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Student Loans Dischargeability in Bankruptcy – Current Issues

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Contents

I.	How Did We Get Here from There?	3
	A. Why Is There a Student Loan "Crisis?"	4
	B. The Origin of Non-dischargeable Student Loan Debt – "Undue Hardship" under 523(a)(8)	6
	C. The *Brunner* Standard and its Three Prongs	7
	D. The Totality of the Circumstances Standard	9
	E. "Certainty of Hopelessness" and/or "Intolerable Difficulties"	9
	F. The Expansion of Non-dischargeable Student Loan Debt: From Five Years (*Brunner*); to Seven Years (in effect at the time of the 3rd Circuit's *Faish* decision); to Chapter 13 (even if the debtor makes all of the required payments under a confirmed plan); then to Lifetime; and then to Private Loans Too, including for Guarantors (e.g., Parents, Spouses)	10
II.	Should Courts Continue to Apply the More Punitive Interpretations of the *Brunner* and Totality of the Circumstances Standards?	11
III.	What is the Effect of the Availability of Income-Based Repayment Plans?	13
	A. Income-Based Repayment Programs	14
	B. Under *Brunner*'s Second Prong, Is the Repayment Period During Which it is Required that the Debtor's State of Affairs Is Likely to Persist Based on the 10-year Initial Term of the Loan, or on the 20-or 25-Year Extended Income-Based Repayment Term?	15
	C. Is *Brunner*'s Third Prong, a "Good Faith" Effort to Repay, Satisfied if the Debtor Has *Not* Applied for an Income-Based Repayment Program?	19

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IV. Can a Student Loan be Classified Separately in a Chapter 13 Plan? 23
- A. Separate Classification in Chapter 13 Plan Permitted 23
  - 1. Separate Classification Does Not Unfairly Discriminate 23
  - 2. Separate Classification Permitted as Long-Term Debt Under Code Section 1322(b)(5) 23
  - 3. Separate Classification Permitted if Payments are Made Using Discretionary Income in Excess of Projected Disposable Income 24
- B. Separate Classification in Chapter 13 Plan Not Permitted 24
- C. Using a "Chapter 20" Serial Filing to Discharge Dischargeable Debt in Chapter 7 and Pay Down a Student Loan in Chapter 13 24

V. Partial Discharge 25
- A. Partial Discharge Absent Undue Hardship 25
- B. Partial Discharge on Proof of Undue Hardship for the Amount Discharged 25
- C. Partial Discharge Not Permitted 26
- D. The "Hybrid" Approach – If More Than One Student Loan, Court May Discharge Some Loans 26
- E. Partial Discharge in the Third Circuit 27

VI. Arbitration 27
- A. Is a Mandatory Arbitration Provision in a Student Loan Contract Enforceable in a Bankruptcy Case, So That An Arbitrator Rather Than the Bankruptcy Judge is Authorized to Determine Whether the Loan is Discharged? 28
- B. Does the Arbitrator or the Bankruptcy Judge Decide Who Has Authority to Determine Whether the Loan is Discharged? 31

VII. Middle District of Florida Loan Modification Program 32

VIII. Recent Proposed Legislation 34

IX. Conclusion 34

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Student Loans Dischargeability in Bankruptcy – Emerging Strategies and Current Issues

I. How Did We Get Here from There?

A fundamental purpose of U.S. bankruptcy law is the "fresh start" that bankruptcy affords a person through the discharge of debt. Even the earliest federal bankruptcy laws provided for a discharge.[1]

For individuals who voluntarily file for bankruptcy, the fresh start that results from a discharge under the Bankruptcy Code is the transcendent purpose of U.S. bankruptcy law. Corporations and limited liability companies have limited liability, and are released from debt by their dissolution. Such entities file under chapter 11 in order to restructure and reorganize pursuant to a plan or by a sale of the debtor's business assets.[2] Individuals by comparison have little ability to ease the burden of crushing debt outside of bankruptcy.

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 their 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 chart below.[3] 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 non-mortgage debt carried by U.S. households and citizens, it stood at $900 billion. It has nearly doubled again since, and today stands at $1.6 *trillion*.[4]

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[1] *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 996 (2005) (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.").

[2] *Bank of America v. 203 North LaSalle Street Partnership*, 119 S. Ct. 1411, 1421 (1999) (recognizing the policy "underlying Chapter 11, of preserving going concerns").

[3] Economic Research, Federal Reserve Bank of New York, "Student Loans Owned and Securitized, Outstanding" (Q2 2019, updated Jan. 8, 2020), available at https://fred.stlouisfed.org/series/SLOAS.

[4] For 2010 amounts, see Federal Reserve Statistical Release, Consumer Credit – G.19 (Nov. 2013, release date Jan. 8, 2014), available at https://www.federalreserve.gov/releases/g19/20140108/g19.pdf. For September 2019 amounts, see Federal Reserve Statistical Release, Consumer Credit – G.19 (Nov. 2019, release date Jan. 8, 2020), available at https://www.federalreserve.gov/releases/g19/current/. Aggregate student loan debt was "only" $480 billion at the beginning of 2006, and at $1.6 trillion has more than tripled since. Economic Research, Federal Reserve Bank of New York, "Student Loans Owned and Securitized, Outstanding" (Q2 2019, updated Jan. 8, 2020), available at https://fred.stlouisfed.org/series/SLOAS.

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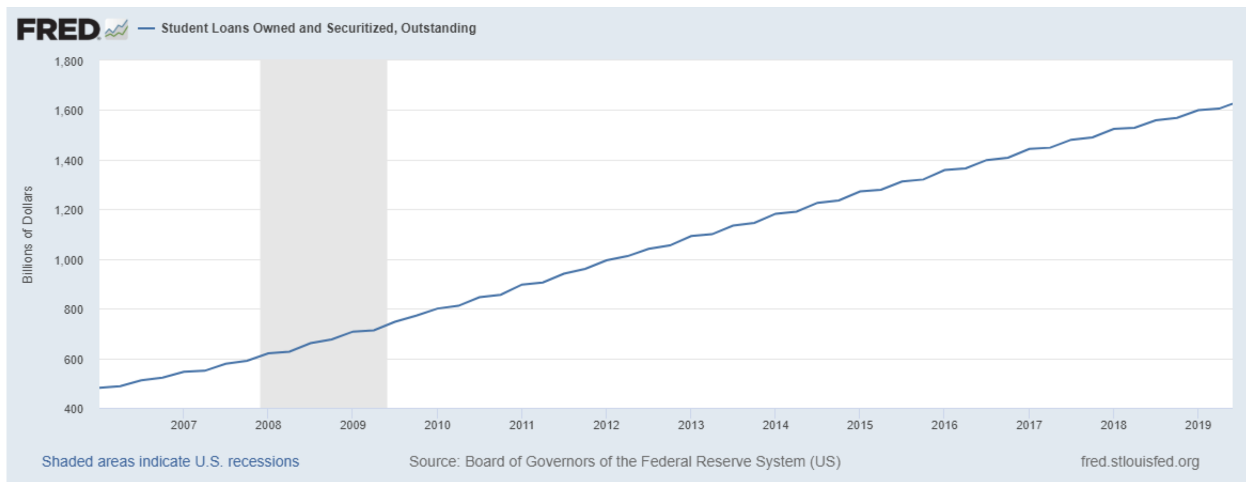
Table – Student Loans Owned, Securitized and Outstanding, Q1 2006 through Q2 2019



More troubling perhaps is the current default rate for student loans – even after a full decade of uninterrupted positive economic growth in the U.S. *One in five* student loan borrowers, with outstanding student loan debt incurred for their own education, is behind on her or his payments.[5]

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.[6]

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, are not the subject of this piece, other than to suggest that addressing them is yet more daunting than the student debt crisis itself.

The most popular, though apparently misidentified suspect at which many point a finger is rising tuition cost, especially at private non-profit colleges and universities. Contrary to those who claim this as a cause for burgeoning student debt, tuition "discounting" by these non-profit schools has become so prevalent that their actual undergraduate tuition has increased by only about 15% during the same ten-year period during which student loan debt has nearly doubled.

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[5] Board of Governors of the Federal Reserve System, " Report on the Economic Well-Being of U.S. Households in 2018," May 2019, p. 45, available at https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf.

[6] See e.g., "The Student Debt Crisis," American Federation of Teachers, available at https://www.aft.org/highered/student-debt-crisis; Daniel M. Johnson, "What Will It Take to Solve the Student Loan Crisis?", Harvard Business Review, September 23, 2019, available at https://hbr.org/2019/09/what-will-it-take-to-solve-the-student-loan-crisis; James B. Steele and Lance Williams, "The Student Debt Crisis: Lives on Hold," June 28, 2016 (condensed version of a story by Reveal from the Center of Investigative Reporting), available at https://www.consumerreports.org/student-loan-debt-crisis/; Nick Phillips, "A Conservative Response to the Student Debt Crisis," November 27, 2017, available at https://www.theamericanconservative.com/articles/a-conservative-response-to-the-student-debt-crisis/.

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This is because, while the "sticker" tuition price 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. These institutional grants currently amount to about *50%* of the stated tuition price for undergraduate students, i.e., students are paying one-half the published tuition rate.[7]

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 2018, in constant dollars for 22-to-27-year-old college graduates is only negligibly higher than it was in 2000 and is *less than* it was in 1990.[8] That five-year age period is the time during which interest becomes payable on almost all student loans, and during which most student loan debtors would be making the 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* even more sharply during the same period, making it more difficult for college students to work their way through college without incurring excessive debt.[9]

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."[10] A 2018 Pew Charitable Trusts study noted that, since 2001, gross rent has increased 3 percent a year, on average, while income has declined by an average of 0.1 percent annually. "This 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."[11]

Healthcare insurance premiums and deductibles also have risen at rates in excess of both wages and inflation. The average dollar contribution for employer-based family coverage has increased 25% since 2014 and 71% since 2009.[12] The average annual deductible among with

[7] 2019 NACUBO (National Association of College and University Business Officers) Tuition Discounting Study, p. 50 (Net Tuition for Undergraduates, showing a 14.2% Percent Change from 2010-11 to 2018-19).

[8] Median wages for recent college graduates, defined as those aged 22 to 27 with a bachelor's degree only, in constant 2018 dollars, were $44,000 in 2018, $43,749 in 2000, and $44,926 in 1990, a *drop* of about 2% from 1990. Federal Reserve Bank of New York, "The Labor Market for Recent College Graduates" (last updated February 6, 2019), available at https://www.newyorkfed.org/research/college-labor-market/college-labor-market_wages.html.

[9] Median wages for high school graduates, in constant 2018 dollars, were $28,000 in 2018, $29,166 in 2000, and $32,672 in 1990, a *drop* of nearly 15% from 1990. Federal Reserve Bank of New York, "The Labor Market for Recent College Graduates" (last updated February 6, 2019), available at https://www.newyorkfed.org/research/college-labor-market/college-labor-market_wages.html.

[10] The Pew Charitable Trusts, "American Families Face a Growing Rent Burden," at 4, April 2018, available at https://www.pewtrusts.org/en/research-and-analysis/reports/2018/04/american-families-face-a-growing-rent-burden,

[11] *Id.* at 6.

[12] Kaiser Family Foundation, "2019 Employer Health Benefits Survey," at 2, Published September 25, 2019, available at https://www.kff.org/report-section/ehbs-2019-summary-of-findings/#figurea.

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covered workers with a deductible has increased 36% over the last five years and 100% over the last ten years.[13]

The final reason for rising student loan debt – though quantifying it would be highly speculative – may be the inability of those who are unable to pay to obtain a discharge of those debts in bankruptcy. But 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.[14]

With the enactment of the Educational Act Amendments of 1976, Congress amended the Bankruptcy Act to make most of these U.S. government-backed students non-dischargeable for a period of five years after the loan first became due, unless the debtor could prove "undue hardship."[15]

The provision in the 1976 bill that limited student loan dischargeability appears very similar to current section 523(a)(8) of the Code:

> (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 future income or other wealth will impose an undue hardship on the debtor or his dependents.[16]

Two years later, in 1978, Congress enacted the Bankruptcy Reform Act, which was codified as, and became, the Bankruptcy Code. The Bankruptcy Reform Act also required a finding of "undue hardship" for a discharge within the first five years of the loan. The Code, though, expanded the kinds of student loans that were not dischargeable for the five-year period

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[13] *Id*. at 3.

[14] 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 "Guaranteed Student Loan Program Bankruptcies," HRD-77-83: Published: Apr 15, 1977. Publicly Released: Apr 15, 1977, available at https://www.gao.gov/products/HRD-77-83.

[15] Education Act Amendments of 1976, Pub. L. 94-482, 90 Stat. 2081, §439A, available at https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg2081.pdf. Section 439A became effective on September 30, 1977.

[16] *Id*. at §439A.

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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."[17]

Under the 1978 Code, section 523(a)(8) did not apply in chapter 13. A debtor who paid her or his disposable income for three years under a chapter 13 plan obtained a discharge from student loan debts along with other dischargeable debts.[18]

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

C. The *Brunner* Standard and its Three Prongs

The test for what constitutes "under hardship" that most courts still follow – the *Brunner* test – was enunciated by the Second Circuit in 1987, when student loans were freely dischargeable after the first five years of the loan. The Second Circuit in *Brunner* affirmed the rule adopted by the district court, based on legislative history and the decisions of other bankruptcy courts. Under that standard, "undue hardship" 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.[19]

Nine circuits have followed *Brunner* since it was decided more than 30 years ago – the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh.[20] Over this period hundreds of opinions have put a high gloss on each of the three prongs of rule.

The first prong, that the debtor *cannot* maintain a "*minimal*" standard of living, has been held to require the debtor to do everything she or he can do to obtain the funds with which to make payments on the educational debt. The debtor must do everything possible to maximize income and minimize expenses, including by taking any available job and by spending nothing

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[17] Pub. L. 95-598, 92 Stat. 2549, November 6, 1978
[18] National Bankruptcy Conference, "Student Loan Dischargeability Position Paper," 2018, p. 3, available at http://nbconf.org/our-work/.
[19] *Brunner v. N.Y. State Higher Education Services Corp. (In re Brunner)*, 831 F.2d 395 (2nd Cir. 1987).
[20] *Brunner v. N.Y. State Higher Education Services Corp. (In re Brunner)*, 831 F.2d 395 (2nd Cir. 1987); *In re Faish*, 72 F.3d 298 (3rd Cir. 1995); *In re Frushour*, 433 F.3d 393 (4th Cir. 2007); *In re Oyler*, 397 F.3d 382 (6th Cir. 2005); *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993); *In re Pena*, 155 F.3d 1108 (9th Cir. 1998); *In re Cox*, 356 F.3d 1302 (10th Cir. 2004); *Educational Credit Management Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004); *In re Cox*, 338 F.3d 1238 (11th Cir. 2003).

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beyond the amounts required for shelter, basic utilities, food and personal hygiene products, transportation, health insurance and healthcare costs, and some small amount on entertainment.[21]

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*. Ms. Brunner, the Second Circuit emphasized, was "not disabled, nor elderly," had no dependents, and had sought a discharge only ten months after she completed a Master's program.[22]

Courts applying *Brunner*, though, characterized its second prong as requiring the debtor to prove a "certainty of hopelessness" for the foreseeable future, such as the debtor's proving "chronic mental or physical ailments that interfere with the debtor's ability to work and generate income."[23] The circumstances must be beyond the debtor's control and not a result of the debtor's own choices.[24] Moreover, "mere" depression experienced by the debtor in response to inescapable debt does not appear to suffice.[25]

The third prong requires the debtor to have made "good faith efforts" to repay the educational loan. Some aspects of this requirement – that the debtor diligently tried to obtain employment, maximize income, and minimize expenses – are similar to those of the first prong. Some courts construed "good faith" in this context to require the debtor, in addition, to have applied for and make payments under an income-based repayment program – even if 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 in section ___ below).[26]

The rigidity of the *Brunner* rule and its many coats of hardened judicial gloss make it nearly impossible for a debtor to break through and obtain a discharge – notwithstanding that *Brunner* was decided when the "undue hardship" standard 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 (see section I.F below).

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[21] Daniel A. Austin and Susan E. Hauser, *Graduating with Debt: Student Loans Under the Bankruptcy Code* (ABI: Alexandria, VA, 2013), at 46-47.
[22] *Brunner*, 831 F.2d at 396-397.
[23] Austin and Hauser, *Graduating with Debt: Student Loans Under the Bankruptcy Code* at 47-48, quoting *In re Oyler*, 397 F.3d 382, 386 (6th Cir. 2005) and citing cases.
[24] *Id*. at 48.
[25] *Id*. Compare *In re Reynolds*, 425 F.3d 526, 533-534 (8th Cir. 2005), holding, 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."
[26] *Id*. at 51-52.

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D. 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 8th Circuit in *In re Long* and is followed in the 8th Circuit and by the bankruptcy courts of the 1st Circuit. 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 reasonable living expenses of the debtor and her dependents; and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case." The debtor has the burden, as under *Brunner*, of establishing undue hardship under this test, by a preponderance of the evidence.[27]

While the totality of the circumstances test appears less onerous than *Brunner*, the courts have interpreted "other relevant facts and circumstances" to include a number of factors, several 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.[28]

E. "Certainty of Hopelessness" and/or "Intolerable Difficulties"

Courts have interpreted Code section 523(a)(8) to require a "certainty of hopelessness" or "intolerable" difficulties if the court is to grant the discharge.[29] These grim terms, do not appear in the statute. Perhaps surprisingly, they are not used in either the Second Circuit's *Brunner* opinion or the Eighth Circuit's *In re Long* opinion. They are best characterized as judicial gloss-on-gloss.

Characterizing a section 523(a)(8) discharge as requiring proof of a "certainty of hopelessness" was coined by the late Judge Burton Lifland (Bankr. S.D. N.Y.), who is best

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[27] *In re Walker*, 650 F.3d 1227, 1230 (8th Cir. 2011), citing *In re Long*, 322 F. 3d 553, 554 (8th Cir. 2003). The 1st Circuit in *In re Nash* saw "no need… to pronounce [its] views of the preferred method of identifying a case of undue hardship. *In re Nash*, 446 F.3d 188, 190-191 (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. *In re Bronsdon*, 435 B.R. 791 (1st Cir. BAP 2010).
[28] *In re Fern*, 563 B.R. 1, 4 (BAP 8th Cir. 2017).
[29] See e.g., *In re Oyler*, 397 F.3d 382, 385-386 (6th Cir. 2005), quoting *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) ("certainty of hopelessness"); and *Matter of Thomas*, 931 F.3d 449, 454 (5th Cir. 2019) ("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.").

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known for presiding over complex and prominent chapter 11 cases, including Eastern Airlines, Johns-Manville and the Madoff Securities case.

Judge Lifland used the term in *In re Briscoe*, in 1981, *prior to Brunner*, at which time the law still provided that educational debt was freely dischargeable after five years.[30] Lifland's judicial gloss is best understood in the context of the statute as it was written at that time – if a student's loan was freely dischargeable after five years, it was to reasonable to conclude that Congress had imposed a harsh standard for that five-year period. It meant to compel student loan borrowers to move heaven and earth to repay for those five years prior to filing bankruptcy and walking away from the debt.

Lifland also emphasized that the debtor's circumstances fell far short of "hopeless." 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." The debtor was "healthy, currently employed, skilled, and [had] no dependents or extraordinary, non-discretionary expenses." 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."[31]

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 her control, that interfere with her ability to work and generate income, that will continue for the foreseeable future and perhaps for the rest of her 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. Rightfully or wrongfully, the courts have been slow to chip away at, much less shatter, the rule.

F. The Expansion of Non-dischargeable Student Loan Debt: From Five Years (*Brunner*); to Seven Years (in effect at the time of the 3rd Circuit's *Faish* decision); to Chapter 13 (even if the debtor makes all of the required payments under a confirmed plan); then to Lifetime; and then to Private Loans Too, including for Guarantors (e.g., Parents, Spouses)

This circumstance is all the more remarkable because, 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, and:

> § 523. Exceptions to discharge
> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt –
> (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*

[30] *In re Briscoe*, 16 B.R. 128, 131 (Bankr. S.D. N.Y. 1981).
[31] *Id*.

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petition; or
(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents …[32]

Thus, under section 523(a)(8) as initially enacted, the undue hardship requirement did not apply *at all* to a debtor who filed a voluntary bankruptcy case 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.

In 1990, Congress extended the five-year period to seven years, by tacking the provision onto the Crime Control Act of 1990.[33] (A few years later, in 1995, while the 7-year rule was still in effect, the 3rd Circuit in *In re Faish* adopted the *Brunner* standard.)[34]

In 1990, Congress also expanded the undue hardship rule to chapter 13.[35] As a result, even a debtor who devoted her disposable income to pay unsecured creditors over the term of a confirmed plan could not obtain a discharge from her student loan debt.

In 1998 Congress imposed the "undue hardship" impediment to the borrower's lifetime. In most cases after then only death could provide debt relief.[36]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) 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.[37] With BAPCPA, purely private student loans, not backed by a governmental entity, are nondischargeable. Further, because private lenders often require guaranties of their loans for a student's parents or other family members (which the government does ask for), the guarantors of those student loans from private lenders also were made subject to the nondischargeability standard of section 523(a)(8).

II. Should Courts Continue to Apply the More Punitive Interpretations of the *Brunner* and Totality of the Circumstances Standards?

The U.S. Bankruptcy Court for the Southern District of New York, in the widely-reported *In re Rosenberg*, recently answered "no" to this question. Courts generally have not etched any lines of leniency into the judge-made gloss-on-gloss surface of what constitutes "undue hardship." Instead, that shield against discharge has become increasingly impenetrable, notwithstanding that when *Brunner* was decided the Code required proof of "undue hardship"

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[32] Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92. Stat. 2549, Nov. 6, 1978, § 523(a)(8) (emphasis supplied).
[33] Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, § 3621.
[34] *In re Faish*, 72 F.3d 298 (3rd Cir. 1995).
[35] Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388-28, cited in National Bankruptcy Conference, "Student Loan Dischargeability Position Paper," 2018, p. 3, available at http://nbconf.org/our-work/.
[36] Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, § 971.
[37] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 220.

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only in the first five years of the loan, and notwithstanding the dearth of Congressional direction regarding meaning of the term since. This has become all the more disturbing in light of the seemingly inexorable expansion of student loan debt-servitude.

This situation changed somewhat surprisingly in the first week of 2020, when Judge Cecelia Morris (Bankr.S.D.N.Y.) issued her strongly-reasoned opinion in *In re Rosenberg*.[38] Judge Morris in *Rosenberg* did not reject *Brunner*, which was and is the governing authority in her bankruptcy court. Rather, she revisited it, leaving behind the punitive baggage that courts had grown accustomed to bringing to it.

In 2005 the debtor Rosenberg consolidated $116,000 loans that he had taken to attend college and law school. The outstanding balance was $221,000 by late 2019. Both the debtor and the holder of the loan, Educational Credit Management Corporation (ECMC), agreed that *Brunner* was the proper test.[39]

The court also recognized that *Brunner* applied. Judge Morris noted, though, the criticisms of the rule and the hardships it imposed on "multitudes" of petitioners such as the debtor, who have been out of school and struggling with student loan debt for many years.[40]

The court then posited that: "The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner.* 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." "Those retributive dicta," she continued, "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."[41] 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 the loan in bankruptcy."[42]

The court would "not participate in perpetuating these myths. 'It is important not to allow judicial glosses ... to supersede the statute itself.'" Rather, the court would apply the *Brunner* test as it was originally intended.[43] The court then turned to the three prongs of *Brunner*.

Regarding *Brunner's* 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 13 eligibility found in BAPCPA. 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

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[38] *In re Rosenberg*, 2020 WL 130302 (Bankr. S.D.N.Y. 2020).
[39] *Id*. at *1-2.
[40] *Id*. at *2.
[41] *Id*. at *3.
[42] *Id*., citing cases.
[43] *Id*., quoting *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).

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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.[44] Thus the first prong of *Brunner* was satisfied.

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. The court reasoned that the contract repayment period of the loan, i.e., the original term of the loan, had ended. The court then stripped away layers *Brunner's* gloss, rejecting 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."[45] Thus the second prong of *Brunner* was satisfied.

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." 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." The court found that the debtor had missed only 16 payments in the almost 13 years since the 2005 consolidation. Thus, the debtor had demonstrated a good faith effort to repay the loan prepetition, and the third prong of *Brunner* was satisfied.[46]

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.

Should courts continue to apply the "retributive dicta" of *Brunner*? The bankruptcy court in the Southern District of New York, the birthplace of the use of the term "certainty of hopeless" in student loan discharge cases, declined in *Rosenberg* to do so, reasoning that those dicta had displaced both the words of the statute and the rule stated in *Brunner*.

III. What is the Effect of the Availability of Income-Based Repayment Plans?

As educational debt swelled in recent years, income-based repayment programs came to be viewed by many as a panacea. Enrollment in these plans has grown to eight million, a fourfold increase since 2013.[47] They include several programs, which we have referred to generically in this section as "income-based repayment plans."

"There was a narrative that this was going to, if not solve, significantly reduce, the problem around defaults on student loans."[48] The availability of income-based repayment and the extended repayment periods of these programs arguably have deepened rather than relieved the debt burdens of students who will never be able to repay a significant part of their loans. Specifically, the availability of these plans arguably has made it more difficult for debtors to

[44] *Id*. at *4-5 (emphasis in original).
[45] *Id*.
[46] *Id*. at *5-6 (emphasis in original).
[47] Tara Siegel Bernard, "The Should-Be Solution to the Student-Debt Problem," New York Times (October 13, 2019), available at https://www.nytimes.com/2019/10/13/your-money/student-loans-income-repayment.html.
[48] *Id*., quoting Mark Huelsman, Associate Director of Policy and Research at Demo.

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satisfy the second and third prongs of *Brunner* and thus obtain a discharge from unsustainable debt.

This section briefly reviews these income-based repayment programs, and the tension between the short-term relief that they afford a debtor and the adverse effect of their availability on the debtor's ability to obtain a discharge. This section then focuses on some recent opinions that offer some prospect of easing this tension.

A. Income-Based Repayment Programs

Federal student loans at their inception typically have a 10-year term, and are payable in level, fully-amortizing monthly installments of principal and interest. There are numerous programs, though, to which a borrower can apply, by which she can repay the loan based on her disposable income over a longer period of time. These programs include the Income Contingent Repayment program (ICR) (with a maximum 25-year repayment term), the Income-Based Repayment program (IBR) (with a maximum 20-year repayment term), and the Pay as You Earn Repayment plan (PAYE) (also with a maximum 20-year repayment term).

The eligibility for qualifying and remaining eligible for these plans also varies. The calculations for determining the debtor's disposable income, and the resulting amount of each monthly payment also varies under these different plans. The unamortized principal that has not been fully amortized by the end of the extended term typically is forgiven.

These income-based repayment plans have been characterized as a panacea by some commentators on the student loan crisis, because of their "pay as you can" approach, coupled with ultimate debt forgiveness. But the debt forgiven in most cases remains subject to income taxation, so that after a debtor has used its disposable income to make the payments that comply with the program over the extended term, he still will have to come up with the money to pay income tax on the "phantom" income – for which the debtor received no actual cash or other payment – attributed under tax law to the forgiven debt.

Moreover, these income-based repayment plans may adversely affect a student loan borrower's ability to obtain a discharge. This occurs for two primary reasons. First, courts have used the extended repayment period afforded by these programs as the period repayment period referred to in determining whether the poor state of the debtor's financial affairs is likely to persist for a significant portion of the repayment period of the student loan, under the second prong of *Brunner*. Second, courts have required application to an income-based repayment program, and repayment of even a nominal amount determined under the applicable disposable income formula, for the purpose of determining whether the debtor has made good faith efforts to repay the loan. Some opinions, including in *In re Rosenberg* discussed above, have begun to revisit these issues, as discussed below.

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B. Under *Brunner*'s Second Prong, Is the Repayment Period During Which it is Required that the Debtor's State of Affairs Is Likely to Persist Based on the 10-year Initial Term of the Loan, or on the 20-or 25-Year Extended Income-Based Repayment Term?

Brunner requires, for satisfaction of its second prong, that the debtor's poor state of financial affairs "is likely to persist for a significant portion of the repayment period of the student loans."[49] Thus, whether a court refers to the 10-year repayment period under the initial terms of the loan at the time the loan was taken, or the 20-or-25 year extended period of the income-based repayment program, can determine whether the debtor can obtain a discharge.

Take, for example, a debtor has filed her bankruptcy case with two years remaining on the 10-year initial term of her loan. The debtor might be eligible for a 20-year IBR plan, or might already have qualified for that income-based repayment plan. If the debtor proves that her dire "state of affairs" will persist for the two years, and the court uses the 10-year initial term of the loan, the debtor will satisfy the second prong of the *Brunner* rule. If the court instead uses the 20-year income-based repayment period, then the debtor will not satisfy the second prong of *Brunner*, unless she can prove, by a preponderance of the evidence, that her dire straits will continue for 12 years. This is a nearly impossible burden of proof for the debtor, absent a crippling disability. Nearly always, after all, "hope springs eternal," and there's nearly always a *possibility* that one's prospect will improve given a long enough time. A "certainty of hopelessness" is a grim state indeed.

The court in *In re Rosenthal* 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. 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 is, therefore, satisfied."[50]

In *In re Price*, the Bankruptcy Court for the Eastern District of Pennsylvania, recently revisited the same temporal aspects of *Brunner's* second prong.[51] The Third Circuit in *In re Faish* adopted the *Brunner* rule in 1995 (when the undue hardship requirement applied to the 7-year period following the date of commencement of the repayment period of the loan).

The debtor in *Price*, Bankruptcy Judge Eric Frank observed, did "not fit into the most common profile of a debtor entitled to a student loan discharge under § 523(a)(8)." She was "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."[52] Yet, the court continued, the debtor's "unintended and involuntary underemployment, her marital separation and likely eventual divorce, and her obligations as the primary custodian of three (3) young children" made it more

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[49] *Brunner*, 831 F.2d at 396.
[50] *Rosenberg*, 2020 WL 130302 at *5.
[51] *In re Price*, 573 B.R. 579 (Bankr. E.D. Pa. 2017), *rev'd* on other grounds, 2018 WL 558464 (E.D. Pa. 2018).
[52] *Id*. at 596.

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likely than not that her present financial difficulties would continue – "**at least for some period of time**."[53]

Determining whether that period was sufficiently length to satisfy *Brunner*, though, required two separate inquiries in the court's view:

> (1) How long is the applicable repayment period?
>
> (2) What is a "significant portion" of that repayment period (sufficient to warrant discharge of the debtor's student loan)?[54]

The debtor in *Price* contended that the applicable repayment period was the seven years remaining under her current loan contract. The Department of Education (DOE) which opposed the discharge, asserted that applicable period was 25 years, "the longest repayment plan" that the debtor might have under an available income contingent repayment program.

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."[55] Several significant changes had occurred since, including Congress' extending the undue hardship requirement to the life of the debtor, the creation of 20- and 25-year income-based repayment programs, and "the enormous growth in the amount of student loan indebtedness."[56]

The *Price* court recognized that Congress had left the *Brunner* test in place when it amended section 523(a)(8) in 1990, removing the seven-year limit on the undue hardship requirement. Yet, the court continued, "the Brunner test has always included its own temporal limitation on the nondischargeability of student loan debt ('**a significant portion of the repayment period'**)."[57]

Judge Frank's 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. Rather, 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.'"[58]

The debtor argued based on a "plain language" methodology that, since *Brunner* refers to a "repayment period," and the only repayment period by which she was legally bound was term

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[53] *Id*. at 597 (emphasis in original).
[54] *Id*.
[55] *Id*. at 598.
[56] *Id*. at 599.
[57] *Id*. at 600 (emphasis in original).
[58] *Id*. at 602.

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of the loan contract, that 10-year period applied. The court rejected this approach because the three prong Brunner approach is not textually grounded in the statute.[59]

The court considered several factors instead. First, the goal of section 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. 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." Second, using 20- or 25-year income-based repayment periods, involves "mere guesswork" by the court, "without any reasonable certitude" regarding the chances that the debtor's condition might improve. Third, the court considered the goods 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. 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. 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."[60]

The court concluded that "the arguments in favor of using the actual contract term outweigh the contrary arguments in this case," and held "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."[61]

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. 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, 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*.[62]

The court emphasized that it did "not suggest that the *Brunner* test need[ed] to be replaced." 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." 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." But, for the reasons stated in the opinion, the

[59] *Id*. at 603.
[60] *Id*. at 604-607.
[61] *Id*. at 607.
[62] *Id*. at 607-611.

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court found that the debtor had shown that failure to discharge her student loan debt owed to the DOE would cause her and her dependents undue hardship, and ordered discharge of the debt.[63]

The DOE appealed Price to the district court, which reversed, though *not* on the ground that the bankruptcy court used the incorrect applicable repayment period. The court agreed with the bankruptcy court's observation that:

> 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.'"[64]

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.[65]

Courts considering *Price* in connection with their determining the applicable repayment period under the second prong of *Brunner* generally have followed *Price*. The bankruptcy court in *In re Coplin* (Bankr. W.D. Wash. 2017), citing *Price*, recognized the "drastically different landscape for student loan debtor from the time when *Brunner* was decided." Noting that 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.[66] The bankruptcy court in *In re Nitcher* (D. Ore. 2019) 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 argument why" it "should stray from the well-reasoned analysis of the court in Price."[67]

The question for today and tomorrow is whether *Rosenberg* and *Price's* use of the 10-year contract repayment period, rather than a 20- or 25-year repayment period derived from an income-based repayment program that actually or hypothetically is available to the debtor will carry the day. These cases make clear the seismic differences between these two different interpretations of the applicable repayment period regarding satisfaction of the second prong of

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[63] *Id*. at 611-612.
[64] *DeVos v. Price*, 583 B.R. 850, 855 (E.D. Pa. 2018).
[65] *Id*. at 856.
[66] *In re Coplin*, 2017 WL 6061580 (Bankr. W.D. Wash. 2017).
[67] *In re Nitcher*, 606 B.R. 67, 78 (Bankr. D. Ore. 2019).

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the *Brunner* test. Indeed, *Rosenberg* appears to stand for the proposition the second prong of *Brunner* is satisfied *per se*, in any case in which the 10-year contract repayment period of the loan has expired at the time the discharge is sought.

C. Is *Brunner*'s Third Prong, a "Good Faith" Effort to Repay, Satisfied if the Debtor Has *Not* Applied for an Income-Based Repayment Program?

The Second Circuit in *Brunner* said surprisingly little about the "good faith" prong of its analysis. What it did say, though, was based on a debtor's conduct that bordered on or perhaps even constituted abuse:

> Finally, as noted by the district court, Brunner filed for the discharge within a month of the date the first payment of her loans came due. Moreover, she did so without first requesting a deferment of payment, a less drastic remedy available to those unable to pay because of prolonged unemployment. Such conduct does not evidence a good faith attempt to repay her student loans.[68]

The Third Circuit in *Faish*, when it adopted *Brunner*, characterized *Brunner's* good faith third prong as follows:

> The good faith inquiry is to be guided by the understanding that "undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from 'factors beyond his reasonable control.'" [citing *In re Roberson,* 999 F.2d 1132 (7th Cir.1993), in which the 7th Circuit adopted *Brunner*] (quoting Comm'n on the Bankruptcy Laws of the United States, Report, [H.R.Doc. No. 137, 93d Congress, 1st Sess., Pt. II], at 140 n. 16).[69]

Income-based repayment plans were not available when *Brunner* and *Faish* were decided, as Judge Frank recently noted in *Price*, which certainly accounts for the Second and Third Circuit's failing to mention them.[70] Whether a debtor has acted in bad faith if it failed to apply for an income-based repayment plan is part of the gloss on *Brunner* decried by Judge Morris in *In re Rosenberg*.

A few opinions have suggested that a debtor who cannot repay the loan in the ordinary installments over its 10-year term, and who has not applied for an extended income-based repayment program, has not made a good faith effort to repay and thus has not satisfied the third prong of *Brunner*. A clear formulation of this comes in the concurrence of Judge Manion in the Seventh Circuit's 2013 *Krieger* opinion.

> A good and expensive education is no longer a guarantee that a good job will ensue… While college tuition continues to rise, job opportunities appear to be contracting. Hope remains that an eventually improving economy will generate

[68] *Brunner*, 831 F.2d at 397.
[69] *Faish*, 72 F.3d at 305.
[70] *Price*, 573 B.R. at 599.

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> more job opportunities. But for those who perceive that their employment-seeking efforts are at a dead end, bankruptcy should not be the answer. Rather than challenging the non-dischargeability barrier in bankruptcy, those who have concluded that there is no way they can pay off the debt should be required to enroll in the William D. Ford Income–Based Repayment Plan. Under that plan, a borrower's monthly payment is limited to 15% of discretionary income (defined as any income above 150% of the poverty line). In Ms. Krieger's case, she would have owed zero dollars unless she received an annual income of something approaching $17,000. And after twenty-five years under the IBR program, any remaining debt is forgiven. This may sound like an unattractive alternative, but as the district court noted, this is certainly better than erasing what should be an undischargeable debt given Ms. Krieger's age, good health, and solid education.[71]

Most courts, though, have held that while the availability of an income-based repayment plan is *a factor* to continue in determining whether the debtor has satisfied the third prong of *Brunner* by making a good faith effort to repay the student loans, the line drawn in the sand by Judge Manion is not the law. Indeed, Judge Easterbrook writing the court's opinion in *Krieger* rejected the per se rule suggested in Judge Manion's concurrence, stating:

> Once again, however, we must remember that the statutory inquiry is "undue hardship," a case-specific, fact-dominated standard, which implies deferential appellate review. 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. What remains is a predominantly factual understanding, on which the bankruptcy judge's findings must prevail. (Educational Credit does not contend, and the district judge did not hold, that any is clearly erroneous.)[72]

The Fourth Circuit in *In re Mosko* characterized *Brunner's* good faith prong as requiring "the debtor's 'efforts to *obtain employment, maximize income,* and *minimize expenses*.' Furthermore, a debtor may not 'willfully or negligently cause his own default, but rather his condition must result from factors beyond his reasonable control.'"[73] The same court added that "the debtor must *seriously pursue* loan consolidation options, but again stopped short of stating a *per se* rule.[74]

A debtor's failure to diligently pursue enrollment in an income-based repayment program nonetheless may tip the balance in the court's determination that the debtor acted in bad faith under the third prong of *Brunner*. The Ninth Circuit held that the debtor in *In re Mason* had appeared "to have made some previous efforts to negotiate repayment of his debt," yet "his efforts ha[d] been inadequate." The record demonstrated that the debtor "could have attempted

[71] *Krieger v. Educ. Credit Mgmt. Corp*., 713 F.3d 882, 886 (7th Cir. 2013) (Manion, J., concurring))
[72] *Id*. at 884.
[73] *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008), quoting *O'Hearn v. Educ. Credit Mgmt. Corp.,* 339 F.3d 559, 564 (7th Cir.2003).
[74] *Id*., citing *In re Frushour,* 433 F.3d 393, 402 (4th Cir.2005).

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renegotiation of his debt under the ICRP, but failed to pursue this option with diligence." For this reason, among others, the Fourth Circuit in *Mason* held that "the bankruptcy court clearly erred in finding that Mason demonstrated good faith efforts to repay his loans."[75]

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).

The Third Circuit in *Coco* then contrasted the facts in the case before it with the facts in *Brunner*:

> This case does not appear to present a situation where a debtor sought to abuse the student loan system or evade repayment. After Coco's loans became due, it appears that she struggled—often below the poverty line—for more than a decade before applying for bankruptcy. *Cf. Brunner,* 831 F.2d at 397 (declining to find undue hardship where the debtor sought to discharge her student loans within a month after the first payment became due). During that time, it appears she [the debtor in *Coco*] attempted to obtain regular employment and negotiate a feasible repayment plan, all the while coping with chronic medical problems and caring for her ailing mother. Although her efforts to repay her loans have been largely unsuccessful, it appears that this lack of success has been caused by factors outside of her control.[76]

The recent cases of *In re Rosenberg* and *In re Price* discussed above also addressed the effect of income-based repayment programs on the good faith prong of *Brunner*.

The *Rosenberg* loan originated in 2005, and during much of the 13-year period that followed was in forbearance. 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. The debtor's income-based repayment plan ended in April 2016, and loan was again in

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[75] *In re Mason*, 464 F.3d 878 (9th Cir. 2006).
[76] *In re Coco*, 335 Fed. Appx. 224, 228-229 (3rd Cir. 2009).

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forbearance, from April to October of that year. The debtor continued to make payments on the loan during that period, despite the fact that no payments were due. 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. In January 2018, the account entered default and was paid in full by the guarantor.[77] The court calculated that, in total, the debtor made 10 payments, in varying amounts, during the 26 months that the debtor was responsible for making payments, which was:

> … approximately 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.[78]

The court found in conclusion that the debtor had demonstrated a good faith effort to repay his loan.

More significantly, perhaps, was the *Rosenberg* court's view of the temporal requirements for its good faith finding. The court emphasized the actual language of *Brunner*, emphasizing that that precedent required it "to determine whether 'the debtor ***has made*** good faith efforts to repay the loans.'"[79]

> 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 reasons for filing bankruptcy; how much debt he has; *or whether the Petitioner rejected repayment options*.[80]

The court in *In re Price* also considered *Brunner's* good faith prong in connection with an income-based repayment plan for which the debtor might have been eligible. The court noted that a debtor "can begin negotiations to enter into a payment plan and still abandon those negotiations in good faith based on the consequences of the plan."[81] In *Price*, the debtor:

> … looked into the possibility of entering an income-based repayment plan. She engaged the DOE's website and began the process of applying for a more suitable repayment plan. She did not complete her application because she realized that under any available plan she would be obliged to make a monthly payment that she could not afford. What would be the point of entering into an "affordable" repayment plan, if a default shortly thereafter appears inevitable due to insufficient income? Simply put, it is not bad faith to investigate the terms of a

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[77] *In re Rosenberg*, 2020 WL 130302 at *5.
[78] *Id.* at *6.
[79] *Id.* at *5, quoting *Brunner*, 831 F.2d at 396 (emphasis in original).
[80] *Id*. at *5.
[81] *In re Price*, 573 B.R. at 593-594.

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payment plan, but to abandon further consideration of the plan when it is obvious that the plan will not permit the debtor to comply with its terms.[82]

The court further found that the debtor was current and had made some payments on her student loans from her graduation in 2011 until November 2015, and that there was nothing in the record to suggest that the "debtor manufactured her hardship by volitional conduct that reduced her income potential or that inflated her living expenses." Accordingly, the debtor had satisfied the good faith requirement.[83]

IV. Can a Student Loan be Classified Separately in a Chapter 13 Plan?

Some courts, including the bankruptcy court for the District of Delaware, permit a chapter 13 debtor to separately classify her student loan debt in her plan, and provide for greater payments on account of that claim than the other unsecured claims against the debtor. Courts have allowed separate classification on the ground that it does not unfairly discriminate under Code section 1322(b)(1), or that it is long-term debt under Code section 1322(b)(5), or that the debtor is making the payments using discretionary income in excess of projected disposable income. The chapter 13 debtor by this avenue does not in all cases receive a discharge from her student loans, but nonetheless may substantially reduce her non-dischargeable student loan debt over the term of the plan, while obtaining a discharge from her remaining general unsecured claims.

Other courts have held that this separate classification is unfair discrimination and is not permitted under Code section 1322(b). Some recent cases are set forth below.

A. Separate Classification in Chapter 13 Plan Permitted

1. Separate Classification Does Not Unfairly Discriminate

- *In re Wood*, 2018 WL 6060305 (Bankr. M.D. Ala. 2018)
- *In re Engen*, 2016 WL 7243519 (Bankr. D. Kan. 2016)
- *In re Belton*, 2016 WL 7011570 (Bankr. D. S.C. 2016)
- *In re Pracht*, 464 B.R. 486 (Bankr. M.D. Ga. 2012)
- *In re Birts*, 2012 WL 631875 (Bankr. E.D. Va. 2012), *rev'd* on other grounds, 2012 WL 3150384 (E.D. Va. 2012)
- *In re Chalayan*, 415 B.R. 907 (Bankr. S.D. Fla. 2009)
- *In re Sharp*, 415 B.R. 803 (Bankr. D. Colo. 2009)
- *In re Machado*, 378 B.R. 14 (Bankr. D. Mass. 2007)

2. Separate Classification Permitted as Long-Term Debt Under Code Section 1322(b)(5)

- *In re Johnson*, 446 B.R. 921 (Bankr. E.D. Wis. 2011)
- *In re Truss*, 404 B.R. 329 (Bankr. E.D. Wis. 2011)
- *In re Knight*, 370 B.R. 429 (Bankr. N.D. Ga. 2007)

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[82] *Id*. at 594.
[83] *Id*.

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3. Separate Classification Permitted if Payments are Made Using Discretionary Income in Excess of Projected Disposable Income

- *In re Brown*, 500 B.R> 255 (Bankr. S.D. Ga. 2013)
- *In re Stull*, 489 B.R. 217 (Bankr. D. Kan. 2013)
- *In re King*, 460 B.R. 708 (Bankr. N.D. Tex. 2011)
- *In re Abaunza*, 452 B.R. 866 (Bankr. S.D. Fla. 2011)
- *In re Sharp*, 415 B.R. 803 (Bankr. D. Colo. 2009)
- *In re Orkawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008)

B. Separate Classification in Chapter 13 Plan Not Permitted

- *In re Kane*, 603 B.R. 491 (Bankr. D. Kan. 2019)
- *In re Quinn*, 586 B.R. 1 (Bankr. E.D. Mich. 2018)
- *In re Dyer*, 2015 WL 430288 (Bankr. W.D. La. 2015)
- *In re Salazar*, 543 B.R. 669 (Bankr. D. Kan. 2015)
- *In re Jordahl*, 516 B.R. 573 (Bankr. D. Minn. 2014)
- *In re Brown*, 500 B.R. (Bankr. S.D. Ga. 2013)
- *In re Renteria*, 2012 WL 1439104 (Bankr. D. Colo. 2012)
- *In re Edmonds*, 444 B.R. 898 (Bankr. E.D. Wis. 2010)
- *In re Boscaccy,* 442 B.R. 501 (Bankr. N.D. Miss. 2010)
- *In re Kruse,* 406 B.R. 833 (Bankr. N.D. Iowa 2009)

C. Using a "Chapter 20" Serial Filing to Discharge Dischargeable Debt in Chapter 7 and Pay Down a Student Loan in Chapter 13

In a court in which a student loan claim is not separately classifiable, a "chapter 20" case is sometimes is used. "A 'chapter 20' is a chapter 13 case filed on the heels of a chapter 7 cases in which the debtor obtained a discharge of all of the debtor's assets."[84] Under this approach, a debtor who is eligible for chapter 7 files his case under that chapter, and obtains a discharge of unsecured claims other than the student loans, which ride through. The debtor then files a chapter 13 case, the purpose of which is not to obtain another discharge, but merely to devote all of his disposable income to paying down his student loans.[85]

[84] *In re Scantling*, 465 B.R. 671, 673, n. 1 (M.D. Fla. 2012).
[85] See Harry D. Boul, "Repeat Filing Under BAPCPA: Stays, Multiple Discharges and Chapter 20," 63 J. Mo. B. 170, 172 (July-August 2007); *In re Pollard*, 2011 WL 576599 *2 (Bankr. D. Md. 2011); *In re Hill*, 440 B.R. 176, 184 (Bankr. S.D. Cal. 2010)

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V. Partial Discharge

A. Partial Discharge Absent Undue Hardship

Some courts have granted a partial discharge of the student loan claims, notwithstanding the debtor's failing to prove under hardship under Code section 523(a)(8). The Sixth Circuit in *In re Hornsby* 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.[86]

In *In re Modeen*, the bankruptcy court for the Western District of Wisconsin recently followed *Hornsby*, construing that case as holding that a bankruptcy court has "the discretion under section 105 to grant a partial discharge even where the debtor ha[s] not proved all the elements of an undue hardship."[87] The court nonetheless found that "the as-written terms of the student loan would impose an undue hardship" on the debtor.[88]

B. Partial Discharge on Proof of Undue Hardship for the Amount Discharged

The Ninth Circuit in *In re Saxman* followed *Hornsby*, also concluding that bankruptcy courts may exercise their equitable authority under 11 U.S.C. § 105(a) to partially discharge student loans.[89] The court concluded 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).[90]

The Sixth Circuit dialed back its *Hornsby* ruling a bit a few years later, requiring a showing of undue hardship with respect to the amount discharged.[91] The court acknowledged that its clarification of *Hornsby* was "at odds" with it post-*Hornsby* decision in *DeMatteis v. Case Western Reserve University*, which because it was unpublished it was "not bound to

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[86] *In re Hornsby*, 144 F.3d 433, 440 (6th Cir. 1998).
[87] *In re Modeen*, 586 B.R. 298 (Bankr. W.D. Wis. 2018).
[88] *Id*. at 306.
[89] *In re Saxman*, 325 F.3d 1168, 1173 (9th Cir. 2003).
[90] *Id*. at 1175.
[91] *In re Miller*, 377 F.3d 616 (6th Cir. 2004). Accord, *In re Tirch*, 409 F.3d 677 (6th Cir. 2005).

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follow." 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."[92]

The Tenth Circuit in *In re Alderete* reversed the bankruptcy court's grant of a partial discharge notwithstanding that the debtors had not established that their student loans created an undue hardship. The court of appeals noted that, though it had "never addressed this issue, [its] sister circuits ha[d] unanimously rejected this proposition. Because § 105(a) only grants the power to 'carry out the provisions' of the Bankruptcy Code, these courts have held that bankruptcy courts can only grant partial discharges when the terms of § 523(a)(8) have been met (i.e., that an undue hardship has been shown)."[93] The Tenth Circuit in *Alderete* did not determine whether a partial discharge is available under section 523(a)(8). A district court in that circuit, though, the District of Kansas, has held that "the bankruptcy court's equitable powers allow it to grant a partial discharge of a student loan debt upon a finding of undue hardship.[94] And the bankruptcy court in that district has characterized *Alderete* as recognizing that "if only a portion of a student loan qualifies for discharge under the undue hardship standard, the bankruptcy court may enter a partial discharge accordingly."[95]

The Eleventh Circuit in *In re Cox* reasoned that the reference to "*any* debt" in Code section 523(a)(8) precluded a partial discharge, absent a finding of "undue hardship." 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.[96]

Numerous district and bankruptcy courts in other circuits have held that a partial discharge is permitted under Code section 523(a)(8).

C. Partial Discharge Not Permitted

Numerous courts in other circuits, though, have held that the Code does not permit a partial discharge. Recent decisions include:

- *In re Demmons*, 2016 WL 5874831 (Bankr. E.D. La. 2016)
- *In re Merriwether*, 2003 WL 22722036 (Bankr. E.D. Wis. 2003)
- *In re Armstrong*, 2011 WL 6779326 (Bankr. C.D. Ill. 2011)

D. The "Hybrid" Approach – If More Than One Student Loan, Court May Discharge Some Loans

Some courts have adopted a "hybrid" approach. Under the hybrid approach, if the debtor has more than one loan, then even if the court cannot partially discharge any single loan, it can

[92] *Id*. at 622 (emphasis in original), citing *DeMatteis v. Case W. Reserve Univ. (In re DeMatteis),* 97 Fed. Appx. 6, 2004 WL 445167, at *3 (6th Cir. *2004*).
[93] *In re Alderete*, 412 F.3d 1200, 1207 (10th Cir. 2005) (internal citations omitted).
[94] *Educational Credit Management Corp. v. Metz*, 2019 WL 1953119 *7 (D. Kan. 2019). Accord, *In re Murray*, 563 B.R. 52, 60 (Bankr. D. Kan. 2016), *aff'd* 2017 WL 4222980 (D. Kan. 2017).
[95] *In re Johnson*, 2015 WL 795830 *6 (Bankr. D. Kan. 2015).
[96] *In re Cox*, 338 F.3d 1238, 1242 (11th Cir. 2003).

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discharge one or more loans while denying discharge to the remainder that the debtor can afford to pay. Recent decisions include:

- *In re Conway*, 495 B.R. 416 (B.A.P. 8th Cir. 2013)
- *In re Swafford*, 604 B.R. 46 (N.D. Iowa 2019)
- *In re Kinney*, 593 B.R. 618 (Bankr. N.D. Iowa 2018)
- *In re Martin*, 584 B.R. 866 (N.D. Iowa 2018)

E. Partial Discharge in the Third Circuit

The Third Circuit has not addressed the issue of a partial discharge. In *In re Rumer*, the bankruptcy court for the Middle District of Pennsylvania summarized the law in the circuit as follows:

> The courts are not in agreement regarding the question of whether repayment of one student loan may be an undue hardship to a debtor while repayment of another student loan would not. While the statutory text clearly does not state that a debt is dischargeable "to the extent" that repayment would impose an undue hardship, some courts have found the discretion to partially discharge student loan debt through the application of 11 U.S.C. § 105(a). The majority of courts have held that the language of § 523(a)(8) allows for a "partial" discharge of student loan debt. [At least one] bankruptcy court held that it could not authorize a debtor to repay a portion of a particular loan and discharge the balance on the basis that repayment would constitute an undue hardship. The Third Circuit, however, has not addressed this issue even though the issues raised on appeal in *Faish* included not only the appropriate test to determine undue hardship, but also whether the partial discharge granted by the bankruptcy court was appropriate. In deciding *Faish*, the Court of Appeals adopted the *Brunner* undue hardship standard and stated further that because Faish had failed to establish undue hardship, "her entire student-loan obligation is nondischargeable." The question remains open whether Faish could have obtained a partial discharge if she had otherwise met the *Brunner* test.[97]

VI. Arbitration

The Supreme Court, in a series of opinions in recent years, has given great deference to contractual provisions which bind one or both parties to binding arbitration of disputes and defaults. Mandatory, binding arbitration is more than an alternate dispute resolution process. Arbitration typically is confidential and non-appealable, so there is no development of case law, and current and future litigants are left in the dark about the arbitrator's decision.

The Court has based these decisions on the Federal Arbitration Act, section 2 of which provides:

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[97] *In re Rumer*, 469 B.R. 553, 564, n. 12 (Bankr. M.D. Pa. 2012) (internal citations omitted).

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> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[98]

The Court has held that such mandatory arbitration provisions are enforceable under the Federal Arbitration Act, even if the dispute arose under a different federal statute. Justice Gorsuch in *Epic Systems v. Lewis* recently characterized the Court's rulings as follows:

> In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled).[99]

Many private student loan contracts contain mandatory arbitration provisions. Whether these loans are dischargeable is question of federal bankruptcy, specifically Code section 523(a)(8). But who makes this determination?

A. Is a Mandatory Arbitration Provision in a Student Loan Contract Enforceable in a Bankruptcy Case, So That An Arbitrator Rather Than the Bankruptcy Judge is Authorized to Determine Whether the Loan is Discharged?

The Supreme Court has not yet considered this question. Several lower courts have in recent years, mostly in the context of asserted violations of the discharge injunction.

The chapter 7 debtor in *In re Williams* listed "student" loans on her schedules and the bankruptcy court entered its "standard order" discharging the debtor "of all obligations dischargeable under section 727."[100] Six months later the debtor filed a motion to reopen her case, for the purpose of filing an adversary complaint against Navient seeking as determination that the student loan debt had been discharged and that Navient had violated the discharge order by attempting to collect on it. The debtor alleged "purportedly on behalf of a putative statewide class of similarly situated persons, that her bar study loans" serviced by Navient were not "qualified education loans" under Code section 523(a)(8) and, therefore, were discharged in her chapter 7 bankruptcy case. The debtor further claims that Navient had violated the discharge order by mailing monthly statements to her, and by making telephone calls to her in an attempt to collect such loans.[101]

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[98] 9 U.S.C. § 2.
[99] *Epic Systems v. Lewis*, 138 S. Ct. 1612, 1627 (2018).
[100] *In re Williams*, 564 B.R. 770, 773 (Bankr. S.D. Fla. 2017).
[101] *Id*. at 774.

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The promissory notes signed by Williams provided that either party could elect to arbitrate "any Claim" under the notes, and that if such elect was made both parties waived the right to a jury trial, and participation in a class action, class arbitration or other consolidated action involving the claims of others.[102] Navient moved to compel arbitration. The debtor in its objection argued that the promissory notes were discharged in her bankruptcy case, and even if not, that the court should deny arbitration of her dischargeability claims because it:

> would inherently conflict with the Bankruptcy Code. In its simplest form, the [debtor's] argument is that the FAA must yield to the Bankruptcy Code in the context of section 523(a)(8) and section 524(a)(2).[103]

The bankruptcy court held that neither the text of the Code nor applicable case law supports the debtor's first argument.

> Even if the student loan debts at issue [were] in fact subject to discharge, a discharge entered under section 727 relieves a debtor only of his or her personal obligations on debts that existed on the petition date. The entry of a chapter 7 discharge does not vitiate the effectiveness of an otherwise binding agreement to arbitrate matters relating to a claim that may or may not be subject to the discharge.[104]

The court then engaged in an extensive analysis of the debtor's second argument, and ruled that enforcement of the parties' arbitration and class action waiver agreement did "not inherently conflict with the underlying purposes of sections 523(a)(8) or 524(a)(2). With one exception, noted below, the Court adopts the analysis presented in *In re Belton*, because it is better aligned with the federal policy favoring arbitration."[105]

Because the debtor had received a discharge in her chapter 7 case prior to commencing her adversary proceeding, arbitration of her claims would "not interfere with or affect the distribution of the estate and will not affect an ongoing reorganization," nor would it "interfere with or affect the preservation of estate assets or the determination of the priority of creditor's claims." Moreover, that the debtor brought her section 523(a)(8) and section 524(a)(2) claims on behalf of a putative class weighed in favor of compelling arbitration.[106]

The Second Circuit in *In re Anderson* effectively overruled the *Belton* (S.D.N.Y.) decision that the *Williams* (S.D. Fla.) court followed approvingly. *Anderson* is one of a contrary line of lower court cases which hold that arbitration clauses are not enforceable with respect to student loan discharge or other discharge determinations.

The chapter 7 debtor in *Anderson* filed a putative class action to recover damages for a credit card issuer's alleged violation of the discharge injunction, for continuing to report as

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[102] *Id*.
[103] *Id*. at 775.
[104] *Id*.
[105] *Id*. at 783, citing with approval, *Belton v. Citigroup Inc. (In re Belton)*, 2015 WL 6163083, at *3–4 (S.D.N.Y. 2015).
[106] *Id*. at 783.

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"charged off" a credit card debt that had been discharged in his bankruptcy case. The issuer moved to compel arbitration. The bankruptcy court denied the motion, the district court affirmed, and the issuer appealed again.[107]

The Second Circuit reasoned as follows:

> … we need only inquire whether arbitration of Anderson's claim presents the sort of inherent conflict with the Bankruptcy Code that would overcome the strong congressional preference for arbitration. We agree with both lower courts that Anderson's complaint is non-arbitrable. The successful discharge of debt is not merely important to the Bankruptcy Code, it is its principal goal. An attempt to coerce debtors to pay a discharged debt is thus an attempt to undo the effect of the discharge order and the bankruptcy proceeding itself. Because the issue strikes at the heart of the bankruptcy court's unique powers to enforce its own orders, we affirm the district court decision below.[108]

The *Anderson* court recognized the strong preference favoring arbitration, and relied heavily on the Supreme Court's 30+ year-old *McMahon* decision to emphasize that this preference is not absolute. "Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command."[109] The Supreme Court in *McMahon* had explained that "[t]he burden is on the party opposing arbitration ... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." Congressional intent may be discerned through the "text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes," which the movant had failed to raise below.[110] The Second Circuit concluded in *Anderson* that the bankruptcy court had properly considered the conflicting policies of the Code and the FAA and had not abused its discretion in denying the motion to compel arbitration.[111]

Two recent bankruptcy court opinions have considered the issue of arbitrability in connection with alleged student loans. Both have found that a debtor's discharge is a "core" matter and declined to compel arbitration.

The debtor in *In re Farmer*, another case involving a bar exam study loan, sought a declaratory judgment that her bar study loan was dischargeable because it was not an "educational loan" under section 523(a)(8). The bankruptcy court rejected the argument made by the servicer, Navient, that the Supreme Court had impliedly eliminated the "inherent conflict" test established in *McMahon* in its more recent arbitration opinions, *CompuCredit Corp*. and *Italian Colors*.[112] The bankruptcy court also declined to follow *In re Williams* (discussed above), because the debtor had not brought her action as a member of a putative class, and because Ninth

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[107] *In re Anderson*, 884 F.3d 382 (2nd Cir. 2018).
[108] *Id*. at 386.
[109] *Id*. at 388, quoting *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332 (1987).
[110] *Id*., quoting *McMahon*, 482 U.S. at 227.
[111] *Id*. at 392.
[112] *In re Farmer*, 567 B.R. 895, 899, 901 (Bankr. W.D. Wash. 2017), citing *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 132 S. Ct. 665, 181 L.Ed.2d 586 (2012), and *American Express Co. v. Italian Colors Restaurant*, —— U.S. ——, 133 S. Ct. 2304, 186 L.Ed.2d 417 (2013).

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Circuit precedent consistently applied *McMahon* to affirm bankruptcy court decisions refusing arbitration. The bankruptcy court concluded that "arbitration of the claims brought by Farmer would 'jeopardize a core bankruptcy proceeding,'" a debtor's entitlement to a discharge. "Since the requested arbitration would inherently conflict with the underlying purposes of section 523(a)(8) of the Bankruptcy Code, it [was] appropriate to decline to enforce the arbitration provision."[113]

The debtor in *In re Roth* moved to reopened his chapter 7 case and filed a complaint seeking to discharge his student loan debt to Sallie Mae, alleging that the loan was not a "qualified educational loan," and, alternatively, that he should be discharged from the loan on the ground of undue hardship.[114] The bankruptcy court in *In re Roth* characterized federal bankruptcy law as "a fundamental public policy, one that is grounded in the Constitution. The very purpose of the Bankruptcy Code is to modify the rights – contractual and otherwise – of debtors and creditors. So it should come as no surprise that a bankruptcy court could, in certain circumstances, override a contractual agreement such as an arbitration provision or a forum selection clause."[115]

Sallie Mae urged that there was no conflict, citing *In re Williams* (discussed above). The court disagreed. Discharge is the fundamental purpose of the Code, it reasoned. Allowing arbitration of whether a claim was dischargeable "would effectively allow parties to contractually overrule the application of federal bankruptcy law. Bankruptcy without the discharge is like a car without an engine; a useful tool rendered ineffective." Allowing arbitration also would undermine "Congress' intention to centralize disputes about a debtor's legal obligations for prompt and efficient resolution in bankruptcy courts."[116] The count concluded that it had jurisdiction over the debtor's claims against Sallie Mae, and declined to enforce the arbitration agreement.[117]

B. Does the Arbitrator or the Bankruptcy Judge Decide Who Has Authority to Determine Whether the Loan is Discharged?

The Supreme Court's 2019 decision in *Henry Schein, Inc. v. Archer and White Sales, Inc*. went so far as to hold that courts must honor a contractual arbitration clause that gives the arbitrator exclusive authority to determine *whether* the case or controversy must be arbitrated rather than determined by an Article III judge. The *Schein* Court reasoned that the contract provided for arbitration under American Arbitration Association (AAA) rules, and that those rules gave the arbitrator exclusive authority to determine whether the dispute was arbitrable. Thus, under the Federal Arbitration Act, courts were required to cede to the arbitrator the authority they otherwise would have to make such threshold determination.[118]

The plaintiff in *Schein*, in the dental equipment business, sued others in the same business alleging antitrust violations under the Sherman Act and state antitrust law. The plaintiff had

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[113] *Id*. at 902.
[114] *In re Roth*, 594 B.R. 672, 673-674 (Bankr. S.D. Ind. 2018)
[115] *Id.* at 675, citing *In re Anderson*, 884 F.3d 382 (2d Cir. 2018).
[116] *Id.* at 677.
[117] *Id.* at 678.
[118] *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019).

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entered into a contract with one of the defendant's predecessors-in-interest, which provided that any disputes (other than for actions seeking injunctive relief or involving intellectual property) would "be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." The defendants moved to compel arbitration. The district court denied the motion and the Fifth Circuit affirmed.[119]

The lower courts in *Schein* relied on the Fifth Circuit's "wholly groundless" rule, followed by that Circuit and several others, by which exception "the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the 'wholly groundless' exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration."[120]

Justice Kavanaugh, writing for the Court, reversed, holding:

> We must interpret the [Federal Arbitration] Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.[121]

The same reasoning would appear to apply to a dispute regarding a claim that may or may not be dischargeable under Code section 523(a)(8). Under *Schein*, it is plausible that even the threshold question of who will decide whether a discharge issue is arbitrable – the bankruptcy judge or an arbitrator – may be left to the arbitrator, with the bankruptcy judge left out of the process completely.

VII. Middle District of Florida Loan Modification Program

On October 1, 2019, the U.S. Bankruptcy Court for the Middle District of Florida recently established a student loan modification program. The court describes the program as follows:

> To facilitate the resolution of student loan issues for the benefit of debtors and lenders for cases filed in the Middle District of Florida, Third Amended Administrative Order FLMB-2019-5 prescribing procedures for a student loan management program for debtors and their student loan lenders was entered. This program will allow the parties to seek repayment options through a student loan management program ("SLM" or "SLM Program"). The Administrative Order has an effective date of October 1, 2019. The Debtor, Creditor or Trustee may initiate the SLM at any time after the commencement of the case by filing a Notice of Participation in Student Loan Management Program (SLM) provided

[119] *Id*. at 528.
[120] *Id*. at 529.
[121] *Id*.

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> the filing fee has been paid, in full, and the filing party has completed the Document Preparation Software. After the conclusion of the mediation, one of two possible notices will be filed: (1) a Notice of Resolution (if the parties reach an agreement); or (2) a Notice of No Resolution (if the parties do not reach an agreement).[122]

The court's Third Amended Administrative Order Prescribing Procedures for Student Loan Management Program is available at:

http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=88.

One of the members of the committee that worked on launching the program has described it as follows:

> As I like to put it, the idea behind the Student Loan Modification program is to: 1) increase communication between bankruptcy debtors and student loan servicers; 2) increase awareness of various options available to reduce student loan debt; and 3) end the needless forbearance and accrual of yet more debt in bankruptcy by providing easier access and instructions for federal programs as well as mediation opportunities for private student loans.
>
> The reason why this Student Loan Portal is so important is because there is a huge disconnect between debtors, debtor bankruptcy attorneys and their student loans. There is hardly any guidance about what to do about student loans throughout the bankruptcy process. Although student loans are listed on the bankruptcy schedules, there is uncertainty about what this actually means. Was the debt discharged? Does it still remain? Has interest still accrued? Who has my loans? Do people get credit for the years of public service while they were in bankruptcy but working full time as a teacher for instance? Confirmation orders are equally vague when they usually say some student loans may be discharged. What all this leads to is no contact for fear of violation of the automatic stay, and years of forbearance which leads in turn to greater debt. The bankruptcy debtor walks out of bankruptcy court with a "false" start instead of a "fresh" start because even though the house, car and credit cards may be back on track, the student loans are now $150,000 instead of $100,000 and who knows who has them.[123]

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[122] http://www.flmb.uscourts.gov/proguide/documents.asp?ID=266.
[123] Christie D. Arkovich, "New Student Loan Portal in Middle District of Florida Bankruptcy Cases," Reboot Your Life: Tampa Student Loan an Bankruptcy Attorney Blog, available at https://www.tampabankruptcylawyerblog.com/new-student-loan-portal-in-middle-district-of-florida-bankruptcy-cases/

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VIII. Recent Proposed Legislation

The most recent proposed legislation, "The Student Borrower Bankruptcy Act of 2019," S. 1414, 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).[124]

The bill was introduced by Senator Durbin on May 9, 2019, and was co-sponsored by 16 Democratic Senators (including Senators Warren and Klobuchar) and one independent Senator (Sanders). The bill was referred to the Judiciary Committee on the same day and no action has been taken on it since.[125]

The House counterpart, H.R. 2648, was introduced on the same date, by Representative Nadler, and co-sponsored by 27 Democrats. The bill was referred on June 26, 2019 to the Subcommittee on Antitrust, Commercial, and Administrative Law and no action has been taken on it since.[126]

IX. Conclusion

These latest legislative proposals, S. 1414 and H.R. 2648, have found no bipartisan support and would appear to be going nowhere on a very slow track. Yet recommendations for normalizing the discharge of student loan debt in bankruptcy abound.

The ABI Commission on Consumer Bankruptcy Reform recently has proposed: "statutory amendments to discharge student loans that are made by nongovernmental entities; incurred by a person other than the person receiving the education; being paid through a five-year chapter 13 plan; or first payable more than seven years before a chapter 7 bankruptcy is filed."[127] The ABI Commission changes would roll back the Code's rules for student loan 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.[128]

The National Bankruptcy Conference in its 2018 position paper characterized the "current 'undue hardship' method of discharge" as "random, arbitrary and unfair," noting that

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[124] "The Student Borrower Bankruptcy Act of 2019," S. 1414, available at https://www.congress.gov/bill/116th-congress/senate-bill/1414/text.
[125] https://www.congress.gov/bill/116th-congress/senate-bill/1414/actions.
[126] https://www.congress.gov/bill/116th-congress/house-bill/2648/cosponsors.
[127] American Bankruptcy Institute, ABI's Commission on Consumer Bankruptcy, "Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy," available at http://s3.amazonaws.com/abi-org/Newsroom/Summary+of+Key+Recommendations_FINALv2.pdf. The Commission expects to release its final report in April, 2020.
[128] See § II.F supra. for a summary of the evolution of Code's treatment of the discharge of student loans in bankruptcy.

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debtors “are faced with the impossible task of proving a negative.” The Conference urged repeal of Code section 523(a)(8), 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 with a further shortening to five years of the period during which the undue hardship requirement would apply.[129]

Absent legislation, though, the courts and bankruptcy lawyers will continue to confront the harsh results of current law on many debtors. For these debtors and their families, bankruptcy’s fundamental promise and policy of a fresh start will remain unfulfilled.

[129] National Bankruptcy Conference, “Student Loan Dischargeability Position Paper,” 2018, p. 10-11, available at http://nbconf.org/our-work/.

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