[109] *Id.* at 457.

[110] *Id.* at 458.

and would be able to afford payments of $143.56 per month for a term of 20 years without suffering an undue hardship.[111]

Thus, the partial discharge began as an attempt to avoid the perceived harsh results of the traditional undue hardship test, but courts have disagreed about whether such relief is available and, if so, the standard that should be applied. Moreover, the partial discharge has also been used as an extra safeguard for lenders. While the desire to ensure equitable results is understandable, the partial discharge has created more confusion and has undermined the integrity of § 523(a)(8).

IV. ADDRESSING STUDENT LOANS OUTSIDE OF § 523(a)(8)

Though undue hardship is an exacting standard that provides relief in only the most desperate circumstances, if a lender does not qualify for protection under § 523(a)(8), its claim will be treated like any other unsecured debt. Section 523(a)(8)'s protections are broad but the scope of the kinds of debts excepted is not infinite. Indeed, while all federal loans are excepted as loans "made, insured, or guaranteed" by a governmental unit, private loans must look for protection under §§ 523(a)(8)(A)(ii) or (B).

Under § 523(a)(8)(A)(ii), a debt is excepted if it is for "an obligation to repay funds received as an *educational benefit*, scholarship, or stipend[.]"[112] Some courts have given the term "educational benefit" a broad construction, essentially including any loan that is in some

[111] *Id.* at 458-59.
[112] 11 U.S.C. § 523(a)(8)(A)(ii) (emphasis added).

way related to education.[113] Under that interpretation, a loan is excepted from discharge so long as the stated purpose is to fund educational expenses.[114]

However, in *Campbell v. Citibank, N.A. (In re Campbell)*, 547 B.R. 49 (Bankr. E.D.N.Y. 2016), the court found that such a loose construction would essentially render the other provisions in § 523(a)(8) superfluous.[115] For example, if § 523(a)(8)(A)(ii) was intended to except private loans with a stated purpose to fund educational expenses, the "qualified educational loan" restriction in § 523(a)(8)(B) would have no effect. The court went on to explain that, based on the *noscitur a sociis* canon, "educational benefit" must have a meaning similar to "scholarship" or "stipend," and could not include a loan, especially given that Congress uses the word "loan" elsewhere in § 523(a)(8).[116] Accordingly, while "educational benefit" may cover a conditional grant,[117] the court found that it did not apply to a bar study loan.[118]

Further supporting a narrow construction is the fact that the language "for an obligation to repay funds received as an educational benefit, scholarship or stipend" was enacted in 1990, before private loans were excepted in 2005 with the inclusion of § 523(a)(8)(B).[119] Decisions

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[113] *See*, *e.g.*, *Brown v. Citibank, N.A. (In re Brown)*, 539 B.R. 853, 857-58 (Bankr. S.D. Cal. 2015) (finding that bar study loan was an obligation received as an educational benefit); *Beesley v. Royal Bank of Canada (In re Beesley)*, 2013 WL 5134404, at *3 (Bankr. W.D. Pa. Sept. 13, 2013) (same); *Skipworth v. Citibank Student Loan Corp. (In re Skipworth)*, 2010 WL 1417964, at *2 (Bankr. N.D. Ala. Apr. 10, 2010).

[114] *Brown*, 539 B.R. at 858.

[115] *Campbell v. Citibank, N.A. (In re Campbell)*, 547 B.R. 49, 54-55 (Bankr. E.D.N.Y. 2016)

[116] *Id.*

[117] *U.S. Dep't of Health & Human Servs. v. Smith*, 807 F.2d 122, 123 (8th Cir. 1986).

[118] *Campbell*, 547 B.R. at 59. *See also Essangui v. SLF V–2015 Trust (In re Essangui)*, 573 B.R. 614, 623-24 (Bankr. D. Md. 2017) (finding that a loan the debtor obtained to attend a medical preparatory course that, upon completion, would allow her to enroll in medical school was not "an educational benefit").

[119] *See* Part I, *supra*.

between 1990 and 2005 rejected the idea that "educational benefit" applied to private loans.[120] Despite the interpretations of those courts, Congress did not amend the language of § 523(a)(8)(A)(ii) to support a broader interpretation.[121] Thus, "Congress is presumed to have intended the same construction to apply to the new statute as applied to the existing statute."[122]

Turning to § 523(a)(8)(B), the language "qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986[,]" has a similarly narrow definition.[123] Under 26 U.S.C. § 221(d), "[t]he term 'qualified education loan' means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses[.]" Qualified higher education expenses, in turn, "means the cost of attendance (as defined in ... 20 U.S.C. 1087ll, as in effect on the day before ... the enactment of the Taxpayer Relief Act of 1997) at an eligible educational institution [,]" which includes tuition and fees, and certain allowances as determined by the institution.[124] An eligible institution is one that is entitled to participate in Title IV aid.[125] Accordingly, loans that exceed the cost of attendance or are paid for the debtor to attend an institution that is ineligible to receive Title IV funding may not be excepted as a "qualified education loan."[126]

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[120] *See*, *e.g.*, *Scott v. Midwestern Training Ctr., Inc. (In re Scott)*, 287 B.R. 470, 474 (Bankr. E.D. Mo. 2002) ("If the third provision of section 523(a)(8) were interpreted to mean that all educational loans were excepted from discharge then the first two categories (extending an exception only to governmental entities and nonprofit institutions) would certainly be rendered meaningless and superfluous."); *Jones v. H & W Recruiting Enters., LLC (In re Jones)*, 242 B.R. 441, 444 (Bankr. W.D. Tenn. 1999).

[121] *See Dufrane v. Navient Sols., Inc. (In re Dufrane)*, 566 B.R. 28, 38 (Bankr. C.D. Cal. 2017).

[122] *Id.* at 39 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979)).

[123] *See, e.g., Wiley v. Wells Fargo Bank, N.A. (In re Wiley)*, 579 B.R. 1, 10 (Bankr. D. Me. 2017) (lender failed to demonstrate that loans were solely to pay qualified higher education expenses); *Nunez v. Key Educ. Res. (In re Nunez)*, 527 B.R. 410, 416 (Bankr. D. Or. 2015) (finding that a qualified education loan only covered the school's cost of attendance to eligible education institutions).

[124] 26 U.S.C. § 221(d); 20 U.S.C. § 1087(1)-(3).

[125] 26 U.S.C. § 25A(f)(2).

[126] See, e.g., Nunez, 527 B.R. at 416 (finding that flight schools were not excepted from discharge because they were not eligible institutions);

V. CONCLUSION

In enacting § 523(a)(8), Congress made it clear that bankruptcy was not a desirable solution for dealing with educational debt. Yet, the dramatic rise in student loans over the past decade has brought increasingly desperate student loan debtors into bankruptcy. While many courts have remained steadfast in refusing to offer relief, others felt compelled to balance the integrity of the student loan system and the individual debtor's fresh start. This has led to increasingly fractured approaches to undue hardship under § 523(a)(8). With these differences, the debtor's relief may depend more on where she files than her individual circumstances. Thus, rather than subject herself to the uncertainties of different undue hardship tests, a debtor may be more successful by proving that her loans are not the kind that are subject to § 523(a)(8).