# CAN STUDENT LOANS BE DISCHARGED IN BANKRUPTCY?

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## INTRODUCTION

### *Bankruptcy's Paradox: The High Wall of "Undue Hardship" and the Fresh Start*

The treatment of student loan debt in bankruptcy contains the most profound incongruity between bankruptcy law's promise of a "fresh start" and the law as it exists. Tens of millions of Americans are denied a discharge from debt servitude and a fresh start, not because they incurred debts by actions that society might wish to discourage, such as by gambling or profligate spending. Rather, they are deprived of a fresh start, even in bankruptcy, because they sought an education.

Student loan debt currently is owed by nearly 50 million Americans. A decade ago, total student loan debt surpassed both car loans and credit card balances as the largest debt carried by U.S. citizens and households other than home mortgages. It has nearly doubled since, and today stands at nearly $1.7 *trillion*. Many of these loans are in default and will never be repaid. The causes are regularly debated, and addressing them systemically goes far beyond the authority of any court. While not the primary subject of this Article, they are considered briefly in Part I.

Student loan debt is difficult to discharge, in part, because § 523(a)(8) of the Bankruptcy Code requires the debtor to prove "undue hardship." This rule reflects Congress' effort in 1976 to address perceived abuses of the bankruptcy system by recent graduates who were able to repay their student loans but simply chose to not. At the time of the initial enactment of the "undue hardship" limitation, it applied only to the first five years of the repayment period of the ten-year term of a student loan. It now applies by statute regardless of the date on which the debt was incurred.[1]

The Bankruptcy Code does not define "undue hardship," and left that job to the courts. Most circuit courts, including the Fifth Circuit, follow the Second Circuit's 1987 opinion in *Brunner v. New York State Higher Education Services Corp*. When *Brunner*

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1 *See infra* Part I.

was decided, the undue hardship requirement still applied only to the first five years of the loan, after which the debt could be freely discharged as are most other unsecured claims in bankruptcy. The *Brunner* rule has three prongs, each of which the debtor has the burden to prove:

> (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 [student] 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.[2]

The *Brunner* rule and the similar, but not identical, "totality of the circumstances" standard adopted by a small minority of courts are discussed further in Part II of this Article.

Courts since *Brunner* have put a high, hard gloss on the rule. Some courts have required a debtor prove a "certainty of hopelessness." The Fifth Circuit recently construed "undue hardship" to mean "intolerable circumstances." This gloss, which the recent case of *In re Rosenberg* described as punitive dicta of mythic proportions, makes it nearly impossible for a debtor—even one who is in deep financial distress with no realistic prospects—to put an end to a lifetime burden of debt. This gloss on *Brunner* is examined in Part III.

There are recent glimmers of change, though. Courts revisiting *Brunner* have looked at that case and the rule in a fresh light. Their strongest focus has been on *Brunner*'s second and third prongs, i.e., whether the "look forward" period for the additional circumstances indicating that the debtor's present impoverishment will continue for a "significant portion of the repayment period of the student loans" means some period beyond the 10-year term of the loan, and whether "good faith" requires the debtor to apply for a 20- or 25-year income based repayment plan, even one that provides for $0 in payments and thus will never result in any repayment of the loan. These developments are considered in Parts IV and V.

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

This Article then, in Parts VI and VII, reviews current law in two related areas: whether a bankruptcy court can *partially* discharge student loan debt or is limited to an all or nothing analysis; and whether a debtor can separately classify and disproportionately pay the student loan debt under a Chapter 13 plan.

This Article concludes that opinions since *Brunner* have raised the wall to a discharge under section 523(a)(8) so high that for every abusive debtor who may slip under it, hundreds of honest and deserving debtors likely cannot climb over it. Many debtors who will never be able to repay their student loans, yet are honest and deserving of bankruptcy's fresh start, will never approach that high wall because they cannot pay the legal fees and expenses of trying, or because trying is a fool's errand. Courts which revisit the "punitive dicta" of *Brunner*, and begin the process of applying that rule as written, are more accurately adhering to the governing precedent, without usurping legislative authority, since Congress left defining "undue hardship" to the courts.

## I. HOW DID WE GET HERE FROM THERE?

A fundamental tension in U.S. bankruptcy law since the founding of the Republic is between the abusive bankrupt who does not pay her or his just debts, and the honest and deserving debtor to whom the law might provide a discharge and a fresh start.[3] Perhaps no other area of current bankruptcy law reflects

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[3] *Compare* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64 (2011) ("Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system . . . [and] to help ensure that debtors who *can* pay creditors *do* pay them.") (quoting Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231-32 (2010)), *with* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006) (A critical feature of every bankruptcy proceeding is "the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."), *and* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("This purpose of the act [—the discharge and fresh start—] has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.").

this stress more than the treatment of student loans under the Bankruptcy Code.[4]

The initial restrictions on the discharge of student loans were enacted in the 1970s. The law required proof of "undue hardship" for the discharge of a student loan within the first five years of the repayment period, after which the debt was freely dischargeable as an ordinary unsecured claim.[5] The movement for an exception to discharge appears to have been generated by "a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who . . . filed [for] bankruptcy shortly after leaving school and before any loans became due . . . ."[6]

For individuals who voluntarily file for bankruptcy, the fresh start that results from a discharge under the Bankruptcy Code likely is the transcendent purpose of U.S. bankruptcy law. A business corporation or limited liability company typically files a Chapter 11 to restructure, reorganize and continue as a going concern pursuant to a plan or a sale of the debtor's business assets.[7] If all else fails it can dissolve and wind up its affairs, and its owners can walk away from the company's debts without a backward glance. Individuals by comparison file to obtain a fresh start and have little ability to do so outside of bankruptcy.

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[4] *Compare* *REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION*, at 216 (Oct. 20, 1997), https://govinfo.library.unt.edu/nbrc/report/07consum.pdf [https://perma.cc/2R2J-PRYT] ("The Commission recommends that Congress eliminate section 523(a)(8) so that most student loans are treated like all other unsecured debts. In so doing, the dischargeability provisions would be consistent with federal policy to encourage educational endeavors . . . . Litigation over 'undue hardship' would be eliminated, so that the discharge of student loans no longer would be denied to those who need it most."), *with* HON. EDITH H. JONES & COMM'R JAMES I. SHEPARD, *ADDITIONAL DISSENT TO RECOMMENDATIONS FOR REFORM OF CONSUMER BANKRUPTCY LAW*, at 16, (Oct. 20, 1997), https://govinfo.library.unt.edu/nbrc/report/24commvi08.html [https://perma.cc/V3LS-8T2A] (asserting that "Congress has already made the public policy choice that the potential for abuse in the educational loan system outweighs the debtor's right to a fresh start.").

[5] H.R. REP. NO. 95-595, at 132 (1977).

[6] *Id.* at 133.

[7] *See* Bank of Am. Nat'l Tr. & Sav. Assoc. v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999) (recognizing the policy "underlying Chapter 11, of preserving going concerns . . . .").

Yet, tens of millions of Americans are denied that discharge and fresh start under current U.S. bankruptcy law. They are not barred because they incurred debts by actions that society might wish to discourage, such as by gambling or profligate spending. Rather, they are deprived of a fresh start, even in bankruptcy, because they sought an education.

Student loan debt currently is owed by nearly 50 million Americans. Educational debt in the U.S. is huge and relentlessly increasing as demonstrated by the table below.[8] Just a decade ago, when, for the first time, total student loan debt surpassed both car loans and credit card debt balances as the largest debt carried by U.S. citizens and households other than mortgages, it stood at $900 billion.[9] It has nearly doubled since, and today stands at nearly $1.7 *trillion*.[10] And younger Americans who attend college are more likely to have incurred student loan debt than older adults, consistent with an upward trend in educational borrowing over the past several decades.[11]

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[8] *Student Loans Owned and Securitized, Outstanding*, FED. RES. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/SLOAS [https://perma.cc/A3XH-REMT] (last updated Dec. 7, 2020) (showing Q3 2020 figure).

[9] *See Federal Reserve Statistical Release: Consumer Credit November 2013*, FED. RES. SYS. (Jan. 8, 2014), https://www.federalreserve.gov/releases/g19/20140108/g19.pdf [https://perma.cc/LAJ7-Z74W].

[10] For 2010 amounts, see *id.* For 2019 amounts, see *Federal Reserve Statistical Release: Consumer Credit April 2020*, FED. RES. SYS. (June 5, 2020) https://www.federalreserve.gov/releases/g19/current/ [https://perma.cc/7NWU-L8K6]. Aggregate student loan debt was "only" $480 billion at the beginning of 2006, and at nearly $1.7 trillion has more than tripled since. *See* FED. RES. BANK OF ST. LOUIS, *supra* note 8.

[11] BD. OF GOVERNORS OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020, at 43 (2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf [https://perma.cc/FC6E-6XDX].

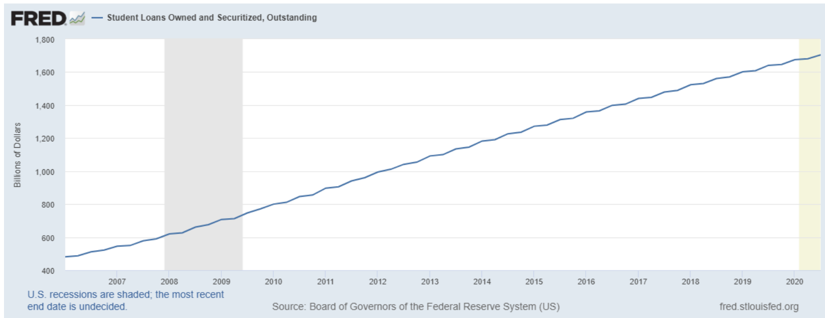


*Table – Student Loans Owned, Securitized and Outstanding, Q1 2006 through Q3 2020*

The default rate on these loans is persistent. Even after a full decade of uninterrupted, positive economic growth in the U.S., and prior to any effect of the Covid-19 pandemic, about two in ten student loan borrowers, with outstanding student loan debt incurred for her or his own education, are behind on payments.[12] The highest default and delinquency rates appear to be among borrowers who attended for-profit two-year and four-year colleges, and among those who owe *less than* $5,000, and who may not have completed their schooling or may have earned credentials that resulted in no improvement in their income.[13]

This state of affairs has been characterized as a "student debt crisis" by observers ranging from the American Federation of Teachers to the Harvard Business Review, and from Consumer Reports to The American Conservative.[14] Setting aside for a

[12] BD. OF GOVERNORS OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 44 (2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/X4AD-NC8V].

[13] *See, e.g.*, Meta Brown, Andrew F. Haughwout, Donghoon Lee, Joelle Scally & Wilbert van der Klaauw, *Looking at Student Loan Defaults through a Larger Window*, FED. RES. BANK OF N.Y.: LIBERTY STREET ECONOMICS (Feb. 19, 2015), https://libertystreeteconomics.newyorkfed.org/2015/02/looking_at_student_loan_defaults_through_a_larger_window.html [https://perma.cc/TZ47-Z48V]; Rajashri Chakrabarti, Nicole Gorton, Michelle Jiang & Wilbert van der Klaauw, *Who Is More Likely to Default on Student Loans?*, FED. RES. BANK OF N.Y.: LIBERTY STREET ECONOMICS (Nov. 20, 2017), https://libertystreeteconomics.newyorkfed.org/2017/11/who-is-more-likely-to-default-on-student-loans.html [https://perma.cc/D2WN-FE7H].

[14] *See, e.g.*, *The Student Debt Crisis*, AM. FED'N OF TEACHERS., https://www.aft.org/highered/student-debt-crisis [https://perma.cc/3BAT-RSVA]; Daniel

moment the debate over whether most bankrupt student loan borrowers are abusive or deserving, the next Part of this paper briefly considers the possible reasons for the unwavering rise in student loan debt, much of which will never be repaid, before turning to some interpretations of the "undue hardship" standard that make the discharge of a student loan nearly impossible.

### A. *Why Is There a Student Loan "Crisis?"*

The causes of the problem—whether we call it a "crisis" or something else—are debated hotly, if with varying rigor, by all sides. Those causes are only briefly considered below, and are not the subject of these materials, other than to suggest that addressing them goes far beyond the authority of any court and is yet more daunting than the student debt crisis itself.

The most popular, though apparently misidentified suspect at which many point a finger is the rising cost of tuition. Contrary to these assertions, at private non-profit colleges and universities at least, tuition "discounting" has become so prevalent that actual undergraduate tuition has increased by only about 15% during the same ten-year period during which student loan debt has nearly doubled.[15] This is because, while the "sticker" price for tuition stated by private non-profit schools has continued to rise, those same schools increasingly and routinely reduce the actual amount of tuition paid by undergraduate students through the use of grants extended by the institutions themselves.[16] These grants are

M. Johnson, *What Will It Take to Solve the Student Loan Crisis?*, HARV. BUS. REV. (Sept. 23, 2019), https://hbr.org/2019/09/what-will-it-take-to-solve-the-student-loan-crisis [https://perma.cc/484S-V63L]; James B. Steele & Lance Williams, *Student Debt: Lives on Hold*, CONSUMER REP.,https://www.consumerreports.org/student-loan-debt-crisis/lives-on-hold/ [https://perma.cc/FZW2-EGCQ] (last visited Nov. 9, 2020); Nick Phillips, *A Conservative Response to The Student Debt Crisis*, THE AM. CONSERVATIVE (Nov. 27, 2017, 12:01 AM), https://www.theamericanconservative.com/articles/a-conservative-response-to-the-student-debt-crisis/ [https://perma.cc/YL7M-YTFN].

[15] *See The 2019 NACUBO Tuition Discounting Study*, NAT'L ASS'N OF C. & U. BUS. OFFICERS, 3 fig. 1, https://www.nasfaa.org/uploads/documents/NACUBO_Tuition_Discounting_2019.pdf [https://perma.cc/C8X8-6BX3] (net tuition for undergraduates, showing a 14.3% percent change from 2011-12 to 2019-20).

[16] *See id.* at 4 ("[T]he increases in institutional discount rates are underscored by the rising average student aid rates. For students who receive aid, the student aid rate

nothing other than a discounted tuition price offered to students on a case-by-case basis. They currently amount to slightly more than 50% of the stated tuition price for undergraduate students, i.e., students overall are paying less than one-half the published tuition rate.[17]

The more likely causes are found elsewhere. These include chronically stagnant compensation both for those who have graduated from college and for those who have not, and other rising household costs, especially for rental housing and healthcare insurance premiums.

Depressed compensation, for both college graduates and high school graduates working their way through college, continues to hinder working Americans. The average wage in 2019, in constant dollars for 22-to-27-year-old college graduates, pre-Covid-19, is about the same that it was in 1990.[18] That five-year period is the time during which most student loan debtors would be making their first five years of installment payments on their ten-year term student loans. The wage for high school graduates, calculated in constant dollars, went *down* during the same period, making it more difficult for college students to work their way through college without incurring excessive debt.[19]

Some non-discretionary living expenses—especially for rental housing—have increased dramatically during the same periods. Increasing numbers of Americans live in rental housing, and they are finding the cost of renting "increasingly onerous."[20] A 2018

is the average institutional grant awarded as a percentage of the sticker price those students would have had to pay for tuition and fees.").

[17] *See id.* at 42 app. tbl.3.

[18] Median wages for recent college graduates, defined as "those aged 22 to 27 with a bachelor's degree only" in constant 2019 dollars, were $44,798 in 2018 and $45,739 in 1990, a *drop* of about 2% from 1990. *See The Labor Market for Recent College Graduates*, FED. RES. BANK OF N.Y. (last updated Feb. 12, 2020), https://www.newyorkfed.org/research/college-labor-market/college-labor-market_wages.html [https://perma.cc/MC4M-PV6P]. At the end of the recent economic expansion, pre-Covid-19, the median wages were $45,000 in 2019, about the same as in 1990. *Id.*

[19] Median wages for high school graduates, in constant 2019 dollars, have gone *down* by more than 10% since 1990, from $33,264 in 1990, to $30,000 2019, again pre-pandemic. *Id.*

[20] *See* THE PEW CHARITABLE TRS., AMERICAN FAMILIES FACE A GROWING RENT BURDEN 4 (2018), https://www.pewtrusts.org/en/research-and-

Pew Charitable Trusts study noted that, since 2001, gross rent had increased 3 percent a year, on average, while income had declined by an average of 0.1 percent annually.[21] The study observed that "[t]his widening gap between rent and income means that after paying rent, many Americans have less money available for other needs than they did 20 years ago."[22]

Healthcare insurance premiums and deductibles have also risen at rates in excess of both wages and inflation. For instance, "[t]he average dollar contribution for [employer-based] family coverage has increased 25% since 2014 and 71% since 2009."[23] And "[t]he average annual deductible among covered workers with a deductible has increased 36% over the last five years and 100% over the last ten years."[24]

The final reason for rising student loan debt—though quantifying it would be highly speculative—may be that a significant number of borrowers who are unable to amortize their student loan debt, in accordance with the terms of the loan, watch their debts swell by accrued interest and penalties in the years following their incurring the debt. Few of these borrowers will seek a discharge, and fewer still will be granted one, because of the statutory requirement of "undue hardship" and the meaning given by the courts to that term. It was not always so.

### *B. The Origin of Non-dischargeable Student Loan Debt: "Undue Hardship" Under 523(a)(8)*

Student loans were dischargeable by a debtor under the Bankruptcy Act before 1976, on the same grounds as other unsecured claims. Total student loan debt was small at the time, due in part to the recent creation of programs for student loans insured or guaranteed by the U.S.[25]

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analysis/reports/2018/04/american-families-face-a-growing-rent-burden [https://perma.cc/YN52-LR6X].

[21] *Id.* at 6.

[22] *Id.*

[23] *Employer Health Benefits 2019 Annual Survey*, THE KAISER FAM. FOUND., 9 (2019), https://www.kff.org/report-section/ehbs-2019-summary-of-findings/#figurea [https://perma.cc/87LV-UAGX].

[24] *Id*. at 11.

[25] Under the Guaranteed Student Loan Program, private lenders made the loans to students, and the loans were insured or reinsured by the U.S. Office of Education. *See*

With the enactment of the Educational Act Amendments of 1976, Congress amended the Bankruptcy Act to make most of these U.S. government-backed student loans non-dischargeable for a period of five years after the loan first became due, unless the debtor could prove "undue hardship."[26] These loans were easily obtained, were made available as a result of governmental largesse at taxpayer expense, and had enabled the borrower to obtain a valuable education.[27] Congress acted in response to perceived abuses by some graduates, who shortly after graduation—and with little if any property to lose in a bankruptcy proceeding—sought to use that proceeding to walk away from loans that they were able to repay.[28]

The bankruptcy provision in the 1976 bill imposed an "undue hardship" requirement for a student loan discharge sought by the borrower within the first five years of the repayment period. It is very similar to the current § 523(a)(8) of the Code, except that Congress would subsequently eliminate the five-year period and require proof of undue hardship at any time a discharge of a student loan is sought:

> (a) A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the [repayment period of such loan, except that prior to the expiration of that five-year period,] such loan may be released only if the court in which the proceeding is pending determines that payment from

U.S. GOV'T ACCOUNTABILITY OFFICE, HRD-77-83, GUARANTEED STUDENT LOAN PROGRAM BANKRUPTCIES (1977), https://www.gao.gov/assets/120/118247.pdf [https://perma.cc/M5B4-MWYB].

[26] Education Amendments of 1976, Pub. L. No. 94-482, sec. 439. A., 90 Stat. 2081; 122 CONG. REC. 33229, 33650 (1976).

[27] *Id.* "The primary program-related cause of defaults, testimony before our committee has reiterated, is the kind of lending situation in which it is not made clear to the student that he is borrowing money—that it is not a gift from his generous Uncle Sam or his generous alma mater, and that he must pay it back, under prescribed conditions." Education Amendments of 1976, Pub. L. No. 94-482, sec. 439. A., 90 Stat. 2081; 122 CONG. REC. 33229, 33650 (1976) (statement of Rep. James O'Hara).

[28] *See id.*

> future income of other wealth will impose an undue hardship on the debtor or his dependents.[29]

Two years later, in 1978, Congress enacted the Bankruptcy Reform Act, which was codified as, and became known as, the Bankruptcy Code.[30] The Bankruptcy Reform Act also required a finding of "undue hardship" for a discharge within the first five years of the loan, and codified that requirement in § 523(a)(8).[31] That section, though, expanded the kinds of student loans that were not dischargeable for the five-year period absent the "undue hardship" finding, to include any debt owed "to a governmental unit, or a nonprofit institution of higher education, for an educational loan . . . ."[32]

Under the 1978 Code, § 523(a)(8) did not apply in Chapter 13. A debtor who paid her or his disposable income to her or his unsecured creditors for three years under a confirmed Chapter 13 plan obtained a discharge from student loan debts along with other dischargeable debts.[33]

Congress did not define "undue hardship" in the Code. It left that job to the courts. In the first few years following the effective date of the Code, courts took varied paths to determine what constituted undue hardship. Not until 1987, when the Second Circuit issued its opinion in *Brunner*, would a standard emerge that eventually would be followed by most courts.[34] The *Brunner* rule is considered below in Part II. Before turning to the rule, the several amendments enacted by Congress to § 523(a)(8) are summarized below.

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[29] Education Amendments of 1976, Pub. L. No. 94-482, sec. 439. A., 90 Stat. 2081.

[30] *See* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, (providing a uniform law on the subject of Bankruptcies).

[31] *Id.*

[32] *Id.*

[33] *Student Loan Dischargeability Position Paper*, NAT'L BANKR. CONF., 3 (2018), http://nbconf.org/our-work/ [https://perma.cc/7FT4-R4FT].

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

### *C. Amendments to the Code Regarding the Applicability of the "Undue Hardship" Requirement for Discharge of Student Loans Since 1978*

When *Brunner* was decided in 1987, the Bankruptcy Code required the debtor to prove an undue hardship *only* during the first five years of the educational loan, after which the loan was as freely dischargeable as any other unsecured claim.[35] Section 523 provided:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt–,
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> . . . .
>
> (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, *unless*–, (A) *such loan first became due before five years before the date of the filing of the petition*; or (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .[36]

Thus, under § 523(a)(8) as initially enacted, the undue hardship requirement did not apply *at all* to a debtor who filed a voluntary bankruptcy case, and sought a discharge, five years and a day after her or his student loan first became due. A student loan borrower who waited the five years before filing could walk away from the debt without a backward glance.

Congress has made the discharge of a student loan more difficult over time. In 1990, it extended the five-year period to seven years, by tacking the provision onto the Crime Control Act of 1990.[37] Also in 1990, Congress expanded the undue hardship rule to Chapter 13.[38] As a result, even a debtor who devoted her disposable income to pay unsecured creditors over the term of a

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[35] Act of Nov. 6, 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549.

[36] *Id.* (emphasis added).

[37] *See* Crime Control Act of 1990, Pub. L. No. 101-647, sec. 3621(2), § 523(a)(8), 104 Stat. 4789.

[38] *See Student Loan Dischargeability Position Paper*, *supra* note 33, at 3 (citing Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388-28).

confirmed plan could not obtain a discharge from her student loan debt.

In 1998 Congress ended the free discharge of student loans altogether, repealing the seven-year period and requiring proof of undue hardship regardless of when the loan was taken.[39] Shortly thereafter, the Fifth Circuit in *In re Gerhardt* adopted the *Brunner* rule.[40]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") further expanded the kind of loans that required proof of "undue hardship," to any "obligation to repay funds received as an educational benefit," and to "any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 . . . ."[41] Thus after BAPCPA, purely private student loans, not backed by a governmental entity, cannot be discharged unless undue hardship is shown.[42] Private lenders often require co-signers of their loans, by a student's parents or other family members (which the federal government usually does not ask for), and most courts construe § 523(a)(8) to provide that a co-signer who is a debtor also cannot obtain a discharge absent proof of undue hardship.[43] BAPCPA thus made non-discharge cross-generational.

Congress did not define "undue hardship," in either the 1976 statute that first required it, or the 1978 Code, nor has it defined the term since. It has left that job to the courts.

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[39] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, sec. 971, § 523(a), 112 Stat. 1581.

[40] U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91-92 (5th Cir. 2003) ("Because the Second Circuit presented a workable approach to evaluating the 'undue hardship' determination, this court expressly adopts the *Brunner* test for purposes of evaluating a Section 523(a)(8) decision.").

[41] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 220, § 523(a), 119 Stat. 23.

[42] SUSAN E. HAUSER & DANIEL A. AUSTIN, AM. BANKR. INST., GRADUATING WITH DEBT: STUDENT LOANS UNDER THE BANKRUPTCY CODE 37 (2d ed. 2016) (BAPCPA "dramatically expanded" the scope of § 523(a)(8), and "makes most private student loans nondischargeable, even if they are not funded or backed by the government or a nonprofit institution, subject only to debtor's ability to prove undue hardship.").

[43] Christopher D. Soper and Benjamin Nicolet, *Statutory Interpretation Merry-Go-Round: Student Loan Cosignor Discharge Then, Now and Later*, 35 AM. BANKR. INST. J. 22 (Aug. 2016).

## II. THE *BRUNNER* RULE AND THE TOTALITY OF THE CIRCUMSTANCES STANDARD

Courts have developed two standards for determining what constitutes an "undue hardship" under § 523(a)(8) of the Bankruptcy Code: the *Brunner* rule and the "totality of the circumstances" standard. These are addressed in turn below.

### *A. The* Brunner *Rule and Its Three Prongs*

The test for what constitutes an "undue hardship" that most courts follow—the *Brunner* rule—was enunciated by the Second Circuit in 1987, when student loans were freely dischargeable after the first five years of the loan.[44] The Second Circuit in *Brunner* affirmed the rule adopted by the district court from which the appeal in that case was taken (the Southern District of New York).[45] Under the rule, an "undue hardship" discharge requires the debtor to make a three-part showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[46]

The Second Circuit noted that, at the time of its decision in 1987, there was "very little appellate authority on the definition of 'undue hardship'" under § 523(a)(8)(B).[47] It stated that it was adopting the district court's test for the reasons set forth by that court.[48] The district court had emphasized that, while the Congressional Reports which accompanied the Code had said little on the subject, "[t]he phrase 'undue hardship' was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy

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[44] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

Laws of the United States . . . ."[49] The Commission had stated that the reason for the undue hardship requirement was a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts."[50] The Commission further envisioned the second prong: "a determination of whether the amount and reliability of income and other wealth which the debtor could reasonably be expected to receive in the future could maintain the debtor and his or her dependents at a minimal standard of living as well as pay off the student loans."[51] "After all," the court continued, "it is not unreasonable to hold that committing the debtor to a life of poverty *for the term of the loan—generally ten years*—imposes 'undue' hardship."[52]

In applying this test, the Second Circuit in *Brunner* focused little on the first prong, which required Ms. Brunner to show an inability to maintain a minimal standard of living. It noted only that the requirement had been "applied frequently as the minimum necessary to establish 'undue hardship[,]'" and comported with common sense as well.[53]

*Brunner*'s second prong—additional circumstances indicating that the debtor's inability to maintain a minimal standard of living will persist "*for a significant portion of the repayment period*"—clearly was not proved by the debtor in *Brunner*.[54] The record on appeal demonstrated no additional circumstances indicating a likelihood that Brunner's current inability to find any work would extend for a significant portion of the loan repayment period.[55] She was "not disabled, nor elderly, and she ha[d]—so far as the record reflected—no dependents."[56] Evidence was not

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[49] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (S.D.N.Y. 1985) *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[50] *Id.* (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93–137, pt. I, at 140 n.14 (1st Sess. 1973).

[51] *Id.* (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93-137, pt. I, at 140-41 n.17 (1st Sess. 1973).

[52] *Id.* (emphasis added).

[53] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d at 396 (citations omitted).

[54] *Id.* at 396-97 (emphasis added).

[55] *Id.* at 396.

[56] *Id.*

presented indicating "a total foreclosure of job prospects in her area of training." Indeed, at the time of the hearing, only ten months had elapsed since her graduation from her Master's program.[57]

The third prong in *Brunner* was easily dispensed with based on the record below. "[A]s noted by the district court, [Ms.] Brunner filed for the discharge within a month of the date [on which] the first payment of her loans came due."[58] She had done so without even "requesting a deferment of payment, a less drastic remedy available to those unable to pay because of prolonged unemployment."[59] According to the court, "[s]uch conduct [did] not evidence a good faith attempt to repay her student loans."[60]

The Second Circuit and the district court each had placed the burden of proof on the debtor. The Second Circuit concluded that the debtor had "not established her eligibility for a discharge of her student loans based on 'undue hardship.'"[61]

Nine circuits have followed *Brunner*—the Second,[62] Third,[63] Fourth,[64] Fifth,[65] Sixth,[66] Seventh,[67] Ninth,[68] Tenth[69] and Eleventh[70]—since it was decided more than thirty years ago. Over

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[57] *Id.* at 396-97.

[58] *Id.* at 397.

[59] *Id.*

[60] *Id.*

[61] *See id.* at 396; Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 757-58 (S.D.N.Y. 1985) *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) ("In short, appellee at most proved that she is currently—or was at the time of the hearing—unable both to meet her minimal expenses and pay off her loans. This alone cannot support a finding that the failure to discharge her loans will impose undue hardship.").

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

[63] Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305-06 (3d Cir. 1995).

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

[65] U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91-92 (5th Cir. 2003).

[66] Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005).

[67] *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

[68] United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998).

[69] Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004).

[70] Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1240 (11th Cir. 2003).

this period, hundreds of opinions have put a high gloss on the three prongs of the rule, especially on the additional circumstances that must be proven under the second prong to indicate the debtor's sub-minimal financial condition "is likely to persist for a significant portion of the repayment period of the student loans."[71] This gloss on *Brunner* is discussed further in Part III of this paper below.

### *B. The Totality of the Circumstances Standard*

The minority rule for what constitutes "undue hardship" is the "totality of the circumstances" standard, which was set forth by the Eighth Circuit in *In re Long* and is followed in the Eighth Circuit and by some of the courts in the First Circuit.[72] Under the totality-of-circumstances test, the court must consider: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[73] The debtor has the burden, as under *Brunner*, of establishing undue hardship under this test by a preponderance of the evidence.[74]

The totality of the circumstances standard appears less onerous than *Brunner*, and some courts, including the Fifth Circuit, have characterized it as such.[75] Courts applying the

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

[72] *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 797, 800 (B.A.P. 1st Cir. 2010).

[73] *In re* Long, 322 F.3d at 554 (citation omitted).

[74] *See, e.g.*, Walker v. Sallie Mae Servicing Corp. (*In re* Walker), 650 F.3d 1227, 1230 (8th Cir. 2011) (citing *In re* Long, 322 F.3d at 554). Similarly, the First Circuit in *In re Nash* opined there was "no need . . . to pronounce [its] views of a preferred method of identifying a case of 'undue hardship.'" Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 190 (1st Cir. 2006). The lower courts in that circuit, though, have tended to apply the totality of the circumstances standard, and have held that neither the second prong (the likelihood that the debtor's financial difficulties will persist) nor the third prong of *Brunner* (that the debtor has made a good faith effort to repay the loan) is required by the Code. *See In re Bronsdon*, 435 B.R. at 797-99.

[75] *See, e.g.*, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 454-55 (5th Cir. 2019).

standard, though, have interpreted "other relevant facts and circumstances" to include a number of factors, many of which are quite *Brunner*-esque:

> (1) total present and future incapacity to pay debts for reasons not within the control of the debtor; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has made payments on the student loan; (5) whether there is permanent or long-term disability of the debtor; (6) the ability of the debtor to obtain gainful employment in the area of the study; (7) whether the debtor has made a good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and (9) the ratio of student loan debt to total indebtedness.[76]

### *C. Burden of Proof*

Section 523(a) of the Bankruptcy Code does not state either *what* the standard of proof is, or *who* has the burden of proof, with respect to any of the exceptions to discharge contained in that section. The Supreme Court in *Grogan v. Garner* held that the preponderance of the evidence standard, rather than the clear and convincing standard, applies to all exceptions to discharge under § 523(a).[77]

The Supreme Court has not made a similarly consistent rule for *who* has the burden.[78] Some circuit, district and bankruptcy courts, though, fairly consistently have held that the debtor has the burden of proof on each prong of the *Brunner* rule.[79] "[I]f even

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[76] Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 4 (B.A.P. 8th Cir. 2017).

[77] *See* Grogan v. Garner, 498 U.S. 279, 291 (1991).

[78] Notably, the *creditor* bears the burden of proof on some of the exceptions to discharge codified in § 523(a). The Supreme Court in *Grogan* reasoned that: "Requiring the *creditor* to establish by a preponderance of the evidence that his claim is *not* dischargeable" because of fraud under § 523(a)(2)(A), "reflects a fair balance" between the conflicting interests of the fresh start and the Congressionally enacted exceptions to discharge. *See id.* at 287 (emphasis added).

[79] *See, e.g.*, United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1111 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995).

one prong is not satisfied, the debt is not dischargeable."[80] The debtor also has the burden under the totality of the circumstances test.[81]

## III. THE GLOSS ON *BRUNNER*—THE DEBTOR'S BURDEN OF PROVING ADDITIONAL CIRCUMSTANCES, GOOD FAITH, AND A "CERTAINTY OF HOPELESSNESS" AND/OR "INTOLERABLE DIFFICULTIES" IN PERPETUITY

Courts have put a high, hard gloss on *Brunner* since it was decided more than thirty years ago, which is nearly impossible for a debtor—even one who is in deep financial distress with no realistic prospects—to penetrate in order to obtain a discharge. This has occurred notwithstanding that Congress has not amended the term "undue hardship" since it first used the term in 1976, or that *Brunner* was decided when the "undue hardship" requirement only applied to the first five years of the loan—after which the claim was freely dischargeable on the same basis as any other unsecured debt—and also was dischargeable on the completion of payments under a Chapter 13 plan.

Taken against the background of the early years of the federal student loan program, it is not surprising that the courts set a high bar. The debtor in *Brunner* and those in many of the other early student loan discharge cases were not sympathetic debtors. Many of those debtors sought the immediate discharge from loans which were easily obtained as a result of governmental largesse, at taxpayer expense, and had given them valuable educations. Such debtors arguably were trying to abuse both the recently enacted federal student loan program and the still newer Bankruptcy Code.[82]

[80] Lewis v. Mass. Higher Educ. Assistance Corp. (*In re* Lewis), No. 17-51357-KMS, 2020 WL 489222 at *3 (Bankr. S.D. Miss. Jan. 29, 2020) (citing Salyer v. Sallie Mae Servicing Corp. (*In re* Salyer), 348 B.R. 66, 70 (Bankr. M.D. La. 2006)). *See also Thomas v. Dep't of Educ.* (*In re* Thomas), 931 F.3d at 451 (noting the debtor must satisfy all three prongs to justify a discharge).

[81] *See* Walker v. Sallie Mae Servicing Corp. (*In re* Walker), 650 F.3d 1227, 1230 (8th Cir. 2011).

[82] The student loan program was enacted as part of the Higher Education Act of 1965 and contributed to President Lyndon Baines Johnson's Great Society legislative initiative. *See* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, https://www.govinfo.gov/content/pkg/STATUTE-79/pdf/STATUTE-79-Pg1219.pdf

Many of today's Americans who carry unsupportable student loan debt, though, appear to have been caught in the crosshairs of the thorny debate over the extent to which an undeserving debtor should be allowed to abuse the bankruptcy system by not paying her or his just debts, or an honest and deserving debtor should be able to obtain the fresh start that comes from a discharge in bankruptcy.

Regardless, few students file discharge complaints today, and still fewer succeed, even if they are unable to make the regular payments required to amortize their loans on time, or ever repay even the interest on them. The expense of trying is too high, especially for an individual in bankruptcy, and the likelihood of success is too low; many, or most, fail. One study has concluded that "barely 0.1 percent of student loan debtors in bankruptcy *sought* to discharge their educational debts." [83]

It is undoubtedly true that Congress, by imposing the undue hardship requirement in § 523(a)(8), meant to make student loans highly difficult to discharge. It also is clear that the courts' purview does not extend to addressing issues regarding financing the costs of higher education or the massive and ever-increasing U.S. student loan debt.

Congress, though, just as clearly gave to the courts the task of defining "undue hardship." *Brunner* did so in 1987, to the eventual satisfaction of most courts. Yet many courts have hardened the *Brunner* rule since, while purporting to follow its requirements, and without any express direction from Congress to do so. The ways in which these courts have done so— primarily with respect to the second and third prongs of the rule—are considered below.

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[https://perma.cc/HY8Z-AQ8K]. The Act's stated purpose was "[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education." *Id.* President Johnson traveled to Southwest Texas State College, his alma mater, and stated the bill meant "that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor." President Lyndon B. Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), http://www.lbjlibrary.org/mediakits/highereducation/p8.html [https://perma.cc/4TTR-U9QU].

[83] Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 499 (2012) (emphasis added).

### *A.* Brunner*'s Second Prong: Debtor's Inability to Maintain a Minimal Standard of Living for Herself and Her Dependents Is Likely to Persist for a Significant Portion of the Repayment Period of the Student Loans*

To satisfy *Brunner*'s second prong the debtor must prove "additional circumstances" which indicate that her inability to maintain a minimal standard of living is likely to continue for a "significant portion of the repayment period of the student loans."[84] The repayment period applicable to the second prong was no more than 10 years—the term of a federal student loan—when the Second Circuit decided *Brunner* in 1987.[85]

The term of a federal student loan is still 10 years, yet many courts have required the debtor to prove that these additional circumstances will persist for a significant portion of the debtor's lifetime.[86] Others have looked to the 20- or 25-year repayment period of an income-based repayment (IBR) plan that *might* be available to the debtor. Indeed, lenders regularly assert, and some courts have held, that *Brunner*'s second prong is not satisfied even if the monthly payment amount under a hypothetical IBR would be $1 a month or even $0 per month—so that the loan, if not discharged, will never be repaid even in part, and the debt will increase over that extended period because of accruing interest.[87]

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84 Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

85 All loans that were subject to the undue hardship test at the time that *Brunner* was decided were within the 10-year repayment period. HAUSER & AUSTIN, *supra* note 42, at 52. Congress did not create the first income-contingent repayment (ICR) election for student loans until 1993. Beginning in 1994, in what has been characterized as a legislative victory for President Clinton, the federal government began making direct student loans. This allowed the government "to offer the student a novel repayment option: the graduate [could] elect to repay the principal and interest out of a modest percentage of his or her future income. The Internal Revenue Service would take on a new role in collecting income-contingent repayments." Evelyn Brody, *Paying Back Your Country Through Income-Contingent Student* Loans, 31 SAN DIEGO L. REV. 449, 517 (1994).

86 *See, e.g.*, Noratesh v. Boston Univ. (*In re* Noratesh), 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004) ("At a minimum, however, a borrower seeking 'an undue hardship' discharge must provide corroborative evidence that he had an impairment that prevents him from earning enough to repay his student loans, and that the impairment is likely to persist well into the future.").

87 Terrence L. Michael and Janie M. Phelps, *"Judges?!—We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the*

Courts also have characterized *Brunner*'s second prong as requiring the debtor to prove a "certainty of hopelessness" and a total incapacity to pay the loan, in whole or in part, not just for "a significant portion of the repayment period," but at any time in the future.[88] This requires proof of "chronic mental or physical ailments that interfere with the debtor's ability to work and generate income."[89]

The words "certainty of hopelessness" do not appear in § 523(a)(8).[90] The Second Circuit in *Brunner* did not use the term "certainty of hopelessness" in its decision either.[91] The district court that it affirmed, though, used the phrase, quoting *In re Briscoe*, which was decided four years earlier.[92]

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*Income Contingent Repayment Plan*, 38 Tex. Tech. L. Rev. 73, 96 (2005) (these "zero-payment cases seem to accentuate the DOE'S [Department of Education's] argument that participation will not be an undue hardship because debtors are not being asked to contribute any part of their limited income toward repayment of their student loans."); Brown v. Sallie Mae (*In re* Brown), 442 B.R. 776, 784 (Bankr. D.Colo. 2010) (failure to apply for income-based repayment program under which payment would be $0.00 per month is a factor in determining good faith required by *Brunner*'s second prong); Bott v. Educ. Credit Mgmt. Corp. (*In re* Bott), 324 B.R. 771, 777-78 (Bankr. E.D. Mo. 2005) (debtor's failure to apply for zero payment income contingent repayment exhibits lack of good faith).

[88] *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (quoting *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993)). Additionally, "proving that the debtor is 'currently in financial straits' is not enough. Instead, the debtor must specifically prove 'a total incapacity . . . in the future to pay [his] debts for reasons not within [his] control." U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 92 (5th Cir. 2003) (quotations omitted).

[89] HAUSER & AUSTIN, *supra* note 42, at 47-48 ("Depression caused by debt, without more, does not appear to suffice."). *But see* Reynolds v. Penn. Higher Educ. Assistance Agency (*In re* Reynolds), 425 F.3d 526, 532-33 (8th Cir. 2005) (holding that under the "totality of the circumstances" standard, "illness often affects both a debtor's ability to earn and her expenses; in such cases, factors affecting the debtor's health also have a financial significance. Where the evidence shows that financial obligations are likely to undermine a debtor's health, which in turn will affect the debtor's financial outlook, we think it entirely consistent with *Andrews* and *Long* to take such facts and circumstances into account. We will not adopt an interpretation of 'undue hardship' that causes the courts to shut their eyes to factors that may lead to disaster, both personal and financial, for a suffering debtor.").

[90] *See* 11 U.S.C. § 523(a)(8) (2020).

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

[92] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 (S.D.N.Y. 1985) (quoting Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)).

The term "certainty of hopelessness" was coined in *In re Briscoe* in 1981 by the late Judge Burton Lifland—better known, perhaps, for presiding over complex and prominent Chapter 11 cases, including *Eastern Airlines*,[93] *Johns-Manville*[94] and the *Madoff Securities*[95] case. At that time the law still provided that a student loan was freely dischargeable after five years, and Judge Lifland's judicial gloss is best understood in that context—if a student's loan was freely dischargeable after five years, it was reasonable to conclude that Congress had imposed a severe standard for that five-year period.[96] Judge Lifland emphasized that the debtor Briscoe's circumstances fell far short of "hopeless."[97] The debtor's claim was "pitched to current (or immediate future) inability to repay this otherwise non-dischargeable debt. This, without more, [did] not constitute undue hardship."[98] "The debtor [was] healthy, currently employed, skilled, and [had] no dependents or extraordinary, non-discretionary expenses."[99] Significantly, there was "the possibility of bright future prospects, support payments from her former husband, as well as the ability to retrench from present levels of spending."[100]

This is a far cry from the standard as it has evolved, which now generally requires a debtor to prove chronic mental or physical ailments beyond his control, that interfere with his ability to work and generate income, that will continue for the foreseeable future and perhaps for the rest of his life. The recurring harshness on debtors with educational loans of this further gloss on the statutory term "undue hardship" has not prompted appellate judges to reconsider their formulations of the rule. They have, if anything, raised the wall of "undue hardship" even higher over time.

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93 *In re* Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989).

94 *In re* Johns-Manville Corpo., 60 B.R. 612 (Bankr. S.D.N.Y. 1986).

95 *In re* Bernard L. Madoff, 418 B.R. 75 (Bankr. S.D.N.Y. 2009).

96 *See* Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981).

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

The Fifth Circuit recently added more gloss to *Brunner*, when it required the debtor in *In re Thomas* to prove that requiring repayment of the student loan "would impose intolerable difficulties on the debtor."[101] Judge Edith Jones wrote, "The plain meaning of the words chosen by Congress is that student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor."[102] The term "intolerable difficulties," like "certainty of hopelessness," is used neither in § 523(a)(8) nor in the Second Circuit's *Brunner* opinion.[103] The *Thomas* Court reached its conclusion textually, noting that "undue" means "going beyond what is appropriate, warranted, or natural'" or "excessive," and "hardship" is "a state of want or privation."[104] One might question how, from these definitions and synonyms of "undue" and "hardship," the *Thomas* Court textually arrived at the word "intolerable" as the modifier of "difficulties." Neither "intolerable" nor "difficulties" is used in any of the definitions cited by the court for either "undue" or "hardship."[105]

Regardless, the more material issue in *Brunner*'s second prong is *how long* the debtor's poor financial condition will continue, rather than the semantics of how one might characterize that condition. Section 523(a)(8) of the Bankruptcy Code requires only a showing of "undue hardship."[106] It is silent on the question of how long the debtor must prove the hardship will continue.[107] *Brunner* requires the debtor to prove that additional circumstances exist indicating that her subminimal financial condition "is likely to persist for a significant portion of *the repayment period of the student loans*."[108] It does not require proof

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[101] Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 454 (5th Cir. 2019).

[102] *Id. See also* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (quoting *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993)) (interpreting the second prong as requiring "certainty of hopelessness").

[103] *See* 11 U.S.C. § 523(a)(8) (2020); Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[104] *See In re* Thomas, 931 F.3d at 454.

[105] *See id.*

[106] 11 U.S.C. § 523(a)(8) (2020).

[107] *See id.*

[108] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (emphasis added).

that the debtor's impoverished state will continue for the 20- to 25-year period of an IBR plan, much less for her lifetime.[109]

The Fifth Circuit's most recent characterization of the second prong of *Brunner*, in its 2019 opinion in *In re Thomas*, did not expressly reach that issue. The debtor in that case was over 60 years old and had borrowed $7,000 to attend community college, which she never completed.[110] Two years later her health declined significantly as a result of her diabetes, making it difficult for her to stand for prolonged periods.[111] She took extensive unpaid leave and eventually was fired from her job.[112] She obtained other work but could not keep the jobs because they required her to be on her feet.[113] She was unable to obtain sedentary work, and remained unemployed on the date when she filed her Chapter 7 bankruptcy case, about five years after taking the loans and four years after dropping out of school.[114]

The bankruptcy court in *Thomas* ruled that the debtor had satisfied the first prong.[115] It stated, though, that under the Fifth Circuit's decision in *Gerhardt*, satisfaction of *Brunner*'s second prong requires proof of projected perpetual impoverishment: "a showing of dire financial conditions is not enough—the circumstances must be outside the debtor's control and result in a '*total incapacity*' *to pay debts now and into the future*."[116] The court denied the debtor a discharge from her student loans.[117] The debtor appealed to the district court and then the Fifth Circuit.[118]

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109 *See id.*

110 *See In re* Thomas, 931 F.3d at 450.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *See* Thomas v. U.S. Dep't of Educ. (*In re* Thomas), 581 B.R. 481, 484 (Bankr. N.D. Tex. 2017) (concluding Ms. Thomas satisfied *Brunner*'s first prong), *aff'd sub nom.* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449 (5th Cir. 2019).

116 *Id.* at 485 (emphasis added) (citing Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 328 (3d Cir. 2001)). The Fifth Circuit in *Gerhardt* declared "[t]he second prong of the *Brunner* test asks if 'additional circumstances exist indicating that this state of affairs is likely to persist *for a significant period of time*.'" Gerhardt v. U.S. Dep't of Educ. (*In re* Gerhardt), 348 F.3d 89, 92 (5th Cir. 2003) (emphasis added) (quoting Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

117 *In re* Thomas, 581 B.R. at 486.

118 *In re* Thomas, 931 F.3d at 450-51.

The Fifth Circuit characterized its rule slightly differently and affirmed on somewhat narrower grounds than the bankruptcy court, and finding that the debtor had failed to establish that her current inability to repay her loans were likely to persist for a significant portion of *the repayment period*.[119] The court reached its conclusion by stating:

> Ms. Thomas's argument that she meets the second *Brunner* prong is contradicted by the record. Foremost, she is, by her own admission, capable of employment in sedentary work environments. Second, her actual employment experience demonstrates that after losing the call center job, she was hired by three different employers, although she quit when they were unable to accommodate her need to remain sedentary for periods of time during her shifts. Finally, she lost her job at the call center not because of physical problems beyond her control but for a violation of company policies.
>
> In sum, there is no evidence that Ms. Thomas's present circumstances, difficult as they are, are likely to persist throughout *a significant portion of the loans' repayment period*. Under the standard adopted by this court and the vast majority of other circuit courts, Ms. Thomas is not eligible for a discharge of her student loans.[120]

This Fifth Circuit's characterization in *Thomas* of *Brunner*'s second prong as requiring proof of projected impoverishment for a "*significant portion of the loans' repayment period*" is somewhat different, both from the bankruptcy court's statement in that case that proof is required that such condition will persist "*now and into the future*," and from its own description in *Gerhardt* that such condition must persist "*for a significant period of time*."[121] Does this mean that the look-forward period for purposes of the second prong of *Brunner*/*Gerhardt*/*Thomas* is the unexpired part of the 10-year term remaining under of a federally-backed student loan, without regard to whether the debtor is eligible for a 20- to

119 *Id.* at 452-53.

120 *Id.* (emphasis added).

121 *Compare id.* at 452-53 (emphasis added), *with In re* Gerhardt, 348 F.3d at 92 (emphasis added) (quoting *Brunner*, 831 F.2d at 396), *and In re* Thomas, 581 B.R. at 485 (emphasis added).

25-year IBR? Answering that question requires consideration of the third prong of *Brunner*, i.e., whether the debtor has made good faith efforts to repay the student loans.

### *B.* Brunner*'s Third Prong: Good Faith*

The third prong requires "that the debtor *has made* good faith efforts to repay the loans."[122] Some aspects of this requirement—that the debtor diligently tried to obtain employment, to maximize income, and to minimize expenses—are similar to those of the first prong. Some courts have construed "good faith" to require also that the debtor applied for and/or made payments under an income-based repayment program—whether those payments will be insufficient to pay even the interest on the loan and the debt will continue to swell over the 20- or 25-year extended repayment term (as further discussed below).[123]

The Fifth Circuit in *Gerhardt*, adopting *Brunner* in 2003, acknowledged that other aspects of the third prong overlap with the requirements of the second prong somewhat, i.e., a debtor has not acted in good faith if he has made insufficient efforts to address the causes of his impoverishment and his resulting inability to repay his student loans.[124] The *Gerhardt* court did not reach the issue of good faith under the third prong because it denied the debtor a discharge under the second prong, reasoning that he could have obtained additional or other work in addition to that of a classical musician.[125] In *In re Thomas*, decided in 2019, the court similarly ruled that the debtor had not satisfied the second prong, and thus it did not need to opine on the good faith requirement of the third prong.[126]

Lower courts within the Fifth Circuit have asked whether the debtor—who is unable to make the monthly payments on the loan—has applied for or would be eligible for an income-based repayment plan, a deferral, or other arrangement by which he could stretch out the payments. These courts generally hold that a

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[122] *Brunner*, 831 F.2d at 396 (emphasis added).

[123] HAUSER & AUSTIN, *supra* note 42, at 51-52.

[124] *In re* Gerhardt, 348 F.3d at 92 n.3 ("Our analysis of the second *Brunner* prong inevitably overlaps to some degree with the third prong. . . . ").

[125] *Id.* at 92-93.

[126] *In re* Thomas, 931 F.3d at 452.

debtor's failure to apply is a factor that weighs against a good faith finding but is not dispositive of the issue.[127]

Distilling this recent case law, the most significant questions regarding the discharge of a student loan are how far into the future the debtor's impoverishment is likely to continue under *Brunner*'s second prong, and the extent to which the debtor must seek an IBR or other extended payment plan in order to satisfy the good faith requirement of *Brunner*'s second prong. Those questions are further considered in Part V below.

Before turning to these questions though, the next Part considers the recent trend in the bankruptcy courts of the Southern District of New York and other bankruptcy courts to apply *Brunner* "as written."

## IV. BACK TO THE BEGINNING—THE SOUTHERN DISTRICT OF NEW YORK APPLIES THE *BRUNNER* RULE "AS WRITTEN"

Should courts continue to apply what some have characterized as the "punitive" interpretations of the *Brunner*

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[127] *See, e.g.*, O'Donohoe v. Panhandle-Plains Higher Educ. Auth. (*In re* O'Donohoe), No. 12-33870, 2013 WL 2905275, at *6 (Bankr. S.D. Tex. June 13, 2013) (internal citations omitted) ("The Debtor made 141 payments toward the Loan totaling $42,289.28. TGSLC asserts that the Debtor's failure to participate in an income contingent repayment plan is a *per se* demonstration of a lack of good faith in attempting to repay the Loan. The Court disagrees. The Debtor's failure to participate in the Direct Loan Program or the IRCP does not prevent him from satisfying the good faith prong of the *Brunner* test. Participation in such a plan is a consideration in determining whether a debtor has made a good faith effort but it is not a prerequisite to proving good faith. Had Congress intended participation in the [income-contingent repayment plan]—implemented in 1994—to effectively repeal discharge under § 523(a)(8), it could have done so. While the utility of the approach may be questionable, the Debtor has been proactive in contacting the Loan servicing agents to obtain forbearances during his periods of unemployment and in exploring an affordable repayment program or modification of his loan."); Wynn v. Educ. Credit Mgmt. Corp. (*In re* Wynn), 378 B.R. 140, 150 (Bankr. S.D. Miss. 2007) (alterations in original) (quoting Salyer v. Sallie Mae Servicing Corp. (*In re* Salyer), 348 B.R. 66, 72 (Bankr. M.D. La. 2006)) ("A debtor's effort to seek out loan consolidation options that make the debt less onerous is an important indicator of good faith. 'Although not always dispositive, it illustrates that the debtor takes [his] obligations seriously, and is doing [his] utmost to repay them despite [his] unfortunate circumstances.'"); Knox v. Sallie Mae (*In re* Knox), No. 0506951EE, 2007 WL 3332060, at *6 (Bankr. S.D. Miss. Nov. 6, 2007); *In re Salyer*, 348 B.R. at 72; Roach v. United Student Aid Fund, Inc. (*In re* Roach), 288 B.R. 437, 446 (Bankr. E.D. La. 2003) ("Another factor of good faith under *Brunner* and other courts is whether the debtor attempted other remedies available, such as requesting deferment of the payment.").

rule? The U.S. Bankruptcy Court for the Southern District of New York, in the widely-reported *In re Rosenberg*, answered "no" to this question in early 2020.[128]

### *A. The* Rosenberg *Opinion*

Chief Judge Cecelia G. Morris in *Rosenberg* did not reject *Brunner*, which was and is the governing authority in her bankruptcy court.[129] Rather, she revisited it, leaving behind some of what she characterized as the more "punitive" baggage and "retributive dicta" that courts had grown accustomed to bringing to it.[130]

In 2005, the debtor Rosenberg consolidated approximately $116,000 in loans that he had taken to attend college and law school.[131] The outstanding balance was approximately $221,000 by late 2019.[132] Both the debtor and the holder of the loan, Educational Credit Management Corporation ("ECMC"), agreed that *Brunner* was the proper test.[133]

The court recognized that *Brunner* applied, as it clearly would since her court is within the Second Circuit which decided that case.[134] Chief Judge Morris noted, though, the criticisms of the rule and the hardships it imposed on a "multitude" of petitioners such as the debtor, "who have been out of school and struggling with student loan debt for many years . . . ."[135]

The court then posited that: "The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner*.[136] Over the past 32 years, many cases have pinned on *Brunner* punitive standards that are not contained therein," including the debtor's need to prove a "certainty of hopelessness."[137] She continued:

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[128] Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).
[129] *See id.*
[130] *See id.*
[131] *Id.* at 457.
[132] *Id.*
[133] *Id.* at 458.
[134] *See id.* at 459.
[135] *Id.* at 458.
[136] *Id.*
[137] *Id.* at 458-59.

> Those retributive dicta were then applied and reapplied so frequently in the context of *Brunner* that they have subsumed the actual language of the *Brunner* test. They have become a quasi-standard of mythic proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans.[138]

"To this end," the court continued, "some courts have even called it 'bad faith' when someone struggling with repaying a student loan attempts to discharge that debt in bankruptcy court."[139]

The court would "not participate in perpetuating these myths" and cited the importance of keeping judicial gloss from superseding the statute itself; rather, the court applied *Brunner* "as it was originally intended."[140] The court then turned to the three prongs of *Brunner*.

Regarding the first prong, which requires that the debtor both repay the loans and maintain a minimal standard of living, the *Rosenberg* Court referred to the debtor's "current income," using the definition of that term applicable to the means test for Chapter 7 eligibility found in BAPCPA.[141] The court found that, "based on *current* income and expenses" for the six-month period prior to the commencement of the bankruptcy case—as set forth in the schedules and statement of financial affairs filed by the debtor—the debtor had a negative income for each month, and could not maintain a minimal standard of living.[142] Thus, the court held the first prong of *Brunner* was satisfied.[143]

The court determined that the second prong—whether "this state of affairs [was] likely to persist for a significant portion of the repayment period of the student loans"—was inapplicable.[144] The court reasoned that the contractual repayment period of the

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138 *Id.* at 459.

139 *Id.* (citations omitted).

140 *Id.* (citing Krieger v. Educs. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013)).

141 *Id.* at 459-60.

142 *Id.* (quoting Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

143 *Id.* at 461.

144 *See id.* (quoting *Brunner*, 831 F.2d at 396).

loan, i.e., the original 10-year term of the loan, had ended.[145] The court rejected ECMC's arguments that the court was required to determine that the debtor's financial state of affairs would "persist forever" and were not the result of the debtor's "choice."[146] Thus, the second prong of *Brunner* was satisfied.[147]

The court characterized the third prong of *Brunner* as requiring it to determine whether "the debtor *has made* good faith efforts to repay the loans," indicating that it should only consider the debtor's "past (*i.e.*, prepetition) behavior in repaying the loans."[148] It was "therefore inappropriate to consider: [the debtor's] reasons for filing bankruptcy; how much debt he ha[d]; or whether the [debtor] rejected repayment options."[149] The court found that the debtor had "missed only 16 payments in the almost 13 years since" the 2005 consolidation.[150] Thus, the debtor had demonstrated a good faith effort to repay the loan prepetition, and the third prong of *Brunner* was satisfied.[151]

The *Rosenberg* Court concluded that the debtor had satisfied the *Brunner* test; it ordered that the student loan imposed an undue hardship on the debtor and discharged the loan.[152]

### *B. Decisions Considering* Rosenberg

Several courts have cited *Rosenberg* since its decision in early 2020. More are sure to follow.

The debtor in *In re Clavell* sought discharge of nearly $100,000 of student loans that he consolidated in 2013.[153] The court considered extensive evidence regarding the debtor's financial condition and efforts to economize and found that if he was required to repay his student loans in full he would be unable

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145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 461-62.

151 *Id.* at 462.

152 *See id.* ECMC appealed to the Southern District of New York. *See* Rosenberg v. Educ. Credit Mgmt. Corp., No. 20-CV-688 (CS), 2020 WL 1048599 (Mar. 4, 2020) (granting ECMC's motion for leave to file interlocutory appeal). The appeal has not been decided at the time of this writing.

153 *See* Clavell v. U.S. Dep't of Educ. (*In re* Clavell), 611 B.R. 504, 510 (Bankr. S.D.N.Y. 2020).

to maintain a minimal standard of living for himself and his son, satisfying *Brunner*'s first prong.[154]

The Department of Education ("DOE") opposed the discharge, arguing that the debtor was able to make the $492 per month payments required under an available IBR.[155] The DOE further argued the debtor:

> [S]hould be able to make the payments that would be due even under a normalized repayment schedule that is not income-based (which would be approximately $629 per month over a 30 year repayment period or $670 per month over a 25-year repayment period) and that Mr. Clavell has failed to satisfy other requirements for a discharge of his student loans.[156]

The *Clavell* Court introduced its consideration of the DOE's arguments with reference to *Brunner* and *Rosenberg*:

> There have also been suggestions that the *Brunner* tests have often been applied in a way that is overly harsh and that is not consistent with *Brunner* itself. *See, e.g.*, *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg)*, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020) (referring to "retributive dicta" in prior decisions that have generated "a quasi-standard of mythic proportions" that is considerably harsher than the standard actually set forth in *Brunner*). *Brunner* is the law of this Circuit and it governs Mr. Clavell's case, though I agree with Chief Judge Morris that the *Brunner* test should be applied "as it was originally intended."[157]

The court stressed that "*Brunner* calls for a court to determine whether a debtor can afford to 'repay' student loans."[158] Following this statement, the *Clavell* Court agreed with other courts' rulings that the possibility of forgiveness in the future does

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154 *See id.* at 517-28. It does not appear that the DOE appealed from the bankruptcy court's decision.

155 *See id.* at 510.

156 *Id*. at 510-11.

157 *Id.* at 514.

158 *Id.* at 515-16.

not equate to an ability to repay loans.[159] The court agreed that a low or zero dollar IBR payment based on low income may just show that the debtor "actually cannot afford to 'repay' a student loan at all."[160] The parties had stipulated, though, that the IBR payments likely would result in a full payment of the student loans eventually, so the court turned to the question of how long the additional circumstances must persist to satisfy *Brunner*'s second prong.[161]

The *Clavell* court maintained that *Brunner* "did not impose a 'certainty of hopelessness' standard," and required only "that a debtor show circumstances that are 'strongly suggestive' of a 'continuing inability to repay over an extended period of time.'"[162] The court would not require a debtor to "suffer extreme burdens while waiting to see if a magical improvement in his or her prospects happens to materialize,"[163] and cited *Rosenberg*'s holding with approval that *Brunner* "does not require a debtor to prove its current state of affairs 'are going to persist forever' and only requires proof that the current state of affairs is 'likely' to persist for 'a significant portion' of the repayment period."[164] The court found that the debtor's responsibility for his special needs son for the 12 years remaining before he reached 18, coupled with

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[159] *See id.* at 516 ("Many courts have held that if the REPAYE program will likely just result in a deferral of payments and a likely forgiveness of the debt in the future (with a potential income tax liability upon forgiveness) then the mere fact that the REPAYE payments are low, or in some cases even zero, does not really mean that a debtor can afford to 'repay' the underlying loans."). For cases supporting this assertion that the availability of a zero payment IBR does *not* preclude a finding of undue hardship, see Price v. DeVos (*In re* Price), 573 B.R. 579, 590, 606 (Bankr. E.D. Pa. 2017) (considering a zero dollar IBR that might have been available to the debtor, and holding that "notwithstanding a debtor's potential eligibility for an extended term student loan repayment program, if a debtor chose not to enter such a program in good faith, the repayment period under the second *Brunner* prong is the remaining contractual term of the debtor's loan."), *rev'd on other grounds*, Devos v. Price, 583 B.R. 850 (E.D. Pa. 2018); Hill v. Educ. Credit Mgmt. Corp. (*In re* Hill), 598 B.R. 907, 917 (Bankr. N.D. Ga. 2019); Nightingale v. N.C. State Educ. Assistance Auth. (*In re* Nightingale), 529 B.R. 641, 649-50 (Bankr. M.D.N.C. 2015); Brooks v. Educ. Credit Mgmt. Corp. (*In re* Brooks), 406 B.R. 382, 393 (Bankr. D. Minn. 2009).

[160] *In re* Clavell, 611 B.R. at 516.

[161] *Id.*

[162] *Id.* at 529.

[163] *Id.*

[164] *Id.* (quoting Rosenberg v. N.Y. State Higher Educ. Servs. (*In re* Rosenberg), 610 B.R. 454, 461 (Bankr. S.D.N.Y. 2020)).

the "dubious likelihood" that the debtor would receive material pay increases in the future satisfied the second prong.[165]

The court further agreed with the view that the "additional circumstances" element of *Brunner* requires only "the presence of 'any circumstances, beyond the mere current inability to pay, that show that the inability to pay is likely to persist for a significant portion of the repayment period,' rather than 'exceptional circumstances' such as 'serious illness, psychiatric problems, [or] disability of a dependent.'"[166] The court rejected the DOE's arguments that the debtor could make reduced payments under an IBR, and even could fully amortize his debt under a "normalized repayment schedule that" was "not income-based" over either 30 or 25 years.[167] In the end, the *Clavell* Court found the debtor's "present inability to repay his student loans while maintaining a minimal standard of living for himself and his son is a circumstance that is likely to continue for a significant portion of the repayment period."[168]

The *Clavell* Court also considered whether the debtor established a good faith effort to repay his student loans as required by *Brunner*'s third prong.[169] The DOE argued that the debtor had not, because in the several years since he had consolidated his loans, he had failed to make a single payment.[170] The court posited that "a debtor's 'good faith' must be determined based on the situation in which the debtor found himself."[171] While the failure "to make payments that a debtor could and should have made may be a sign of bad faith . . . . in this case the loan servicers themselves recognized that Mr. Clavell's circumstances did not permit him to make payments" and themselves had suspended his "payment obligations and put the loans in forbearance."[172] In fact, the court emphasized, he had

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165 *Id.* at 530.

166 *Id.* at 529 (alteration in original) (quoting Nys v. Educ. Credit Mgmt. Corp. (*In re* Nys), 308 B.R. 436, 444 (9th Cir. BAP 2004), *aff'd*, 446 F.3d 938 (9th Cir. 2006)).

167 *Id.* at 510-11.

168 *Id.* at 529.

169 *See id.* at 530-31.

170 *Id.* at 530.

171 *Id.*

172 *Id.*

never defaulted on his student loans.[173] The debtor's "failure to make payments was hardly a sign of 'bad faith' when the lender acknowledged that [he] could not make such payments and when the lender agreed to suspend his obligation to make them."[174] The *Clavell* Court concluded that the debtor had established that he made good faith efforts to repay his student loans.[175]

The debtor, though, had "asked that his student loans be discharged either in whole or in part."[176] The *Clavell* Court noted that some courts had granted a partial discharge of a student loan, though the Code does not expressly provide for it and there was no binding or definitive authority for it in the Second Circuit.[177] Both the debtor and the DOE stated their understanding that the court had the authority to partially discharge the loans provided the *Brunner* factors were satisfied for the portion of the loans to be discharged.[178] The court found that the debtor had carried his burden for a partial discharge and ordered it.[179]

In *In re Bukovics*, the Bankruptcy Court for the Northern District of Illinois discharged a debtor's student loans, writing that the strict, "certainty of hopelessness" standard had "been heavily criticized by many courts as overtaking the language of the statute itself[,]" and cited *Rosenberg* for support.[180] The court also stated that the Seventh Circuit, within which it sat, had recently "softened the harsh standard," noting that "[boiling] the three criteria [of the Brunner test] down to 'certainty of hopelessness' . . . sounds more restrictive than the statutory 'undue hardship' [requirement]."[181]

In *In re Hlady*, the Bankruptcy Court for the Eastern District of New York agreed with Chief Judge Morris's reasoning in *Rosenberg* that the *Brunner* test should be applied by the courts

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[173] *Id.*
[174] *Id.*
[175] *Id.* at 531.
[176] *Id.*
[177] *See id.*
[178] *Id.* at 531-32.
[179] *Id.* at 532.
[180] Bukovics v. Navient (*In re* Bukovics), 612 B.R. 174, 189 (Bankr. N.D. Ill. 2020).
[181] *Id.* (alterations in original) (quoting Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 885 (7th Cir. 2013)).

"as it was originally intended."[182] The debtor was "48 years old, in good health, with no dependents, with a solid education" (an undergraduate degree in speech and a law degree), "and . . . gainfully employed" in her own law practice, and had not presented clear evidence that she satisfied even the first prong of *Brunner*.[183] The court stated that, while there are cases that warrant a discharge of student loan debt under *Brunner* "as it was originally intended," this case was "not one of them."[184] Notwithstanding the court's stated agreement with *Rosenberg*, though, the court took into account—in its finding regarding *Brunner*'s first prong—that the debtor was eligible for a 25-year IBR with a payment obligation of $0 per month.[185]

At least one court has expressly declined to embrace some of the holdings in *Rosenberg* and the abovementioned cases. The Bankruptcy Court for the Western District of Pennsylvania, in *In re Rubash*, found that the debtor had not carried his burden of proof with respect to *Brunner*'s first prong.[186] Among other things, the court found that there was "room for belt-tightening" and disagreed with the debtor's assertion that it was "unconscionable to tell parents they cannot assist their young-adult children . . . ."[187] But the court also stated its view that the "certainty of hopelessness" standard had been cited approvingly by the Third Circuit.[188]

## V. WHAT IS THE "LOOK FORWARD" PERIOD FOR THE PURPOSES OF THE SECOND PRONG OF *BRUNNER* AND WHAT DOES THE "GOOD FAITH" REQUIREMENT OF THE THIRD PRONG HAVE TO DO WITH IT?

The availability of 20- and 25-year extended payment plans, generically referred to in this paper as "IBRs" or "income-based

[182] Hlady v. Key Bank N.A. (*In re* Hlady), 616 B.R. 257, 270 (Bankr. E.D.N.Y. 2020).

[183] *Id.* at 277.

[184] *Id.* at 270.

[185] *Id.* at 275.

[186] *See* Rubash v. U.S. Dep't of Educ. (*In re* Rubash), No. 18-20449-CMB, 2020 WL 2554234, at *4 (Bankr. W.D. Pa., May 19, 2020) ("By applying the foregoing standard, this case begins and ends with the first prong of the *Brunner* test.").

[187] *Id.* at *5.

[188] *See id.* at *6 n.19 (citing Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 328 (3d Cir. 2001)).

repayment plans," likely is the most material factor in the current application of *Brunner*. These IBRs figure into both the "look forward" period under *Brunner*'s second prong, and whether the debtor has acted in good faith under *Brunner*'s third prong.

The eligibility for qualifying and remaining eligible for these plans varies. The calculations for determining the debtor's disposable income, and the resulting amount of each monthly payment also vary under these different plans.[189] The unamortized principal that has not been fully amortized by the end of the extended term typically is forgiven.[190] The student, though, may have to pay income tax on the "phantom" income she realizes on the forgiveness of the debt.[191]

Ironically, the first IBR became available in 1994, seven years *after Brunner* was decided, and when § 523(a)(8) still provided for the discharge of student loans, without an undue hardship showing, after seven years.[192] Enrollment in these plans has grown to eight million, a fourfold increase since 2013.[193]

IBRs initially were viewed by some as a panacea. "There was a narrative that this was going to, if not solve, significantly reduce, the problem around defaults on student loans . . . ."[194]

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[189] FEDERAL STUDENT AID, AN OFFICE OF THE U.S. DEPT. OF EDUC., FEDERAL STUDENT LOANS: REPAYING YOUR LOANS 10-11 (Feb. 2015), available at https://studentaid.gov/sites/default/files/repaying-your-loans.pdf [https://perma.cc/V34F-3C8M].

[190] *Id.*

[191] *Id.*

[192] For a description of the earliest IBR, called an "income-contingent" plan, see Antoinette Flores, *Proposed Student Loan Repayment Plan Would Extend the Same Income-Based Terms to All Federal Loan Borrowers*, CTR FOR AM. PROGRESS, (Aug. 18, 2015, 4:19 PM), https://www.americanprogress.org/issues/education-postsecondary/news/2015/08/18/119574/proposed-student-loan-repayment-plan-would-extend-the-same-income-based-terms-to-all-federal-loan-borrowers/#:~:text=Background,a%2010%2Dyear%20repayment%20term [https://perma.cc/P787-5TUE]. For background on the seven-year rule under § 523(a)(8), see *Student Loan Dischargeability Position Paper*, *supra* note 33. For descriptions of the several IBRs that are currently available, see *Income-Driven Repayment Plans*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven [https://perma.cc/QX59-EQSR] (last visited Oct. 10, 2020).

[193] *See* Tara Siegel Bernard, *The Should-Be Solution to the Student-Debt Problem*, N.Y. TIMES (Oct. 13, 2019), https://www.nytimes.com/2019/10/13/your-money/student-loans-income-repayment.html [https://perma.cc/KT2W-GZNC].

[194] *Id.*

Yet the availability of IBRs and other extended repayment periods may have deepened rather than relieved the debt burdens of students who will never be able to repay their loans. This occurred because some courts interpret the "significant portion of the repayment period of the student loans" under *Brunner*'s second prong to mean that the debtor must prove that her impoverishment is likely to persist for the 20- or 25-year period of an IBR for which the debtor might qualify, and/or to find that a debtor has not acted in good faith under the third prong if she failed to apply for an IBR, even one that provides for $0 in payments and thus will never result in any repayment of the loan. *Rosenberg* and some other cases have begun to reexamine these interpretations.

### *A. What is the "Look Forward" Period for the Purposes of the Second Prong of* Brunner*?*

The court in *In re Rosenberg* interpreted *Brunner's* reference to "a significant portion of the repayment period of the student loans" to mean the original 10-year repayment period in the loan contract.[195] Chief Judge Morris found that debtor's "circumstances will certainly exist for the remainder of the repayment period as the repayment period has ended and the loan is due and payable in the full amount. The second prong of the *Brunner* test [was], therefore, satisfied."[196]

In *In re Price*, the Bankruptcy Court for the Eastern District of Pennsylvania recently revisited the same temporal aspect of *Brunner*'s second prong.[197] The court's precedent was the Third Circuit's *In re Faish*, adopting the *Brunner* rule in 1995; this was when the undue hardship requirement applied to the 7-year period following the date of commencement of the repayment period of the loan.[198]

The Bankruptcy Chief Judge Eric L. Frank observed that the debtor in *Price* did "not fit into the most common profile of a

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[195] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 461 (Bankr. S.D.N.Y. 2020).

[196] *Id.*

[197] *See In re* Price, 573 B.R. at 584.

[198] *See id.* at 598.

debtor entitled to a student loan discharge under § 523(a)(8)."[199] The debtor in this case was described as "young and healthy; she completed the schooling for which she incurred her student loans and obtained a professional license in her field; she is employed, albeit only part-time. All of these factors suggest that her circumstances could improve."[200] Yet, the court continued, "the [d]ebtor's unintended and involuntary underemployment, her marital separation and likely eventual divorce, and her obligations as the primary custodian of three (3) young children ma[de] it more likely than not that her present financial difficulties [would] continue—<u>at least for some period of time</u>."[201]

According to the court, determining whether *Brunner*'s second prong was satisfied required two separate questions: first, "[h]ow long is the applicable repayment period?"; and second, "[w]hat is a 'significant portion' of that repayment period (sufficient to warrant discharge of the debtor's student loan)?"[202] The debtor in *Price* took the position later adopted by the court in *Rosenberg*, contending that the applicable repayment period was the seven years remaining under her current loan contract.[203] The DOE, which opposed the discharge, asserted that the applicable period was 25 years, "the longest repayment plan [that] the [d]ebtor might have under an available income contingent repayment program[]."[204]

The court began its consideration of the issue by observing that the "reported decisions in the *Brunner*/*Faish* era regularly referred to the discharge of student loan debts, prior to the temporal waiting period (so soon after the debtor had completed schooling), as a potential 'abuse' of the bankruptcy system."[205] The court stressed significant changes that had occurred since, including Congress' extending the undue hardship requirement beyond first five and then seven years of the term of the loan, the creation of 20- and 25-year income-based repayment programs,

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199 *Id.* at 596.
200 *Id.*
201 *Id.* at 597.
202 *Id.*
203 *See id.* at 597, 608.
204 *Id.* at 597.
205 *Id.* at 598.

and "the enormous growth in the amount of student loan indebtedness."[206]

The *Price* Court recognized that Congress had left the *Brunner* test in place when it amended § 523(a)(8) in 1998, removing the seven-year statutory limit on the undue hardship requirement.[207] Yet, the court continued, "the *Brunner* test has always included its own temporal limitation on the nondischargeability of student loan debt ('<u>a significant portion of the repayment period</u>')."[208] "As a result," the court continued, "the net effect of the deletion of the temporal discharge from § 523(a)(8) was to eliminate the objective, fixed 'passage-of-time' basis for the discharge of student loan debt, while leaving in place, untouched, the undue hardship test that includes its own, more case-specific, temporal test."[209]

According to Chief Judge Frank, his research had "not uncovered any reported decision that has grappled squarely with the effect of an uninvoked, but available, extended repayment term in analyzing the second prong of *Brunner*."[210] Instead, "the reported decisions generally evaluate the consequences of the uninvoked extended, income-contingent loan term only in connection with the third prong of the *Brunner* inquiry—'good faith.'"[211]

The *Price* Court agreed with the debtor's contention that the "repayment period" referred to in *Brunner*'s second prong was the initial 10-year term of the loan.[212] The debtor took a "plain language" approach to *Brunner*, which refers to the "repayment period."[213] The only repayment period by which the debtor was legally bound was the 10-year term of the loan, and thus, the debtor argued, that period applied to the second prong.[214] The

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[206] *Id.* at 599.
[207] *See id.* at 600-01.
[208] *Id.*at 600.
[209] *Id.* at 600-01.
[210] *Id.* at 602.
[211] *Id.*
[212] *Id.*at 606.
[213] *Id.* at 603.
[214] *Id.* at 585 n.4, 603.

court rejected this reasoning because the three-pronged *Brunner* rule is "not textually grounded in the statute."[215]

The court considered several factors instead, in reaching the same conclusion: First, the goal of § 523(a)(8) is to deny a discharge to a debtor who has a reasonable possibility of repaying the loan in full, and not to saddle a student loan borrower with interest payments for a lengthy period that leave an unpaid balance that the government then forgives.[216] The court further reasoned that the "minuscule effect on government finance that results from not discharging unpayable loans is trumped by the general bankruptcy policy of providing a debtor with a fresh start."[217]

Second, using 20- or 25-year income-based repayment periods, involves "mere guesswork" by the court, "without any reasonable degree of certitude" regarding the chances that the debtor's condition might improve.[218]

Third, there are good reasons why a debtor would decide not to enter into an income-based repayment program, including that a debtor's meager income might be insufficient to pay even the accruing interest, much less any principal.[219] The court characterized the DOE's position as asking the court to consider the 25-year income-based repayment term "irrespective of these adverse financial consequences," and "making the [d]ebtor's financial decisions for her," which the court was not willing to do.[220]

Finally, using the contract term of ten years would not encourage "litigation gamesmanship," because the good faith requirement of the third prong of Brunner "provides a well-developed process for preventing abuse."[221]

The court concluded that "the arguments in favor of using the actual contract term outweigh the contrary arguments in this case."[222] The *Price* Court held "that notwithstanding a debtor's

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[215] *Id.* at 603.
[216] *See id.* at 604.
[217] *Id.*
[218] *Id.* at 605.
[219] *Id.* at 605-06.
[220] *Id.* at 606.
[221] *Id.*
[222] *Id.*

potential eligibility for an extended term student loan repayment program, if a debtor chose not to enter such a program in good faith, the repayment period under the second *Brunner* prong is the remaining contractual term of the debtor's loan."[223]

Judge Frank acknowledged that while he might have found certainty by applying the 10-year contract term period for the repayment period, there was "no mechanical approach or inflexible fixed length of time that constitutes a significant portion of [that] repayment period . . . ."[224] The court applied a "look-forward" period of five years, representing about 70% of the seven years remaining on the 10-year term of the loan.[225] It concluded on the evidence presented that the debtor's financial situation would not improve materially over the next five years, and held that the debtor had satisfied the second prong of *Brunner*.[226]

The court did "not suggest that the *Brunner* test need[ed] to be replaced."[227] Rather, as the court in *In re Rosenberg* would later assert, courts should "take a fresh look at the manner in which *Brunner* is applied."[228]

It further recognized that the "outcome may well be different in other cases in which the extended loan repayment programs present a more attractive option, or for other appropriate reasons[,]" and that the failure to pursue that option might affect the determination of whether the debtor was acting in good faith (as considered in Part V.B below).[229] But, for the reasons stated in the opinion, the court held that the debtor demonstrated "that failure to discharge her student loan debt owed to the DOE would cause her and her dependents undue hardship[,]" and ordered it discharged.[230]

The DOE appealed *Price* to the district court. The court agreed with the bankruptcy court's observation and stated:

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[223] *Id.*
[224] *Id.* at 608.
[225] *See id.*
[226] *Id.* at 610.
[227] *Id.* at 611.
[228] *Id.*
[229] *Id.*
[230] *Id.* at 612.

> . . . [T]he Third Circuit has not yet addressed whether the repayment period referenced in *Brunner*'s second prong can be calculated on the basis of available extended-term repayment programs. . . . As the bankruptcy court noted, most courts that have addressed "the consequences of [an] uninvoked extended, income-contingent loan term," have done so "only in connection with the third prong of the *Brunner* inquiry—'good faith.'"[231]

The district court nonetheless reversed on the ground that the debtor had not carried her admittedly "heavy burden," even with respect the likelihood that the state of affairs would continue of the shorter, contract-based repayment period:

> The length of the repayment term as it relates to the second element of *Brunner* is a difficult question. For purposes of this decision, however, the court does not need to resolve this issue. Even on the shorter time period—the one applied by the bankruptcy court—Price has not met her burden of showing that it is more likely than not that she will be unable to maintain a minimum standard of living.[232]

Courts considering *Price* in connection with the applicable repayment period under the second prong of *Brunner* have generally followed *Price*. The bankruptcy court in *In re Coplin* cited *Price* as support when it recognized the "drastically different landscape for a student loan debtor from the time when *Brunner* was decided."[233] Noting the parties had not addressed the issue of the relevant loan repayment period, it used the standard contract amortization period for direct loans of ten years.[234] Similarly, the bankruptcy court in *In re Nitcher* also used the contract loan term for the applicable repayment period, including because the lender did "not cite any authority for the proposition that the repayment period should be extended due to default and offers no convincing

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[231] DeVos v. Price, 583 B.R. 850, 855 (E.D. Pa. 2018).

[232] *Id.* at 856.

[233] Coplin v. U.S. Dep't of Educ. (*In re* Coplin), No. 13-46108, 2017 WL 6061580 at *6 (Bankr. W.D. Wash., Dec. 6, 2017).

[234] *Id.* at *10.

argument why [the court] should stray from the well-reasoned analysis of the court in *Price*."[235]

The Fifth Circuit, as noted in Part III.A above, has not determined whether the "look forward" period for *Brunner*'s second prong is the 10-year repayment period of the term of the loan, or instead requires proof that the debtor's impoverished state will continue for the 20- to 25-year period of an IBR plan or longer. The lower courts within the circuit generally have viewed the issue through the lens of good faith, *Brunner*'s third prong, as discussed below.

### *B. The "Good Faith" Requirement of* Brunner*'s Third Prong and the Availability of an IBR*

Lenders often assert that a debtor's declining to apply for or accept a $0 per month IBR, or other IBR by which the debt will increase (because of accruing interest) rather than amortize over time, precludes a good faith finding under *Brunner*'s third prong. Courts recently have begun to more strenuously challenge these contentions, stressing that the purpose of § 523(a)(8) of the Bankruptcy Code is to maximize the *repayment* of student loans.

The Fifth Circuit in *Gerhardt* and *Thomas* did not reach the issue of good faith at all, much less with respect to the interplay between IBRs and that requirement.[236] The lower courts within the circuit have stated—similar to the court in *Price* discussed above—that a debtor's failure to apply for an IBR program is a factor applicable to the court's determination of good faith, but is not dispositive on the issue.[237] Other circuits have taken similar positions with respect to IBRs and loan consolidations.[238]

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[235] Nitcher v. Educ. Credit Mgmt. Corp. (*In re* Nitcher), 606 B.R. 67, 78 (Bankr. D. Or. 2019).

[236] *See supra* Part III.B.

[237] *See supra* note 125.

[238] *See, e.g.*, Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013) ("To the extent that the district judge thought that debtors *always* must agree to a payment plan and forgo a discharge, that is a proposition of law—an incorrect proposition, for the reasons we have given."); Mosko v. Magers (*In re* Mosko), 515 F.3d 319, 324 (4th Cir. 2008) (citation omitted) ("[T]he debtor must seriously pursue loan consolidation options."); Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 885 (9th Cir. 2006) (stating the debtor "could have attempted renegotiation of his debt under the ICRP, but failed to pursue this option with diligence. [Thus,] . . . the

If application to an income-based repayment program is not a *per se* requirement, but is a factor to be considered for a good faith finding under the third prong of *Brunner*, what standard should a court apply? The Third Circuit provided some guidance in 2009 in *In re Coco*, when it noted:

> The Bankruptcy Court also placed too much weight on Coco's refusal to enroll in the ICRP. Under this repayment plan, she would be obligated to pay a reduced amount for a period of up to 25 years, after which the unpaid portion of the loan would be discharged. *See* 34 C.F.R. § 685.209. Importantly, and as Coco emphasizes, because any discharged portion of her loan would be treated as taxable income at the time of the discharge, her participation in the ICRP could ultimately result in her simply trading a student loan debt for an IRS debt. *See Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley),* 494 F.3d 1320, 1327 (11th Cir. 2007). In light of her purported financial and medical circumstances, which Coco's proffered evidence suggests will continue indefinitely, her decision to forgo enrolling in the ICRP seems reasonable. *See Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett),* 487 F.3d 353, 365 (6th Cir. 2007).[239]

*Rosenberg* also addressed the effect of income-based repayment programs on the good faith prong of *Brunner*, emphasizing, again, the actual language of *Brunner*, which required it to "determine whether 'the debtor <u>*has made*</u> good faith efforts to repay the loans.'"[240] Discussing the third prong, the *Rosenberg* Court opined:

> The *Brunner* test asks the Court to look at whether the Petitioner "has made" good faith efforts to repay the loan, which indicates that the Court should only consider Petitioner's past (*i.e.* prepetition) behavior in repaying the loans. It is therefore inappropriate to consider: Petitioner's

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bankruptcy court clearly erred in finding that [the debtor] demonstrated good faith efforts to repay his loans." (citation omitted)).

[239] Coco v. N.J. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 Fed. App'x 224, 228 (3d Cir. 2009).

[240] Rosenberg v. N.Y. Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 461 (Bankr. S.D.N.Y. 2020) (quoting Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

> reasons for filing bankruptcy; how much debt he has; *or whether the Petitioner rejected repayment options*.[241]

The *Rosenberg* loan originated in 2005, and during much of the 13-year period that followed was in forbearance.[242] The loan went into income-based repayment in 2015, and within the year that followed, the debtor made only six payments, and those were in varying amounts.[243] The debtor's income-based repayment plan ended in April 2016, and the loan was again in forbearance, from April to October of that year.[244] The debtor continued to make payments on the loan during that period, despite the fact that no payments were due.[245] In October 2016, the debtor's loan entered into the standard repayment period, after which the debtor made one more payment, in the amount of $100.[246] In January 2018, the "account entered default and was paid in full by the guarantor."[247] The court calculated that, in total, the debtor made ten payments of varying amounts, during the 26 month-period that the debtor was required to make payments, which was:

> [A]pproximately a 40% rate of payment over a thirteen-year period. Additionally, the Petitioner did not sit back for 20 years but made a good faith effort to repay his Student Loan. He actively called and requested forbearance on at least five separate occasions, all of which were granted by the servicer.[248]

The court did not suggest that the debtor should apply for a further IBR and concluded that the debtor had demonstrated a good faith effort to repay his loan.[249]

Several courts have stressed that the purpose of the "undue hardship" requirement of § 523(a)(8) is to make it more likely that a debtor will *repay* her or his loan. The court in *Price* emphasized that there are good reasons why a debtor would decide not to enter

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241 *Id*. at 461 (emphasis added).
242 *Id.* at 462.
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.*

into an income-based repayment program, including that a debtor's meager income might be insufficient to pay even the accruing interest, much less any principal.[250] The court characterized the DOE's position as asking the court to consider the 25-year income-based repayment term "irrespective of these adverse financial consequences," and "making the Debtor's financial decisions for her," which the court was not willing to do.[251]

The court in *In re Price* further noted that a debtor "can begin negotiations to enter a repayment plan and still abandon those negotiations in good faith based upon the consequences of the plan[,]" including because she realized that under any available plan she would be obliged to make a monthly payment that she could not afford.[252]

The bankruptcy court in *In re Clavell* similarly stressed that "*Brunner* calls for a court to determine whether a debtor can afford to 'repay' student loans."[253] It agreed with the courts that have held that if the IBR plan "will likely just result in a deferral of payments and a likely forgiveness of the debt in the future," and a concomitant income tax liability, then the mere fact that the IBR payments "are low, or in some cases even zero, does not really mean that a debtor can afford to 'repay' the underlying loans."[254] The court agreed that a low IBR payment based on low income may just show that the debtor "actually cannot afford to 'repay' a student loan at all."[255] The parties had stipulated, though, that the IBR payments likely would result in a full payment of the student loans eventually, so the court turned to the question of how long the additional circumstances must persist to satisfy *Brunner*'s second prong.[256]

The bankruptcy court in *In re Nightingale* in the Middle District of North Carolina stated that:

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[250] *See* Price v. DeVos (*In re* Price), 573 B.R 579, 605-06 (Bankr. E.D. Pa. 2017) *rev'd on other grounds*, Devos v. Price, 583 B.R. 850 (E.D. Pa. 2018).

[251] *Id.* at 606.

[252] *Id*. at 593-94.

[253] Clavell v. U.S. Dep't of Educ. (*In re* Clavell), 611 B.R. 504, 515-16.

[254] *Id.* at 516 (citations omitted).

[255] *Id.*

[256] *Id.*

> The debtor's choice to enter into an income based repayment plan under which she is not required to make any payments potentially affects both whether the debtor is able to maintain a minimal standard of living if she "repays" her student loans, and whether she has made a good faith effort to repay by simply agreeing to pay nothing.[257]

The court refused "to jump the logical chasm necessary to conclude that no payment constitutes repayment, regardless of the title that the lenders choose to give to a program that excuses the debtor from repaying her loans."[258] The court emphasized:

> The *Brunner* test specifically requires that the Court determine whether the debtor would be able to maintain a minimal standard of living if forced to "repay" her student loans. Participation in such a "repayment" program in which the Plaintiff's monthly payment is zero is not repayment at all; rather, the loan continues to accrue interest on the principal without any repayment.[259]

The court further noted that, at the end of the 25-year period, the debtor's loans "may be forgiven, but that amount, on which interest has been accruing, may become taxable as income."[260]

### C. *"Additional Circumstances" and "Good Faith" Combined*

These cases applying *Brunner* "as written" or looking with fresh eyes at what constitutes good faith in the context of an undue hardship discharge raise a fundamental question. Does the "undue hardship" requirement of § 523(a)(8) preclude the discharge of a student loan that the debtor is projected to be unable to repay for 20 or 25 years or even longer?

Chief Judge Morris in *Rosenberg* held that "the repayment period of the student loan" under *Brunner*'s second prong is the 10-year term of the loan.[261] Thus, the debtor must prove only that

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[257] Nightingale v. N.C. State Educ. Assistance Auth. (*In re* Nightingale), 529 B.R. 641, 649-50 (Bankr. M.D.N.C. 2015).

[258] *Id.* at 650.

[259] *Id.*

[260] *Id.*

[261] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 461 (Bankr. S.D.N.Y. 2020).

his or her impoverishment is likely to continue for a significant portion of that loan term, upon the expiration of which the second prong is satisfied.[262] The court also noted that the third prong of *Brunner* requires only that the debtor already "*has made* good faith efforts to repay the loans"—it does not require the debtor to bind himself to a 20- to 25-year extended repayment period of an IBR.[263] It is difficult to dispute these conclusions based on *Brunner* as written.

But the agitated argument—about the abusive bankrupt who doesn't pay her or his just debts, versus the honest and deserving debtor to whom the law might provide a discharge and a fresh start—rears its head again at the crossroads of what undue hardship requires. Congress, after all, meant to end the abuse of bankruptcy by student loan borrowers who did not want to repay their loans, and such an interpretation possibly makes it too easy for an impoverished debtor to discharge the loan.

Even if one accepts this "spirit of the law" position, though, it is hard to accept that a student is not acting in good faith unless she applies for a 20- to 25-year IBR under which it is unlikely that she ever repays the loan or even the ever-accruing interest on it. As some courts have stated, had Congress intended undue hardship to mean that, it would have said so.

## VI. PARTIAL DISCHARGE

Some circuit courts and lower courts have upheld the partial discharge of student loan debt under § 523(a)(8) of the Bankruptcy Code.[264] The Fifth Circuit has not ruled on the issue and the bankruptcy courts with published opinions within the circuit are split.

Some courts have granted *a partial discharge without* a showing of undue hardship, others have granted a partial discharge *with* proof of undue hardship. Still others have reached the conclusion that the Code does not authorize a partial discharge on any facts, even if the debtor proves undue hardship

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[262] *Id.*

[263] *Id.*

[264] *See, e.g.*, Clavell v. U.S. Dep't of Educ. (*In re* Clavell), 611 B.R. 504, 531-32 (Bankr. S.D.N.Y. 2020).

with respect to some but not all of the student loan claims. These cases are discussed below.

### *A. Partial Discharge Without Proof of Undue Hardship*

*In re Modeen*, a recent case from the Bankruptcy Court for the Western District of Wisconsin, granted a *partial* discharge of the debtor's student loans *without* proof of undue hardship.[265] *Modeen* followed a 1998 decision from the Sixth Circuit, *In re Hornsby*,[266] which it construed as holding that a bankruptcy court has "the discretion under section 105 to grant a partial discharge even where the debtor had not proved all the elements of an undue hardship."[267] The court nonetheless found that "the as-written terms of the student loan would impose an undue hardship" on the debtor.[268]

The Sixth Circuit in *Hornsby*, on which *Modeen* relied, held that:

> Where a debtor's circumstances do not constitute undue hardship, some bankruptcy courts have thus given a debtor the benefit of a "fresh start" by partially discharging loans, whether by discharging an arbitrary amount of the principal, interest accrued, or attorney's fees; by instituting a repayment schedule; by deferring the debtor's repayment of the student loans; or by simply acknowledging that a debtor may reopen bankruptcy proceedings to revisit the question of undue hardship. We conclude that, pursuant to its powers codified in § 105(a), the bankruptcy court here may fashion a remedy allowing the [debtors] ultimately to satisfy their obligations to [the lender] while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances.[269]

*Hornsby* has a somewhat tortured history within its circuit, though. The Sixth Circuit dialed back its ruling in the case a few

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[265] *See generally* Manion v. Modeen (*In re* Modeen), 586 B.R. 298 (Bankr. W.D. Wis. 2018).
[266] Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433 (6th Cir. 1998).
[267] *Manion*, 586 B.R. at 306.
[268] *Id.*
[269] *In re* Hornsby, 144 F.3d at 440.

years later, when it required a showing of undue hardship with respect to the amount discharged in *In re Miller*.[270] The court acknowledged that its clarification of *Hornsby* was "at odds" with its post-*Hornsby* decision in *DeMatteis v. Case Western Reserve University*,[271] an unpublished decision which it thus was "not bound to follow."[272] The court "stress[ed] that the requirement of undue hardship must always apply to the discharge of student loans in bankruptcy—regardless of whether a court is discharging a debtor's student loans in full or only partially."[273]

### *B. Partial Discharge With Proof of Undue Hardship with Respect to the Amount Discharged*

Circuits that have permitted a partial discharge—or have speculated about the basis on which it might be available—have required proof of hardship for the part of the loans to be discharged. As noted, the Sixth Circuit in *In re Miller*, clarifying its *Hornsby* decision just a bit, so held.

The Ninth Circuit in *In re Saxman*, purporting to follow *Hornsby*, concluded that a bankruptcy court may exercise its equitable authority under § 105(a) to partially discharge student loans.[274] The court nonetheless held, unlike *Hornsby*, that "before the bankruptcy court can partially discharge student debt pursuant to § 105(a), it must first find that the portion being discharged satisfies the requirements under § 523(a)(8)."[275]

There is favorable, though weaker, authority for a partial discharge in the courts of the Tenth and the Eleventh Circuits. In the Tenth Circuit, a judge in the District of Kansas held in *In re Johnson* that its circuit's decision in *In re Alderete* recognized that "if only a portion of a student loan qualifies for discharge under the undue hardship standard, the bankruptcy court may enter a

[270] Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616, 622 (6th Cir. 2004). *Accord* Tirch v. Pa. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 680 (6th Cir. 2005).

[271] DeMatteis v. Case W. Reserve Univ. (*In re* DeMatteis), 97 F. App'x. 6 (6th Cir. 2004).

[272] *In re* Miller, 377 F.3d at 622.

[273] *Id.*

[274] Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168, 1173 (9th Cir. 2003).

[275] *Id*. at 1175.

partial discharge accordingly."[276] And the Eleventh Circuit in *In re Cox* reasoned that the reference to "*any* debt" in § 523(a)(8) of the Code precluded a partial discharge, absent a finding of "undue hardship."[277] The court, though, fell short of holding that a finding of undue hardship with respect to part of a debtor's student loans would enable a partial discharge.[278]

### *C. Partial Discharge Not Permitted*

Numerous courts in other circuits, though, have held that the Code does not permit a partial discharge.[279] Many of these opinions reason that § 523(a)(8) of the Code says nothing of partial discharge, and to permit it amounts to judicial legislation.[280]

### *D. Split Within the Bankruptcy Courts in the Fifth Circuit*

The bankruptcy courts in the Fifth Circuit are split on the issue of a partial discharge of a student loan.

In *In re Lewis*, Bankruptcy Judge Katharine M. Samson recently declined to grant a discharge of a student loan—in part or full—based on her finding that the debtor could maintain a minimal standard of living and repay the loan in full.[281] The court did not reach the question of whether a partial discharge is permitted, but nonetheless expressly rejected *Hornsby* and *Modeen* discussed above, positing that "if it is, the debtor must prove undue hardship as to the portion of the loan to be discharged."[282]

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[276] Johnson v. Sallie Mae, Inc. (*In re* Johnson), No. 11-23108, 2015 WL 795830 *6 (Bankr. D. Kan., Feb. 19, 2015), *vacated*, 2016 WL 827752 (citing Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200 (10th Cir. 2005)).

[277] Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1242 (11th Cir. 2003).

[278] *Id.*

[279] *See, e.g.*, Armstrong v. U.S. Dep't of Educ. (*In re* Armstrong), No. 10-82092, 2011 WL 6779326 *9 n. 12 (Bankr. C.D. Ill. 2011) ("This Court does not believe that it has the authority to partially discharge a student loan obligation.").

[280] *See, e.g.*, Merriwether v. Educ. Credit Mgmt. Corp. (*In re* Merriwether), No. 03-32060=SVK, ADV. 02-2424, 2003 WL 22722036 *3 (Bankr. E.D. Wis. 2003) (noting that "the statute is plain on its face and does not permit a partial discharge").

[281] Lewis v. Mass. Higher Educ. Assistance Corp. (*In re* Lewis), No. 17-51357-KMS, 2020 WL 489222, at *7 (Bankr. S.D. Miss. 2020).

[282] *Id.*

Bankruptcy Judge Jerry Brown unwaveringly ruled that a partial discharge is not authorized by the Code.[283] In *In re Roach* he wrote:

> The court is aware that some courts have allowed a partial discharge of student loans when full payment would perpetuate hardship. This court disagrees with those cases, and cannot find any basis either in the language of the Bankruptcy Code, or in the reasoning of these decisions that would allow a partial discharge of a student loan. Instead, this court agrees with the decisions that hold that Section 523(a)(8) means what it says—a discharge of student loans is allowed only upon a showing of hardship that is "undue"—partial discharges are not permitted.[284]

Judge Brown reaffirmed his determination in *In re Demmons* in 2016, reiterating that § 523(a)(8) "does not allow it."[285]

In contrast, the lower courts in the Northern District of Texas in *In re Nary*[286] and *In re Hollins*,[287] and the Eastern District of Texas in *In re Barron*,[288] have permitted a partial discharge based on their equitable powers under § 105(a) of the Code.

The district court in *In re Nary* decided the case when the circuit court authority was limited to the Sixth Circuit's *Hornsby* decision.[289] It "decline[d] to create a form of circuit split," and "adopt[ed] the holding of *Hornsby* that § 105(a) authorizes a bankruptcy court to grant a partial discharge where the undue hardship requirement of § 523(a)(8) is met as to part but not all of a student loan."[290] The district court noted that if the bankruptcy court was determined to have no authority to grant the partial discharge (which the U.S. had opposed), and instead was

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283 *See* Roach v. United Student Aid Fund, Inc. (*In re* Roach), 288 B.R. 437 (Bankr. E.D. La. 2003).

284 *Id.* at 447-48.

285 Demmons v. R3 Educ., Inc. (*In re* Demmons), No. 14-11638, 2016 WL 5874831, at *10 (Bankr. E.D. La. 2016).

286 Nary v. Complete Source (*In re* Nary), 253 B.R. 752 (Bankr. N.D. Tex. 2000).

287 Hollins v. U.S. Dep't of Educ. (*In re Hollins*), 286 B.R. 310 (Bankr. N.D. Tex. 2002).

288 Barron v. Tex. Guaranteed Student Loan Corp. (In re Barron), 264 B.R. 833 (Bankr. E.D. Tex. 2001).

289 *See In re* Nary, 253 B.R. at 767.

290 *Id.*

"constrained by an 'all or nothing' standard," the bankruptcy court might have found that the debtor under the undue hardship rule could pay nothing on the federal student loan.[291]

The bankruptcy court in *In re Barron* cited the Sixth and Ninth Circuits approvingly and ordered a partial discharge.[292] It reasoned that the "unique circumstances" of the case justified its use of § 105(a), because while the debtor was not capable of repaying the entire amount, even if amortized over an extended time period, she was capable of addressing at least a portion of the debt if restructured to provide a reasonable monthly payment over a reasonable period of time.[293]

The bankruptcy court in *In re Hollins* cited *Nary* and *Barron* for its authority to grant a partial discharge, and made no reference to § 105 of the Bankruptcy Code.[294] The court reasoned that, "if repayment of the full debt constitutes an undue hardship, the court may, in effect, restructure the debt by a partial discharge, if a reduced debt would not be an undue hardship."[295] "In other words," the court continued, it "may by a partial discharge eliminate the undue hardship."[296] That would result in payment of the non-discharged part of the debt, "thereby fostering the Congressional policy of repayment of student loans albeit in a restructured amount to avoid undue hardship."[297]

## VII. SEPARATE CLASSIFICATION OF A STUDENT LOAN IN A CHAPTER 13 PLAN

Many courts have confirmed Chapter 13 plans which separately classify student loan claims from other unsecured claims, and provide for a disproportionately higher payment on the student loans. The Chapter 13 debtor under such a plan does not in all cases receive a discharge from her student loans. The debtor nonetheless may substantially reduce her non-

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291 *Id*. at 767-68.
292 *See* Barron v. Tex. Guaranteed Student Loan Corp. (*In re* Barron), 264 B.R. 833, 845-47 (Bankr. E.D. Tex. 2001).
293 *Id.* at 846.
294 *See* Hollins v. U.S. Dep't of Educ. (*In re* Hollins), 286 B.R. 310, 313-17 (Bankr. N.D. Tex. 2002).
295 *Id.* at 317.
296 *Id.*
297 *Id.*

dischargeable student loan debt over the term of such a confirmed plan, while obtaining a discharge from her remaining general unsecured claims.

### *A. Statutory Basis for Separate Classification of Student Loans in Chapter 13*

Some courts have approved Chapter 13 plans that separately classify student loan claims on the basis that they do not unfairly discriminate under § 1322(b)(1) of the Code. These courts reach such determinations using somewhat different legal rules, and often taking into account any number of facts and circumstances specific to the case and plan before it. Many recognize that the application of the "discriminate unfairly" standard of § 1322(b)(1) "may involve little more than exercise of the bankruptcy court's broad discretion."[298] Most courts, though, have held that a student loan cannot be separately classified from other unsecured claims *solely* because it is not dischargeable.[299]

Some courts have determined that the bar against "unfair discrimination" under § 1322(b)(1) of the Code does not apply at all, because separate classification of student loans is permitted under the "cure and maintain" provision for long-term debt under § 1322(b)(5), the text of which does not prohibit "unfair discrimination." These courts reason that while the "unfair discrimination" prohibition is found in the general classification provision of § 1322(b)(1), it does not appear in the more specific long-term debt classification provision of § 1322(b)(5).[300]

### *B. Separate Classification of Student Loans in Chapter 13 in the Fifth Circuit*

The Fifth Circuit has not ruled on the issue of separate classification. Published opinions from the lower courts within the

[298] *See, e.g.*, Groves v. LaBarge (*In re* Groves), 39 F.3d 212, 214 (8th Cir. 1994).
[299] *See, e.g.*, *id.* at 215; Gorman v. Birts (*In re* Birts), No. 1:12cv427 (LMB/TCB), 2012 WL 3150384, at *4 (E.D. Va. Aug. 1, 2012); *In re* Simmons, 288 B.R. 737, 749 (Bankr. N.D. Tex. 2003).
[300] *See, e.g.*, *In re* Truss, 404 B.R. 329, 333-34 (Bankr. E.D. Wis. 2009); *In re* Hanson, 310 B.R. 131, 134-135 (Bankr. W.D. Wis. 2004).

circuit reflect the mosaic complexity of this issue that also prevails nationally.

### 1. "Unfair" Discrimination if Payments are Made from Disposable Income

The Bankruptcy Court for the Northern District of Mississippi in *In re Boscaccy* considered three different Chapter 13 plans in three different cases—*Boscaccy* (a joint filing by spouses), *George*, and *Nunnally*, respectively.[301] Each plan separately classified student loans from other unsecured claims, and proposed to "cure and maintain," by curing existing defaults on the debtor's student loans and maintaining future payments on the terms of the loan pursuant to § 1322(b)(5).[302] There was no dispute that, in each case, the debtor was committing her or his full projected disposable income to the payments under the Chapter 13 plan, but the holders of the separately classified student loans would receive a higher percentage payment than the holders of other unsecured claims.[303]

The *Boscaccy* Court began its consideration of the separate classification issue noting that it had "long been of the opinion that, under most circumstances, debtors may 'cure and maintain' their student loan obligations pursuant to § 1322(b)(5), *if the discrimination mentioned in § 1322(b)(1) is not 'unfair.'*"[304] The thorny problem is determining what's "fair."[305] The court approvingly cited *In re Orawsky*, written by Judge Frank (who also decided *In re Price* discussed in Part V.A above), and examined the several tests that have been devised by different courts to determine "unfairness."[306] Quoting *In re Orawsky*, the court concluded that, in the end, determining what's "unfair" is highly speculative, and can run the "gamut from everything goes to nothing is allowed," and "somewhere between total whim and an Act of God lies the answer to what justification is needed to

301 *See In re* Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010).
302 *See id.* at 507.
303 *Id.* at 504.
304 *Id.* at 507.
305 *Id.* at 507, 510.
306 *Id.* at 508 (citing *In re* Orawsky, 387 B.R. 128 (Bankr. E.D. Pa. 2008)).

hew out a particular class of unsecured creditors and distinguish it from other unsecured creditors."[307]

The *Boscaccy* Court then turned to the three Chapter 13 plans. In making its determination with respect to each, it considered the extent of the discrimination, and with respect to two of the plans it also considered the totality of the circumstances in each case.[308]

Under the Boscaccys' plan, without the separate classification unsecured creditors would receive 21% and with it they would receive 0%.[309] But in a Chapter 7 plan, they also would receive nothing, and absent the proposed separate classification the interest accrual on the student loans during the life of the plan would "likely render [the debtors'] bankruptcy filing meaningless."[310] The court concluded that the discrimination was not unfair and overruled the Chapter 13 trustee's objection to plan confirmation.[311]

Under the George plan, without the separate classification unsecured creditors would receive 36% and with it they would receive 10%.[312] In a Chapter 7 plan, they also would receive nothing, and absent the proposed separate classification the debtor "would emerge from bankruptcy, insofar as this nondischargeable debt is concerned, in a much worse position than the debtor was in prior to filing."[313] The court concluded, for this plan too, that the discrimination was not unfair and overruled the Chapter 13 trustee's objection to plan confirmation.[314]

And under the Nunnally plan, without the separate classification unsecured creditors would receive 80% and with it they would receive 0%.[315] The court did not consider any other circumstances with respect to the Nunnally plan. The percentage difference was so dramatic because the total amount of general unsecured claims was low compared to the amount of the student

[307] *Id.* at 511 (quoting *In re* Orawsky, 387 B.R. at 141).
[308] *Id.* at 511-12.
[309] *Id.* at 512.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Id.*

loan debt. If all creditors were treated equally, though, the student loan payment would be reduced 20%, but the general unsecured creditors' distribution would be increased by 80%.[316] The court held that, as such, the separate classification did indeed constitute unfair discrimination.[317]

The Bankruptcy Court for the Western District of Louisiana in *In re Dyer* spent much of its opinion considering whether the prohibition against unfair discrimination in § 1322(b)(1) of the Bankruptcy Code applies to a "cure and maintain" treatment of long-term debt under a plan pursuant to § 1322(b)(5).[318] The court concluded that it does, and followed "the vast majority of cases [that] have held that it is unfair discrimination to separately classify education loans for more favorable treatment."[319] The court found that the proposed plan violated the prohibition against unfair discrimination because "it propose[d] a less than 1% distribution to general unsecured creditors and a distribution to two student loan lenders of 23% and 62% respectfully."[320]

### 2. "Unfair" Discrimination if Payments are Made "Outside of the Plan"

The Bankruptcy Court for the Northern District of Texas in *In re King* held that "a plan does not discriminate unfairly if the class discriminated against receives no less than it would have received if there were no discrimination and 60 months (or 36 months for below-median income debtors) of the debtor's disposable income were applied to the plan."[321] The court reasoned that, post-BAPCPA, § 1325(b) requires only that the full amount of the debtor's projected disposable income (the "unsecured creditors' pool" or "UCP") will be paid to unsecured creditors under the plan.[322] If the plan meets this and the other requirements of § 1325, then "the court is required to confirm the Plan[.]"[323] Thus,

316 *Id.*
317 *Id.*
318 *See In re* Dyer, No. 14-11321, 2015 WL 430288 (Bankr. W.D. La. 2015).
319 *Id.* at *2.
320 *Id.* at *3.
321 *In re* King, 460 B.R. 708, 712 (Bankr. N.D. Tex. 2011).
322 *See id.* at 713-14.
323 *Id.* at 712 (noting "the court *shall* confirm").

post-BAPCPA, a debtor may utilize funds *in excess of projected disposable income*, i.e., those paid "outside of the plan," to prefer certain unsecured creditors over others.[324] While the court declined to opine on the extent to which a debtor may use discretionary income outside of the plan, it held that, post-BAPCPA, an "unfair discrimination analysis allows a debtor to utilize funds in excess of projected disposable income to prefer certain creditors, as long as unsecured creditors receive at least their pro rata share of the UCP."[325]

## CONCLUSION

Student loans and the limits enacted by Congress on their discharge present a somewhat unique problem under the Bankruptcy Code. The other exceptions to discharge in § 523(a) of the Code specifically delineate what constitutes the exception. The bankruptcy court's job is to make findings of fact, apply those facts to the delineated exception, and determine based on the preponderance of the evidence whether the claim falls within or outside of it.

Congress qualified only one exception to discharge—student loans—with a term of art, "undue hardship," leaving it to the courts to define the term. The courts recognized early on that Congress meant the discharge of student loans to be more difficult than other, freely dischargeable kinds of claims. Just how much more difficult, Congress has never legislated.

Most courts purport to follow the *Brunner* rule, formulated by the Second Circuit in 1987. Yet many have viewed *Brunner* through a glass darkly. *Brunner* says nothing of "certainty of hopelessness" or "intolerable difficulties." Many courts also suggest that applying *Brunner* necessitates their looking at a debtor's distant future through a cloudy crystal ball and finding no glimmer of hope. The Second Circuit in *Brunner* required only that a debtor prove the existence of additional circumstances indicating that the debtor's present impoverishment was "likely to persist for a significant portion of the *repayment* period of the student loans." It did not require the debtor to prove that such

[324] *Id.* at 712-14.
[325] *Id.* at 714.

state of affairs would continue forever or for a lengthy hypothetical extended repayment period. The Second Circuit could not have contemplated that a 20- or 25-year IBR under which the debtor would pay $0 or such other amount whereby the principal on the loan would never be *repaid* would bar a discharge—because IBRs were not available in 1987. And *Brunner* only required that "the debtor *has made* good faith efforts *to repay* the loans." It did not require demonstration of future good faith. It could not have contemplated that a debtor's not having applied for such a 20- or 25-year non-amortizing IBR might be the kind of bad faith that preclude a discharge. Applying *Brunner* as written and with less regard for the 30+ years of its most punitive gloss does greater justice both to *Brunner* and to the honest and deserving debtors who have tried in good faith but remain unable to repay their loans.

Congressional action on this issue remains most appropriate. The most recently proposed legislation, The Student Borrower Bankruptcy Relief Act of 2019, would make student loans freely dischargeable, as follows:

> (a) EXCEPTION TO DISCHARGE.—Section 523 of title 11, United States Code, is amended in subsection (a), by striking paragraph (8).[326]

The bill was introduced by Senator Durbin on May 9, 2019.[327] It currently has 21 cosponsors—20 Democrats and one Independent, Senator Sanders.[328] The bill was referred to the Senate Judiciary Committee on the day it was introduced, and no action has been taken on it since.[329]

The House counterpart, H.R. 2648, was introduced on the same day, by Representative Nadler.[330] It currently has 29

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[326] Student Borrower Bankruptcy Act of 2019, S. 1414, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/1414 [https://perma.cc/LA9J-5FJJ].

[327] *Id.*

[328] *Id.*

[329] *Id.*

[330] Student Borrower Bankruptcy Relief Act of 2019, H.R. 2648, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/2648 [https://perma.cc/ZKC3-8B42].

cosponsors—28 Democrats and one Republican. [331] The bill was ordered to be reported by the House Judiciary on September 29, 2020. No action has been taken by the Senate.[332]

These latest legislative proposals have found virtually no bipartisan support and would appear to be going nowhere on a very slow track. One reason might be that they go too far toward enabling the kind of "abuse" that the undue hardship requirement was meant to curb. Another might be the intransigence of members of Congress unwilling to find compromise on the middle ground. Yet recommendations abound for normalizing the discharge of student loan debt in some middle ground.

The ABI Commission on Consumer Bankruptcy Reform has proposed amending the Code to limit the restriction on discharge to loans made or backed by the government, to require proof of undue hardship for only the first seven years of the student loan repayment period (after which the loan would be dischargeable as an ordinary unsecured claim), and to permit a discharge in Chapter 13 upon payment by the debtor of all of her projected disposable income pursuant to a five-year plan.[333] This proposal essentially rolls back the Code's rules for a discharge to those which applied during a period of prior law—when the balance between preserving the government-backed student loan program and giving a debtor a fresh start in bankruptcy was more fairly struck, and the undue hardship requirement applied only to the borrower (and not a guarantor), of a government loan (and not a private loan), and for only the first seven years of the repayment period of the loan (rather than to the student's lifetime), and did not apply at all to a Chapter 13 debtor who completed making the payments under a confirmed Chapter 13 plan.[334]

The National Bankruptcy Conference in its 2018 position paper characterized the current undue hardship discharge rule as "random, arbitrary and unfair," noting that debtors "are faced with the impossible task of proving a negative." The Conference

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[331] *Id.*

[332] *Id.*

[333] *See* AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 1-2 (2019), https://consumercommission.abi.org/commission-report [https://perma.cc/EE9R-AWBL].

[334] *See id. See also supra* Part I.C for a summary of the evolution of the Code's treatment of the discharge of student loans in bankruptcy.

urged repeal of § 523(a)(8) of the Bankruptcy Code, so that student loans could be discharged in the same manner as other unsecured claims. The Conference recommended, in the alternative, changes to the Code similar to those proposed by the ABI Commission, but shortening to five years of the period during which the undue hardship requirement would apply.[335]

The election of 2020 has brought talk of new proposals. President-elect Joseph Biden has said that he would back legislation cancelling up to $10,000 of student loan debt for every borrower. Several House and Senate Democrats have introduced resolutions calling on the incoming administration to raise this amount to $50,000.[336] Even assuming that some relief for student borrowers results from this back-and-forth, there still will be borrowers–presently and in the future–who cannot repay their student loans and for whom a more realistic bankruptcy solution will be key.

The bankruptcy judges in *Rosenberg*, *Price* and other cases, in the absence of Congressional action, have begun the process of revisiting *Brunner* as written. These courts have sought to determine the proper balance of the bankruptcy law's effect on both the honest and deserving debtor for whom bankruptcy law's promise of a fresh start is appropriate, and the abusive debtor who should be required to pay her or his just debts.

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[335] *See Student Loan Dischargeability Position Paper*, *supra* note 33, at 10-11. The ABI Report also urged a "Best Interpretation of Current Law," including that the three-factor Brunner test should be understood to require the debtor to establish only that:

> (i) the debtor cannot pay the student loan sought to be discharged according to its standard ten-year contractual schedule while maintaining a reasonable standard of living, (ii) the debtor will not be able to pay the loan in full *within its initial contractual payment period* (ten years is the standard repayment period) *during the balance of the contractual term*, while maintaining a reasonable standard of living, and (iii) the debtor has not acted in bad faith in failing to pay the loan *prior to the bankruptcy filing*.

FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY, *supra* note 333, at 2 (emphasis added).

[336] Emily Stewart, *Exclusive: House Democrats Roll Out Resolution Calling for Biden to Forgive $50,000 of Borrowers' Student Debt*, VOX (Dec. 17, 2020), https://www.vox.com/2020/12/17/22179577/biden-student-debt-house-resolution [https://perma.cc/WCH7-D8L3] (last visited Dec. 17, 2020).

These courts which revisit *Brunner* are not usurping legislative authority. Congress has conferred on the courts the difficult task of defining "undue hardship" and the circuits mostly have done so. The lower courts within those circuits which have looked again at *Brunner* are not disregarding the precedent of their respective circuits. Applying *Brunner* as written more faithfully follows that precedent.