Educational Materials

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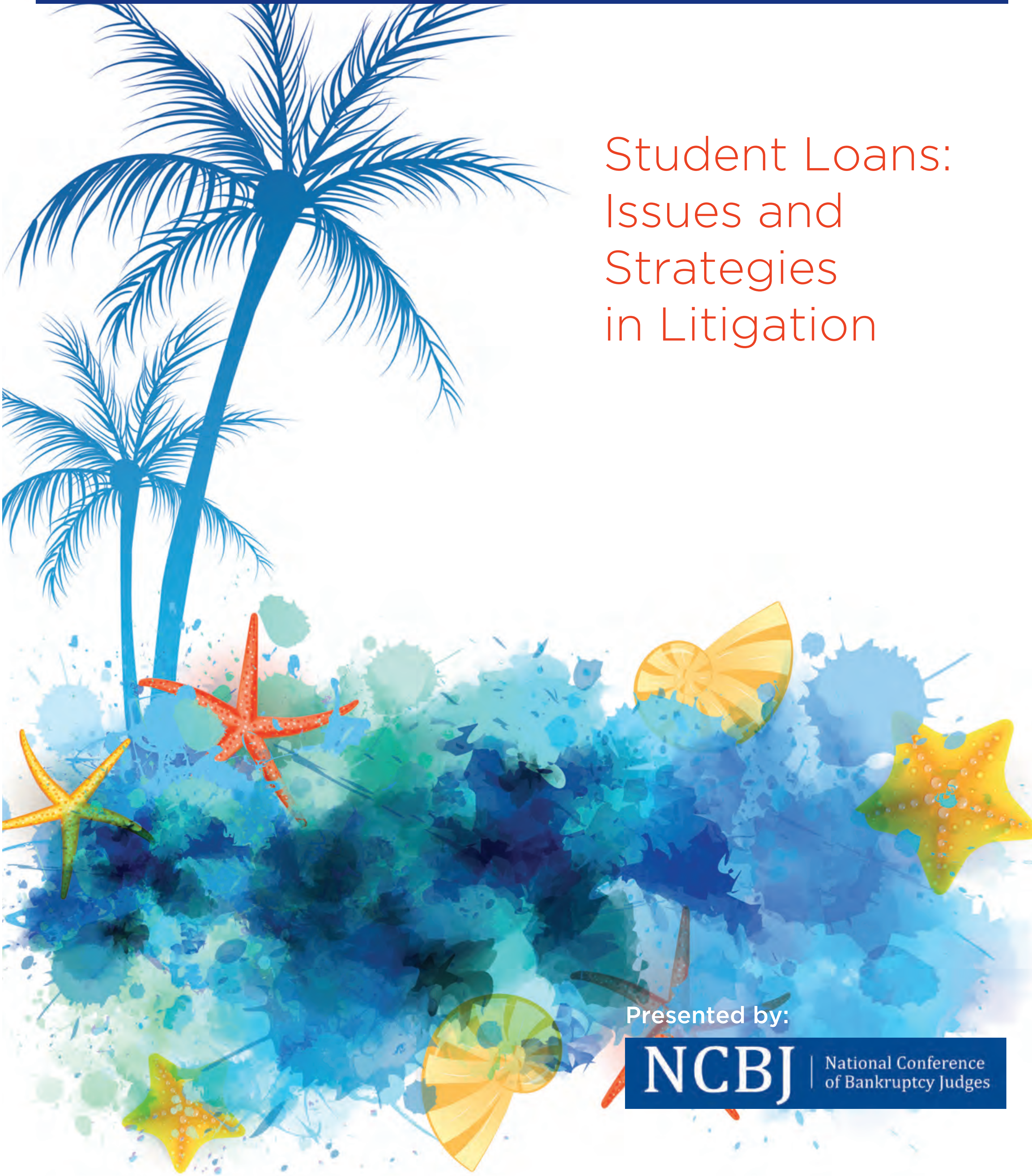
Student Loans: Issues and Strategies in Litigation



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Student Loan Debt in Bankruptcy: An Overview

By Prof. Susan E. Hauser[1]

I. Section 523(a)(8): Treatment of Educational Debt Under the Bankruptcy Code

Section 523(a)(8) of the Bankruptcy Code excludes public and private student loans from discharge in bankruptcy unless "excepting such debt from discharge . . . would impose an undue hardship on the debtor or the debtor's dependents."[2] The present statute is the product of a series of amendments to the Bankruptcy Code that roughly parallels the development of the modern student loan industry.[3]

A. The Development of the Current Statute

Before 1976, educational loans were completely dischargeable in bankruptcy. The first statute restricting the discharge of educational loan debt appeared in 1976, when the former Bankruptcy Act was amended to make most government-backed student loans nondischargeable for a period of five years after the date the loan first became due.[4] During this five-year period, student loans continued to be dischargeable if disallowing the discharge would impose an undue hardship on the debtor or his dependents.

When the Bankruptcy Code was adopted in 1978, these provisions were carried forward, and the five-year provision was expanded in 1979 to apply to any educational loan funded, made, insured or guaranteed by a governmental unit or funded by a "nonprofit

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[2] 11 U.S.C. § 523(a)(8).

[3] *See*, *e.g.*, Cox v. Hemar Ins. Corp. of Am. (*In re* Cox), 338 F.3d 1238, 1242-43 (11th Cir. 2003) (detailing the evolution of § 523(a)(8)).

[4] Education Act Amendments of 1976, Pub. L. 94-482, 90 Stat. 2081, *cited in* Alan M. Ahart, *Discharging Student Loans in Bankruptcy*, 52 AM. BANKR. L.J. 201, fn. 1 (1978).

institution of higher education."[5] In 1984, the statute was amended to include private student loans funded or guaranteed by a governmental or non-profit entity.[6] Congress increased the five-year limit to seven years in 1990.[7] The seven-year rule was eliminated completely in 1998, leaving undue hardship as the only avenue for the discharge of most educational debt.[8] The most recent amendment to the statute came in 2005 when BAPCPA extended the application of § 523(a)(8) to "any qualified educational loan," making student loans originated by private lenders nondischargeable even when these loans are not backed by a governmental entity.[9]

B. The Current Statute

In its present form, § 523(a)(8) excludes both public and private student loans from discharge in bankruptcy, subject only to an "undue hardship" exception. In its entirety, the statute now reads:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A)
>
> (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
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> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
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> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . . .

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[5] Act of Aug. 14, 1979, Pub. L. No. 96-56, 93 Stat. 387.

[6] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

[7] Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

[8] Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581.

[9] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

Section 523(a)(8) applies to all cases filed under chapters 7, 11, 12, or 13 of the Bankruptcy Code and prevents an individual debtor from discharging most types of education debt absent a showing of undue hardship.

The broad scope of the present statute places a heavy emphasis on the debtor's ability to prove undue hardship. However, several preliminary considerations may allow the debtor to exclude some obligations from the operation of the statute and discharge these debts without reference to undue hardship. First, not every obligation is considered a loan or an "educational benefit" for purposes of § 523(a)(8). Second, although § 523(a)(8) applies to educational loans from most sources, it does not apply to loans from every possible source. These initial questions of scope may excuse some debts from the operation of § 523(a)(8).

1. Obligations Within the Operation of § 523(a)(8)

Four broad categories of debts are made nondischargeable by the three subsections of § 523(a)(8)."[10] First, § 523(a)(8)(A)(i) applies to an "educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit." The same subsection also makes an overpayment or loan nondischargeable if "made under any program funded in whole or in part by a governmental unit or nonprofit institution." Third, § 523(a)(8)(A)(ii) excepts from discharge any "obligation to repay funds received as an educational benefit, scholarship, or stipend." Finally, § 523(a)(8)(B) excepts from discharge "any other educational loan that is a qualified educational loan" as defined in § 221(d)(1) of the Internal Revenue Code.

[10] These were outlined by the court in *In re Rumer* as: "(1) loans made, insured, or guaranteed by a governmental unit; (2) loans made under any program partially or fully funded by a government unit or nonprofit institution; (3) loans received as an educational benefit, scholarship, or stipend; and (4) any 'qualified educational loan' as that term is defined in the Internal Revenue Code." Rumer v. American Educ. Servs. (*In re* Rumer), 469 B.R. 553 561 (M.D. Pa. 2012).

a. Section 523(a)(8)(A)

Section 523(a)(8)(A)(i) makes all federal loans nondischargeable, including Stafford Loans, PLUS Loans (Parents Plus), and Consolidation Loans. The phrase "governmental unit" extends nondischargeability to any loan made, insured, guaranteed, or funded by a state agency or other non-federal governmental entity.[11] Section 523(a)(8)(A)(i) also applies to any loan funded by a nonprofit organization, a term that includes most educational institutions.[12] This subsection specifically applies to overpayments, in addition to loans.

Section 523(a)(8)(A)(ii) further extends nondischargeability to any obligation to repay funds received, from any source, as an educational benefit, scholarship, or stipend. Because § 523(a)(8)(A)(ii) applies to credit from *any* source and uses the expansive term "educational benefit," it has been used to extend nondischargeability in unexpected directions.[13] For example, a loan obtained by a law student to pay for a bar review course was held nondischargeable under § 523(a)(8)(A)(ii).[14] In addition, neither subsection of § 523(a)(8)(A) is limited to loans connected to post-secondary or higher education. This, combined with the expansive language of subsection (A)(ii), has supported the nondischargeability of the debtor's obligation to pay for tutoring services provided to her

[11] 11 U.S.C. § 101(27) defines "governmental unit" to include the United States, States, municipalities, and any department, agency, or instrumentality thereof.

[12] *See*, *e.g.*, Busson-Sokolik v. Milwaukee School of Engineering (*In re* Busson-Sokolik), 635 F.3d 261 (7th Cir. 2011) (school was a § 501(c)(3) non-profit institution); Andrews Univ. v. Merchant, 958 F.2d 738 (6th Cir. 1992) (private university was nonprofit institution for purposes of this section).

[13] Because of the breadth of this language, § 523(a)(8)(A)(ii) has been used as a fallback provision when the facts of a particular case fail to satisfy the more precise language of the other parts of § 523(a)(8). For example, in Carow v. Chase Student Loan Serv. (*In re* Carow), 2011 WL 802847 (Bankr. D.N.D. 2011), loans were found nondischargeable under § 523(a)(8)(A)(ii) even though the court could not conclusively find they were "qualified educational loans" as required by § 523(a)(8)(B).

[14] Skipworth v. Citibank Student Loan Corp. (*In re* Skipworth), 2010 WL 1417964 (Bankr. N.D. Ala. 2010).

child,[15] as well as an unsecured line of credit used to pay for tuition and books for the debtor's children.[16]

Because of the broad language used in § 523(a)(8)(A), a long list of obligations is clearly included in its coverage. However, debtors have still found ample room to argue that particular obligations are outside the scope of this section. The cases in this area divide into two broad categories. First, debtors have questioned whether the debt at issue is properly categorized as a loan. Second, debtors have contended that particular debts are not properly categorized as "educational." If the obligation fails to meet either of these requirements, it falls outside the scope of § 523(a)(8)(A) and will be discharged without any need for the debtor to prove undue hardship.

b. Section 523(a)(8)(B)

Section 523(a)(8)(B) was added in 2005 when the statute was amended by BAPCPA, and it dramatically expanded the scope of the statute. Subsection (B) acts as a dragnet, extending nondischargeability to any educational loan not covered in subsection (A), so long as that loan is a "qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code," and is incurred by an individual. Section 523(a)(8)(B) makes most private student loans nondischargeable, even if not funded or backed by the government or a nonprofit institution, subject only to the debtor's ability to prove undue hardship. Unlike § 523(a)(8)(A), however, the operation of subsection (B) is limited to loans connected to the debtor's post-secondary education.

The key to § 523(a)(8)(B) is its expansion of nondischargeability to the specific subset of educational loans from any source that are also *qualified education loans* under the

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[15] Roy v. Sallie Mae (*In re* Roy), 2010 WL 1523996 (Bankr. D.N.J. 2010).
[16] Liberty Bay Credit Union v. Belforte (*In re* Belforte), 2012 WL 4620987 (Bankr. D. Mass. 2012).

Internal Revenue Code. Practically speaking, for purposes of tax law, a qualified education loan is any student loan on which a taxpayer is allowed to claim a deduction for interest paid on the loan.[17] Thus, § 523(a)(8)(B) extends nondischargebility to any student loan, even a purely private loan, if the interest paid on the loan would be deductible by a taxpayer.

Section 523(a)(8)(B) references § 226(d)(1) of the Internal Revenue Code, which defines a qualified education loan as:

> Any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses –
>
> > (A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,
> > (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and
> > (C) which are attributable to education furnished during a period during which the recipient was an eligible student.[18]

The term "qualified education loan" specifically includes any debt incurred to refinance another debt that is a qualified education loan.[19]

Section 226(d)(1) includes the dependent term *qualified higher education expenses*, which is defined separately to encompass the cost of attendance at an institution that is an "eligible educational institution" for purposes of Title IV of the Higher Education Act of 1965.[20] Thus, a nondischargeable qualified education loan is a loan obtained by a taxpayer or taxpayer's spouse or dependent solely to pay qualified higher education expenses, a category of expenses limited to (1) the cost of attendance, (2) at an eligible educational institution.

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[17] 26 U.S.C. § 221(a) (2013).
[18] *Id*. at § 221(d)(1).
[19] *Id*.
[20] *Id*. at § 221(d)(2).

2. Creditors Within the Protection of § 523(a)(8)

With very few exceptions, nearly all student loan creditors will be protected by one or more subsections of § 523(a)(8). Subsection 523(a)(8)(A)(i) shields governmental units and nonprofit institutions that engage in the specified transactions. Subsection 523(a)(8)(B) protects any creditor that makes a qualified education loan. And, subsection 523(a)(8)(A)(ii) is catchall provision that applies to the obligation to repay funds received as a scholarship, stipend, or "educational benefit" from any source.

Because of the breadth of the statute, a creditor will typically be excluded from the statute only if the debt it holds is not an educational loan or qualified education loan. These debts may be bills for tuition with no accompanying promissory note, post-education "buyout" loans, or loans that fail the statutory definitions in some other way.[21]

One final line of cases involves family members or friends who offer financial assistance to the student loan debtor, and then seek to have the assistance declared a nondischargeable debt.[22] The creditor in *In re Posner* was a family friend who co-signed several student loans for the debtor. After the debtor defaulted on the loans, the creditor paid the lenders and obtained a judgment of $112,322 against the debtor. This balance had increased to $170,799 by the time the debtor filed chapter 7 in 2009. The judgment creditor

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[21] For example, in S.B.R. Investments, Ltd. v. Luxa-LeBlanc (*In re* LeBlanc,) 404 B.R. 793 (Bankr. M.D. Pa. 2009), the loan was not a "qualified education loan" for purposes § 523(a)(8)(B) because it was not made to a "taxpayer."

[22] Gorosh v. Posner (*In re* Posner), 434 B.R. 800 (Bankr. E.D. Mich. 2010); *In re* Reis, 274 B.R. 46 (Bankr. D. Mass 2002) (educational loan made by debtor's grandparents was dischargeable); *but cf.* Wills v. Sallie Mae Serv. (*In re* Wills), 2010 WL 1688221 (S.D. Ind. 2010). The bankruptcy debtor in *Wills* was a 68 year old grandfather who mistakenly became the sole obligor on private student loans taken to enable his grandson to attend Nashville Auto-Diesel College. The grandson was unable to complete the program, had not worked for the past 5 years, and suffered from mental illness. Despite these highly sympathetic facts, the court traced the requirements of the statute and concluded this was a nondischargeable qualified education loan under § 523(a)(8)(B). The debtor claimed his grandson as a dependent for tax purposes, and the College was an eligible educational institute.

later filed an adversary proceeding seeking to have the state court judgment declared nondischargeable under § 523(a)(8).

The court in *Posner* began with an examination of the policy considerations underlying the statute and found that these "necessarily limit the parties who may take advantage of the statute's protections."[23] The court concluded that the plaintiff co-signer did not qualify as a person whose claim was protected by § 523(a)(8). This conclusion was based on a "recognition of the Congressional purpose of § 523(a)(8), namely to insure the availability of educational financing." Here, the plaintiff was not a lender because she never loaned money to the defendant; instead, she co-signed a loan. Although she subsequently paid off the debtor's student loans, she remained a general unsecured creditor, not a lender protected by § 523(a)(8). Finally, the court found no support for the debtor's argument that she was equitably subordinated to the rights of the original lender.[24]

C. Policy Arguments Supporting the Nondischargeability of Student Loan Debt

The fundamental purpose of bankruptcy law is to provide a procedure that provides the debtor "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[25] Section 523(a)(8) is an exception to this general policy and is based on independent policy considerations that, in the view of Congress, are sufficiently strong to outweigh the benefits obtained by providing the debtor with a fresh start.

Section 523(a)(8) was added to the Bankruptcy Code in response to Congressional concern that students were abusing bankruptcy by attempting to discharge student loans

[23] *Id*. at 803.
[24] *See also* Resurrection Medical Center v. Lakemaker (*In re* Lakemaker), 241 B.R. 577 (Bankr. N.D. Ill. 1999) (rejecting a similar equitable subordination argument brought by a former employer that obtained a judgment after advancing funds to pay off debtor's student loans).
[25] Grogan v. Garner, 111 S. Ct. 654, 659 (1991).

immediately after graduation.[26] The perception of abuse was fueled by the fact that student loans are generally unsecured and frequently written with little regard to the debtor's current financial circumstances, instead looking to the debtor's future income for repayment.[27] Quelling this perceived abuse by debtors was certainly one of the original policies supporting the nondischargeability of student loans.[28]

A second original purpose of § 523(a)(8) was "rescuing the student loan program from fiscal doom"[29] by protecting the solvency of educational loan programs and ensuring these programs would be available for future students. At the most fundamental level, the nondischargeability of student loans is justified by the strong public interest in ensuring educational loans will be available to future students. Protecting the financial viability of the student loan system is, in turn, linked to a related policy interest in ensuring that education is equally available to students from all socio-economic backgrounds.

Finally, § 523(a)(8) has been justified by the policy that it is more appropriate to place the risk of default on the student/borrower, rather than on taxpayers.

> The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; . . . the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.[30]

This policy works well in the context of student loans that are made or backed by a governmental unit or non-profit. However, it loses its force when applied to private student

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[26] Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992), *citing* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 466-75 *reprinted in* 1978 U.S. Code Cong. & Admin. New 5787.
[27] *In re* Roberson, 999 F.2d 1132, 1135-36 (7th Cir. 1993) ("the loan is viewed as a mortgage on the debtor's future").
[28] *In re* Pelkowski, 990 F.2d 738, 744 (3d Cir. 1993) (noting that "legislative history reveals a clear congressional intent to prevent debtor abuse of the program and depletion of the Program's resources").
[29] *Id.* at 743.
[30] *Roberson*, *supra* note 27, at 1137.

loan debt that, for purposes of this policy argument, is indistinguishable from any other general unsecured debt.

II. Undue Hardship

Nine circuits follow the three-pronged test for undue hardship given by the Second Circuit Court of Appeals in Brunner v. New York State Higher Education Services Corp.[31] To establish undue hardship under the *Brunner* test, the debtor must prove:

> (1) She cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
> (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
> (3) she has made good faith efforts to repay the loan.[32]

The *Brunner* test, which poses difficult proof issues for the debtor, remains the majority rule despite recent criticism suggesting that it should be revised to reflect changes in the statute and in educational lending practices since 1987.[33]

Only the First and Eighth Circuits have declined to adopt *Brunner*. The Eighth Circuit uses a "totality of the circumstances" test that considers (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

[31] 831 F.2d 395 (2d Cir. 1987). *Brunner* has been adopted in eight other circuits: the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1995); Ekenasi v. United Student Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541 (4th Cir. 2003); U.S. Dept. of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 297 F.3d 382 (6th Cir. 2005); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1103 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003).
[32] *Brunner,* at 396.
[33] *See, e.g.*, Roth v. Educational Credit Management Corp. (*In re* Roth), 490 B.R. 908 (9th Cir. BAP 2013), Pappas, J., concurring.

circumstances surrounding each particular bankruptcy case."[34] The First Circuit has not adopted either test, [35] although bankruptcy courts within the First Circuit have adopted the totality of the circumstances test.[36]

Although they continue to follow *Brunner*, the Sixth, Ninth, Tenth, and Eleventh Circuits have softened its effect by adopting a doctrine of partial discharge.[37] Partial discharge allows the debtor to discharge part of his student loan debt while remaining obligated to repay the remainder. Analytically, partial discharge is justified by using the bankruptcy court's equitable powers under § 105(a) to apply the *Brunner* or totality of the circumstances test to only part of the student loan debt. Partial discharge, which is not within the literal language of § 523(a)(8), has been disallowed in the Third Circuit and many bankruptcy courts.

III. Issues in Student Loan Litigation

A. Burdens of Proof

In a § 523(a)(8) adversary proceeding, the debtor/plaintiff has the burden of proving that repayment of his student loans would impose an undue hardship on the debtor and his dependents.[38] It follows that the debtor/plaintiff has the burden of proving every element of the undue hardship test by a preponderance of the evidence.[39]

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[34] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549 (8th Cir. 2003); Walker v. Sallie Mae Servicing Corp. (*In re* Walker), 650 F.3d 1227 (8th Cir. 2011).
[35] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188 (1st Cir 2006).
[36] *See, e.g.*, Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791 (1st Cir. BAP 2010).
[37] Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F3d 433 (6th Cir. 1998); Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616 (6th Cir. 2004); Saxman v. Educ. Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168 (9th Cir. 2003); Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200)10th Cir. 2005); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003).
[38] *In re* Pena, 155 F.3d 1108 (9th Cir. 1998); Penn. Higher Educ. Assis. Agency v. Faish (*In re* Faish), 72 F.3d 298, 301 (3d Cir. 1995).
[39] Brightful v. Penn. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324 (3d Cir. 2001); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393 (4th Cir. 2005); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559 (7th Cir. 2003); Walker v. Sallie Mae Serv. Corp. (*In re* Walker), 650 F.3d

Conversely, the creditor has the initial burden of proving the validity of its claim against the debtor.[40] For purposes of § 523(a)(8) litigation, this means that the creditor has the burden of establishing the existence of the debt by a preponderance of the evidence. The creditor also has the burden of proving that its debt is based on an educational loan or qualified educational loan, so that the debt falls within one of the various categories of debt made nondischargeable by § 523(a)(8).[41]

B. When to File – Chapter 7 and Chapter 13

Bankruptcy Rule 4007 provides that a complaint under § 523(a)(8) may be filed "at any time" and also allows a case to be "reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule." Despite the clear language of this rule, issues may arise if a chapter 13 debtor files an adversary proceeding early in a chapter 13 case. Because § 1328 delays the debtor's discharge until she completes all payments under a three to five year plan, an early adversary proceeding gives the creditor an argument that the case should be dismissed on grounds of ripeness. This issue has been addressed by several circuit courts.[42]

C. Discovery

Because of the fact-intensive nature of the undue hardship question, the parties' ability to use discovery to marshal supporting evidence may ultimately prove one of the

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1227, 1230 (8th Cir. 2011) ("The debtor has the burden of establishing undue hardship by a preponderance of the evidence.").

[40] *See*, *e.g.*, *In re* Mehta, 310 F.3d 308 (3d Cir. 2002); *In re* Renshaw, 222 F.3d 82 (2d Cir. 2000); *In re* Nies, 334 B.R. 495 (Bankr. D. Mass. 2005).

[41] Rumer v. American Educ. Servs. (*In re* Rumer), 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012); Raymond v. Northwest Educ. Loan Ass'n (*In re* Raymond), 169 B.R. 67 (Bankr. W.D. Wash. 1994); *In re* Stone, 199 B.R. 753 (Bankr. N.D. Ala. 1996).

[42] Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 41 (4th Cir. 2003) (declining to adopt a "hard and fast rule" forbidding an early adversary proceeding); Rubarts v. First Gibralter Bank (*In re* Rubarts), 896 F.2d 107 (5th Cir. 1990) (finding it preferable to delay the adversary proceeding until close to the discharge); Bender v. Educ. Credit Mgmt. Corp. (In re Bender), 368 F.3d 846 (8th Cir. 2004) (same); Educ. Credit Mgmt. Corp. v. Coleman (*In re* Coleman), 560 F.3d 1000 (9th Cir. 2009) (finding the doctrine of ripeness did not prevent the undue hardship determination in advance of the discharge).

keys to success in a § 523(a)(8) action. At trial, the judicially developed tests for undue hardship may require the debtor to prove specific facts about his current income and expenses, employment history, family circumstances, and student loan payment history. The parties will also need predictive evidence relevant to the debtor's future financial condition, a category of information that potentially includes evidence of the debtor's employment prospects, mental health status, or physical condition. Much of this information will be in the debtor's possession, and the student loan creditor can use discovery to obtain documents, depose the debtor and the debtor's witnesses, and explore other potential evidence relative to these questions.[43] The creditor, on the other hand, may have superior or differing information about the debtor's payment history and outstanding loan balance. The debtor can use interrogatories and requests for production to uncover this information through discovery.[44]

D. Motions for Summary Judgment

The debtor/plaintiff has the burden of proof in actions seeking to discharge student loan debt under § 523(a)(8). Therefore, if the creditor files a motion for summary judgment, it is incumbent on the debtor to respond with specific evidentiary submissions creating a genuine issue of material fact as to each element of the undue hardship test. Undue hardship determinations are fact-dependent, and summary judgment offers the defendant a way to test the plaintiff's case and terminate insubstantial claims short of trial. The fact-intensive

[43] *In re* Williams, 492 B.R. 79 (Bankr. M.D. Ga. 2013) (debtor's expenses reported on Schedule J were supplemented by her responses to the defendant's discovery requests); Educ. Credit Mgmt. Corp. v. McLeroy (*In re* McLeroy), 250 B.R. 872 (N.D. Tex. 2000) (discovery requests sought documentation of debtor's church contributions and history of tithing); *cf*. Joyce v. Mountain Peaks Fin. Servs. (*In re* Joyce), 342 B.R. 385 (Table), 2005 WL 3946869 (1st Cir. B.A.P. 2005) (discovery issue not addressed because raised on appeal for first time).

[44] United Student Aid Funds, Inc. v. Roberts (*In re* Roberts), 376 Fed. Appx. 398 (5th Cir. 2010) (discovery request sought to substantiate the amount of the debt).

nature of undue hardship indicates that cases are likely to survive to trial, however, if the plaintiff can proffer credible submissions in support of his claim.[45]

Summary judgment is always a two-pronged inquiry, gauging (1) whether there is a genuine dispute as to any material fact, and (2) whether the moving party is entitled to judgment as a matter of law. In adversary proceedings filed under § 523(a)(8), both of these questions require the court to refer to the substantive law of undue hardship. Depending on the district, this means that the court must determine whether it appears that the plaintiff will be able to satisfy either the totality of the circumstances test used in the First and Eighth Circuits,[46] or the three elements of the *Brunner* test adopted in nine other circuits.[47]

In courts that apply the widely-used *Brunner* test, the debtor/plaintiff has the burden of substantiating the following at summary judgment:

> (1) she cannot maintain a minimal standard of living and repay the loans;
> (2) additional circumstances exist that illustrate she will not be able to repay the loans for a substantial part of the repayment period;
> (3) she attempted to repay the loans in good faith.[48]

The first *Brunner* factor looks to the debtor's current income and expenses, a straightforward set of facts that may be difficult to dispute. In *In re Wills*, for example, the court considered the debtor's bankruptcy schedules and discovery responses and found "no doubt" that the plaintiff had the current financial ability to repay his student loans and maintain his current standard of living.[49] The second and

[45] Traversa v. Educ. Credit Mgmt. Corp., 386 B.R. 386 (D. Conn. 2008) (appellate court recounted that bankruptcy judge had denied summary judgment for plaintiff "because determinations of undue hardship under 11 U.S.C. § 523(a)(8) 'are highly fact sensitive'").
[46] *See* Lovell v. Iowa Student Loan Liquidity Corp. (*In re* Lovell), 2012 WL 1252594 (Bankr. N.D. Iowa 2012) (denying creditor's motion for summary judgment because genuine issues of material fact existed under the totality of the circumstances test).
[47] *See* note 31 and accompanying text, *supra*.
[48] Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 398 (4th Cir. 2005).
[49] Wills v. Sallie Mae Servicing (*In re* Wills), 2010 WL 1688221, at *4 (S.D. Ind. 2010) (granting defendant's motion for summary judgment).

third *Brunner* factors require a more detailed and uncertain factual inquiry and are, accordingly, more likely to preclude the entry of summary judgment.

The second *Brunner* factor requires the debtor to prove additional circumstances indicating that his straitened circumstances are likely to persist into the future. These additional circumstances "may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents," or other circumstances beyond the debtor's control.[50] At summary judgment, evidence of the debtor's age, health, education, and employment history will likely be relevant to this factor.[51] And, because this factor is forward-looking, the debtor will be required to show that these conditions will not improve over the life of the loan. Not only will this be difficult for the debtor to show, courts have been willing to grant summary judgment for the creditor when the debtor's showing is weak.[52]

The third *Brunner* factor requires a debtor to show that she has made good faith efforts to repay her student loans. Good faith is typically determined by looking at the debtor's past payment history on the loans. At summary judgment, this may require the debtor to show that she has made payments during periods of

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[50] Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005).

[51] For example, in Geyer v. U.S. Dept. of Educ. (*In re* Geyer), 334 B.R. 129 (S.D. Cal. 2006), the court cited the second *Brunner* prong and granted the defendant's motion for summary judgment. The parties' submissions showed that the debtors were well-educated, in good health, and had no dependents. The female debtor spoke three languages and had published two books. Both debtors had an academic bent and "less than complete dedication to retaining employment," having voluntarily given up jobs to volunteer on an archeological dig in Israel. In addition, they had entered an Income Contingent Repayment Plan that required no payments at all.

[52] Marlow v. U.S. Dept. of Educ. (*In re* Marlow), 2013 WL 3515726 (E.D. Tenn. 2013). (Debtor was a healthy, 31-year old, law school graduate who had been barred from practice on character and fitness grounds. The court found him capable of future gainful employment and noted that the denial of his law license was the result of his own action). Duval v. IRS (In re Duval), 2012 WL 1123041 (Bankr. S.D.N.Y. 2012). (Dentist claimed that his income was lower than expected because his practice primarily accepted Medicaid patients. The court found it possible he could move to a high-paying practice in the future).

employment.[53] In a number of recent cases, courts have also examined whether the debtor has applied for an income contingent or other alternative repayment plan.[54] Although most courts do not require a debtor to participate in an alternative payment plan, they have found the debtor's repayment choices relevant to good faith on summary judgment.[55]

E. Evidence Issues at Trial

If the case survives summary judgment and goes to trial, the plaintiff debtor will have the burden of proving every element of undue hardship by a preponderance of the evidence. The Federal Rules of Evidence apply in bankruptcy adversary proceedings, and many of the distinctive issues that arise in the trial of a § 523(a)(8) claim will involve evidentiary questions that arise as the debtor attempts to prove undue hardship. Typically, the debtor will offer his own testimony as evidence, but the outcome of the trial is likely to depend on the debtor's ability to support and corroborate his own testimony with other forms of evidence.

Fact issues about the debtor's current income and expenses, as well as the debtor's student loan payment history, can be addressed by the debtor's testimony and bolstered with documentary evidence. For example, in *Barrett*, the bankruptcy court heard testimony from the debtor and also admitted the following documents: the debtor's tax returns from three preceding years, Schedules I and J filed with his petition, a print-out of a search result from

[53] *Wills*, *supra* note 48 (debtor's minimal payments on her student loans did not show good faith effort to repay).
[54] *See, e.g.,* Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353 (6th Cir. 2007) (declining to adopt a per se rule); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320 (11th Cir. 2007) (accord).
[55] Straub v. Sallie Mae (*In re* Straub), 435 B.R. 312, 317 (Bankr. D.S.C. 2010). "Evidence of good faith may be found where a debtor has sought consolidation offered a compromise payment, or otherwise offered to pay or settle the obligation in a meaningful manner." *See also Marlow*, *supra* note 51 (because debtor had declined to apply for an income contingent repayment plan, he had not used all available recourses to repay the loans).

the Department of Education's Interactive Repayment Calculator, and a copy of the Poverty Guidelines published in the Federal Register.[56] This type of evidence is particularly well-suited to meet the debtor's burden under the first and third prongs of the *Brunner* test, as well as under the first and second components of the totality of the circumstances test.

More difficult evidentiary issues have arisen in conjunction with the second prong of the *Brunner* test, which requires the debtor to prove additional circumstances indicating that the inability to repay will persist for a significant portion of the repayment period. Although *Brunner* is not followed in the First and Eighth Circuits, debtors there have a similar burden of showing that the "current inability to maintain a minimal standard of living, if forced to repay the debt, will continue into the future."[57] Debtors typically try to satisfy the burden of proving the persistence of conditions into the future with evidence of physical illness or another medical condition, psychiatric disorder, or some other special situation that will continue to interfere with the debtor's ability to earn a living.[58]

When the debtor's future mental or physical condition is an issue, her case becomes much stronger when she is able to corroborate her own testimony with testimony from an expert witness. Although the debtor may be competent to testify to her present condition, expert testimony is helpful in establishing the debtor's future prognosis, a key to showing that her condition is likely continue during the repayment period.[59]

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[56] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358 (6th Cir. 2007).
[57] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 192 (1st Cir. 2006).
[58] Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878 (9th Cir. 2006) (debtor cited learning disability as "additional circumstances").
[59] *Nash, supra* note 56, at 194. The court noted that the debtor had submitted no expert evidence to support her own prognosis that her bipolar illness was unlikely to abate. The First Circuit affirmed the bankruptcy judge's finding that the debtor's evidentiary showing was insufficient. *See also* Kelsey v. Great Lakes Higher Educ. Corp. (*In re* Kelsey), 287 B.R. 132 (Bankr. D. Vt. 2001).

In re Reynolds, from the Eighth Circuit, illustrates the value of expert testimony.[60] In *Reynolds*, the debtor's psychiatric expert testified about her illness, and then gave additional testimony that her student loans "caused her stress," left her "overwhelmed by indebtedness," and "made it harder for her to sustain improvement in her depressive illness."[61] Based on this testimony, the bankruptcy court found that "the mere existence of this debt burden clearly is a significant block to the debtor's recovery from mental illness."[62] This judgment was affirmed on appeal.

Despite the desirability of expert testimony as a way to bolster the debtor's case, the cost of retaining an expert places this type of evidence beyond the means of many debtors. For this reason, most courts do not impose a per se requirement that debtors substantiate medical conditions with expert testimony in § 523(a)(8) actions. In *Barrett*, for example, the Sixth Circuit agreed with the Bankruptcy Appellate Panel that "a requirement of corroborating evidence 'when Plaintiff is unable to afford expert testimony or documentation imposes an unnecessary and undue burden on Plaintiff in establishing his burden of proof,' *if corroborating evidence is understood to be limited to expert medical testimony*."[63] Many courts have echoed this view.[64]

Although expert testimony may not be a requirement, most courts look for corroborating evidence beyond the debtor's own testimony. In *Barrett*, the bankruptcy court described Barrett as "credible" and found that he "testified informatively and cogently about his medical history," explaining in "great detail . . . how his condition affects his health and

[60] Reynolds v. Penn. Higher Educ. Assistance Agency (*In re* Reynolds), 425 F.3d. 526, 528-29 (8th Cir. 2005).
[61] *Id*. at 528.
[62] Reynolds v. Penn. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823, 837 (Bankr. D. Minn. 2004).
[63] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 360 (6th Cir. 2007) (emphasis added).
[64] Educ. Credit Mgmt. Corp. v. Mosley *(In re* Mosley), 494 F.3d 1320 (11th Cir. 2007); Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856 (Bankr. E.D. Va. 2006); Swinney v. Academic Fin. Servs. (*In re* Swinney), 266 B.R. 800 (Bankr. N.D. Ohio 2001).

prevents him from working."[65] His testimony, however, had certain limits. Although he was competent to testify about his diagnosis and how his condition impacted his life and work, he was not competent to testify about medical issues like his prognosis and the cause of his illness.

To prevail, it was necessary for Barrett and his counsel to provide the court with additional evidence to corroborate his testimony. In the absence of an expert witness, the court accepted a properly authenticated letter from his treating physician. The debtor also proffered tax returns that substantiated his persistent inability to earn income because of his health problems, as well as evidence of economic hardship deferments on his student loans for four consecutive years. This evidence was not contradicted by the creditor, prompting the Sixth Circuit to hold: "[w]here, as here, the debtor testifies credibly and without rebuttal about his medical history, his current health, his employment history, and his ability to perform work functions – and that testimony is corroborated in part by a letter from the debtor's treating physician and tax records – the debtor has offered proof sufficient to support a finding of undue hardship."[66]

The Eleventh Circuit adopted and arguably expanded *Barrett*'s holding in *In re Mosley*.[67] Mosley had incurred $45,000 in student loans while in college. As a student, he had joined the Reserve Officers' Training Corps and was injured when he fell from a tank. He was forced to resign his commission and failed to complete college. He testified that the physical limitations from his injury led to depression and heavy drinking. He had been hospitalized for depression and Veteran's Affairs had placed him on medication that left him

[65] *Barrett*, *supra* note 62, at 361.
[66] *Id*. at 363.
[67] *Mosley*, *supra* note 63.

"unable to function." His monthly income was $210 in VA disability, he had been homeless for years, and he had no car.

Mosley, who was not represented by counsel, was the only witness at his § 523(a)(8) trial. In addition to his own testimony, he offered a letter from an Emory University professor stating Mosley's medical diagnosis. The bankruptcy judge excluded several other doctors' letters that Mosley attempted to introduce because they had not been properly authenticated. The court found little probative value in the one letter admitted and, instead, primarily relied on the debtor's testimony to conclude that his illnesses were likely to impair his future ability to repay the loans.

On appeal, the creditor argued that corroborating medical evidence beyond the debtor's testimony is required when medical conditions are used as "additional circumstances" under the second prong of *Brunner*. The Eleventh Circuit held that additional evidence was not necessary, and declined "to adopt a rule requiring Mosley to submit independent medical evidence to corroborate his testimony that his depression and back problems were additional circumstances likely to render him unable to repay his student loans."[68] The court noted that the debtor did not testify about his medical prognosis, but instead testified from personal knowledge about how his condition and medications have made it difficult for him to work.

The evidentiary record in *Mosley* is slender, consisting only of the debtor's testimony, one supporting letter, and Social Security earnings statements that corroborated that he had not held a job. Despite this, the Eleventh Circuit found "the bankruptcy court had before it sufficient evidence to support a finding that there is no reason to believe that Mosley's condition will improve in the future. Mosley's evidence of

[68] *Id*. at 1325.

medical problems, lack of skills and dire living conditions support the bankruptcy court's finding that it is highly unlikely he will become unable to repay his loans."[69]

The opinions in *Mosley* and *Barrett* are attributable in part to the "clear error" standard of review that appellate courts must apply to the bankruptcy judge's findings of fact in these cases. Under this standard, the appellate court is likely to defer to the lower court's findings of fact unless the appellate court is willing to announce a new, and stricter, evidentiary rule that will apply to all future cases. In declining the invitation to adopt a per se evidentiary requirement in § 523(a)(8) cases, the appellate courts may be reflecting the fact that bankruptcy courts are, in fact, already quite demanding in their assessment of the debtor's evidentiary submissions.[70]

F. Standard of Appellate Review

A bankruptcy judge's findings of law in a § 523(a)(8) adversary proceeding are subject to *de novo* review on appeal.[71] However, the judge's findings of fact are subject to more lenient clear error review and "must stand if reasonably supported."[72] A majority of the circuit courts of appeal have held that the undue hardship determination under § 523(a)(8) is a question of law subject to de novo review.[73] Two other circuits, the Fourth and Eleventh, have found that this determination is a mixed question of law and fact.[74]

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[69] *Id*. at 1327.

[70] In a majority of reported cases, the debtor's evidentiary submissions are found insufficient. *See*, *e.g*., Traversa v. Educ. Credit Mgmt. Corp. (*In re* Traversa), 2010 WL 4683920 (D. Conn. 2010); Joyce v. Mountain Peaks Fin. Servs. (*In re* Joyce), 2005 WL 3946869 (1st Cir. B.A.P. 2005); Pobiner v. Educ. Credit Mgmt. Corp. (*In re* Pobiner), 309 B.R. 405 (Bankr. E.D.N.Y. 2004); Burkhead v. U.S. (*In re* Burkhead), 304 B.R. 560 (Bankr. D. Mass. 2004); Pace v. Educ. Credit Mgmt. Corp. (*In re* Pace), 288 B.R. 788 (Bankr. S.D. Ohio 2003); Daugherty v. First Tenn. Bank (*In re* Daugherty), 175 B.R. 953 (Bankr. E.D. Tenn. 1994).

[71] Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188 (1st Cir. 2006); Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 425 F.3d 526 (8th Cir. 2005).

[72] *Id*.

[73] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d. Cir. 1987); Brightful v. PHEAA (*In re* Brightful), 267 F.3d 324 (3d Cir. 2001); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353 (6th Cir. 2007); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993); Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 553 (8th Cir. 2003); Rifino

IV. Adjusting Student Loan Debt Outside of Section 523(a)(8)

As discussed above, student loans - both public and private - are presently nondischargeable under § 523(a)(8) unless the debtor can prove undue hardship. The current law is the product of a series of amendments to the Bankruptcy Code that roughly parallels the development of the modern student loan industry.[75] These amendments have made § 523(a)(8) increasingly creditor-friendly, culminating with a 2005 amendment added by BAPCPA extending nondischargeability to student loans made by private lenders. The enormous expansion in the amount of student loan debt has, at the same time, presented bankruptcy lawyers and judges with individual debtors who are genuinely unable to repay the full amount of their educational debt.[76] The tension between the restrictive language of the Code and the reality of their caseload has created pressure on both judges and lawyers to push the law in new directions to allow relief to overburdened debtors. This section examines the resulting cases, dividing them into the following categories: (1) partial discharge of educational debt, (2) separate classification of student loan debt in chapter 13

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v. U.S. (*In re* Rifino), 245 F.3d 1083 (9th Cir. 2001); Woodcock v. Chemical Bank (*In re* Woodcock), 45 F.3d 363 (10th Cir. 1995).

[74] Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393 (4th Cir. 2005); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320 (11th Cir. 2007).

[75] The first provision limiting the discharge of student loan debt did not appear until 1976, when certain government-backed student loans were made nondischargeable under the former Bankruptcy Act for a period of 5 years after the date the loan first became due. During this 5-year period, student loans continued to be dischargeable if disallowing the discharge would impose an undue hardship on the debtor or his dependents. These provisions were carried forward into the Bankruptcy Code of 1978, and the 5-year provision was expanded to include a wider array of educational loans (any educational loan funded, made, insured, or guaranteed by a governmental unit or funded by a nonprofit educational institution). The 5-year limit was increased to 7 years in 1990. The 7-year rule was eliminated in 1998, leaving undue hardship as the only avenue for the discharge of most educational debt. *See*, *e.g*., Cox v. Hemar Ins. Corp. of Am. (*In re* Cox), 338 F.3d 1238, 1242-43 (11th Cir. 2003) (detailing the evolution of § 523(a)(8)). Student loans made by private lenders, as opposed to governmental units or nonprofit institutions, were made nondischargeable by BAPCPA in 2005.

[76] *See*, *e.g.*, Carnduff v. United States Dept. of Educ. (*In re* Carnduff), 367 B.R. 120 (9th Cir. B.A.P. 2007). After discharging $215,000 in private student loan debt, the debtors, a married couple, brought a second action to discharge an additional $350,000 in student loans owed to the government, for a stunning total of $565,000 in educational debt. The court allowed a partial discharge, finding it impossible for them to repay their loans in full "unless one or both of the debtors wins the lottery, receives a substantial inheritance, [or] finds a gold mine or a treasure trove in the backyard." 367 B.R. at 130.

plans, and (3) the possibility of using plan confirmation to obtain a discharge "by declaration."

A. Partial Discharge

A number of courts have been willing to discharge part of a debtor's student loan obligations when the facts do not support a finding that the entire obligation poses an undue hardship on the debtor. These cases are fact-driven. As the Sixth Circuit explained in *Hornsby v. Tennessee Student Assistance Corp. (In re Hornsby)*, a partial discharge of student loan debt may be appropriate "where facts and circumstances require intervention in the financial burden on the debtor, [and] an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act."[77]

Hornsby was the first circuit court decision upholding the bankruptcy courts' equitable power to grant a partial discharge of student loan debt under § 105(a)'s authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[78] *Hornsby*, however, did not squarely address the relationship between § 105(a) and § 523(a)(8). The Sixth Circuit revisited this issue in *Miller v. Pennsylvania Higher Education Assistance Agency (In re Miller)*, clarifying that § 105(a) provides no "independent rubric" and must be read in conjunction with § 523(a)(8) to evaluate when a partial discharge is appropriate.[79]

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[77] 144 F.3d 433, 439 (6th Cir. 1998).

[78] 11 U.S.C. § 105(a). A number of bankruptcy courts had previously used § 105(a) to grant a partial discharge of student loan debt – sometimes with no reference to § 523(a)(8). *See*, *e.g.*, Griffin v. Eduserv (*In re* Griffin), 197 B.R. 144 (Bankr. E.D. Okla. 1996) (relying on § 523(a)(8)); *In re* Brown, 18 B.R. 219 (Bankr. D. Kan. 1982) (no reference to § 523(a)(8)); *In re* Albert, 25 B.R. 98 (Bankr. D. Ohio 1982) (no reference to § 523(a)(8)).

[79] 377 F.3d 616, 622 (6th Cir. 2004).

A similar approach has been adopted in the Ninth, Tenth, and Eleventh Circuit Courts of Appeal.[80] While recognizing that the bankruptcy court's equitable powers do not allow it to ignore the specific statutory language found in § 523(a)(8), these four circuits hold that "§ 105(a) authorizes a bankruptcy court to grant a partial discharge where the undue hardship requirement of § 523(a)(8) is met as to part but not all of a student loan."[81]

Under these decisions, the bankruptcy court may not use its equitable powers to grant a partial discharge unless § 523(a)(8) has been satisfied as to some portion of the obligation. "To allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of § 523(a)(8) mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts."[82]

Lower courts outside these four circuits have been less uniform in their approach, with a number finding that the Code does not permit a partial discharge of student loan debt.[83] These decisions apply a strict approach and find that § 105(a) does not authorize the bankruptcy court "to use its equitable powers to achieve a result not contemplated by the Code, particularly where a specific section of the Code squarely addresses the issue before the court."[84] Courts that have allowed partial discharge without circuit authority have generally followed the approach of the circuits, looking to § 105(a) as a source of equitable

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[80] Saxman v. Educational Credit Management Corp. (*In re* Saxman), 325 F.3d 1168 (9th Cir. 2003); Alderete v. Educational Credit Management Corp. (*In re* Alderete), 412 F.3d 1200 (10th Cir. 2005); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003). The Third Circuit reversed the bankruptcy court's grant of a partial discharge in Faish v. Penn. Higher Educ. Assistance Agency (*In re* Faish), 72 F.3d 298 (3d Cir. 1995), however, it did so on factual grounds without discussion of the related law in an opinion devoted to the adoption of the *Brunner* test.

[81] *Miller*, 377 F.3d at 621, *quoting* Nary v. Complete Source (*In re* Nary), 253 B.R. 752, 767 (N.D. Tex. 2000).

[82] *Cox*, 338 F.3d at 1207.

[83] Pincus v. Graduate Loan Center (*In re* Pincus), 280 B.R. 303 (Bankr. S.D.N.Y. 2002); Young v. PHEAA (*In re* Young), 225 B.R. 312 (Bankr. E.D. Penn. 1998) (partial discharge sought by creditor to avoid discharge *in toto);* Skaggs v. Great Lakes Higher Educ. Corp. (*In re* Skaggs), 196 B.R. 865 (Bankr. W.D. Okla. 1996); Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294 (Bankr. N.D. Iowa 1995). *And see* Andreson v. Nebraska Student Loan Program, Inc. (*In re* Andreson), 232 B.R. 127 (8th Cir. B.A.P. 1999) (finding no authority in the Code for partial discharge, but declining to decide the issue).

[84] *Pincus*, *supra* note 9, at 312.

authority to soften the application of § 523(a)(8).[85] A small minority of courts, however, has been willing to draw the power for partial discharge solely from the language of § 523(a)(8).[86]

In courts that allow partial discharge, a final issue is the form that the partial discharge will take. When, as is typical, debtors owe more than one student loan, some decisions frame the partial discharge as a complete release from liability on some loans, while leaving the debtor entirely liable on the remaining loans.[87] Some courts have followed this "loan by loan" pattern without regarding this as a partial discharge, holding instead that each loan can be treated as a singular entity.[88] Still others reject this approach entirely, holding that student loans must be treated in the aggregate.[89]

Another set of courts has been willing to grant a partial discharge that is effectively a loan modification. These decisions either reduce the principal balance on the loans to a more manageable amount,[90] relieve the debtor from liability on interest and fees while

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[85] Stevenson v. Educational Credit Management Corp. (*In re* Stevenson), 463 B.R. 586 (Bankr. D. Mass. 2011) (looking to § 105(a)); Fraley v. U.S. Dept. of Ed., 247 B.R. 417 (Bankr. N.D. Ohio 2000); Fox v. Student Loan Mktg. Ass'n (*In re* Fox), 189 B.R. 115 (Bankr. N.D. Ohio 1995).

[86] *See*, *e.g*., Rivers v. United Student Aid Funds, Inc. (*In re* Rivers), 213 B.R. 616 (Bankr. S.D. Ga. 1997).

[87] Hinkle v. Wheaton College (*In re* Hinkle), 200 B.R. 690 (Bankr. W.D. Wash. 1996); Coutts v. Mass. Higher Educ. Corp. (In re Coutts), 263 B.R. 394 (Bankr. D. Mass. 2001); Gharavi v. U.S. Dept. of Educ. (In re Gharavi), 335 B.R. 492 (Bankr. D. Mass. 2006); Ledbetter v. U.S. Dept. of Ed. (*In re* Ledbetter), 254 B.R. 714 (Bankr. S.D. Ohio 2000) (following *Andreson*, *supra* note 9). *Cf. Young*, *supra* note 9, at 318 ("If a holder of student loans is prepared to stipulate that certain student loans are unconditionally dischargeable, leaving only a limited number of loans remaining as particularly nondischargeable, there would seem to be no way of stopping it from doing so."

[88] *See Andreson*, *supra* note 9 (although 2 of 3 student loans were discharged, the B.A.P held that this was not a partial discharge because each loan could be treated separately); Hollister v. University of N.D., 247 B.R. 485 (Bankr. W.D. Okla. 2000) (adopting the reasoning of *Andreson*); Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866 (Bankr. D.N.H. 2000).

[89] *Pincus*, *supra* note 9 (rejecting the "loan by loan" approach); *Young*, *supra* note 9; Raimondo v. New York State Higher Educ. Serv. Corp. (*In re* Raimondo), 183 B.R. 677 (Bankr. W.D.N.Y. 1995) (holding that equity requires equal treatment among student lenders).

[90] Hedlund v. Educational Resources Inst., Inc. (*In re* Hedlund), 468 B.R. 901 (D. Or. 2012). The bankruptcy court discharged all amounts owed in excess of $32,080. The district court reversed on the ground that debtor had failed to establish good faith as required by Brunner and *In re* Pena, 155 F.3d 1108 (9th Cir. 1998).

leaving the debtor liable on the principal,[91] impose a deferral,[92] or fashion another appropriate equitable remedy.[93] The variability of the remedy in partial discharge cases illustrates the difficulty that arises when courts fashion equitable amendments to the Code.

B. Separate Classification in Chapter 13

As in chapter 7, student loan debt is generally nondischargeable in chapter 13 cases and does not have priority status.[94] Despite this, debtors have sometimes used chapter 13 to treat student loan debts more advantageously than other unsecured debts. This is typically accomplished by classifying the student loan claims separately from other unsecured claims, then making the full contract payment directly to the student loan creditor while making a reduced pro rata payment to other unsecured creditors through the plan. [95]

The relevant provisions of the Code for this purpose are §§ 1322(b)(1) and (5).[96] Section 1322(b)(1) allows a chapter 13 plan to "designate a class or classes of unsecured claims, as provided in section 1122 of this title," with the proviso that classification "may not discriminate unfairly" against any class. Section 1322(b)(5) permits a chapter 13 plan to "provide for the curing of any default . . . and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

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[91] *Alderete*, *supra* note 6; Griffin v. Eduserv, 197 B.R. 144 (Bankr. E.D. Okla. 1996).
[92] Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman), 25 F.3d 356 (6th Cir. 1994) (student loans nondischargeable, but order stayed for 18 months); In re Roberson, 999 F.2d 1132 (7th Cir. 1993) (bankruptcy court's order deferring student loan payments for 2 years affirmed without discussion); Dennehy v. Sallie Mae (*In re* Dennehy), 201 B.R. 1008 (Bankr. N.D. Fla. 1996).
[93] In *Stevenson*, *supra* note 11, the court granted the debtor a prospective discharge of whatever debt remained at the conclusion of her participation in the Ford Program's Income Based Repayment Plan.
[94] 11 U.S.C. §§ 507 and 1328(a)(2).
[95] For example, the debtors in *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007), proposed to maintain their regular monthly payments to student loan creditors, while making only a 1% payout to other unsecured creditors.
[96] 11 U.S.C. § 1322(b)(10), a provision added by BAPCPA that limits the payment of interest on nondischargeable unsecured claims in chapter 13, is also a factor in some cases.

Because most student loans are long-term debts with payments extending beyond the life of the plan, they fall within the subset of obligations governed by § 1322(b)(5). Read in isolation, this subsection permits the debtor to maintain contract payments on her student loans, while relegating other unsecured debts to a lower pro rata payment as a separate class. Because this provides preferential treatment to student loan creditors, however, the issue then becomes whether § 1322(b)(5) controls over the conflicting "unfair discrimination" provision found in § 1322(b)(1).

This problem has been addressed by a number of courts, with a minority of reported decisions finding that subsection (b)(5) trumps (b)(1), thereby completely excepting long-term debt payments from the unfair discrimination analysis of subsection (b)(1).[97] Courts that accept this position allow the plan to cure defaults and maintain payments on student loans without regard for the position of other unsecured creditors. Under the majority view, however, subsection (b)(5) must be read in conjunction with (b)(1), with the result that a plan that provides for full payment of student loan obligations under (b)(5) must then be analyzed for unfair discrimination as required by (b)(1).[98]

The Code does not define "unfair discrimination," and courts have developed several multi-factor tests to enable this analysis. The most widely used test, stated by the Eighth Circuit in *In re Leser*,[99] has four components: "(1) whether the discrimination has a reasonable basis, (2) whether the debtor can carry out a plan without the discrimination, (3) whether the discrimination is proposed in good faith, and (4) whether the degree of

[97] *See*, *e.g.*, *In re* Johnson, 446 B.R. 921 (Bankr. E.D. Wisc. 2011); *In re* Truss, 404 B.R. 329, 333 (Bankr. E.D. Wisc. 2009). ("If the plan provides for the cure of a default and maintenance of payments on a debt, the terms of which extend beyond the term of the plan, it is not for the court to determine whether this is fair to the other creditors or not.")
[98] *See*, *e.g.*, *In re* Zeigafuse, 2012 WL 1155680 (Bankr. W.D. Wyo. 2012); *In re* Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012); *In re* Harding, 423 B.R. 568 (Bankr. S.D. Fla. 2010); *In re* Simmons, 288 B.R. 737 (Bankr. N.D. Tex. 2003).
[99] Mickelson v. Leser (*In re* Leser), 939 F.2d 669 (8th Cir. 1991).

discrimination is directly related to the basis or rationale for the discrimination."[100] A variation of the *Leser* test was adopted in *In re Husted*, which added a fifth factor: an examination of "the difference between what the creditors discriminated against will receive as the plan is proposed, and the amount they would receive if there were no separate classification."[101]

The *Leser* test has been criticized as offering "no real direction for determining the fairness of discrimination in any given instance,"[102] and other courts have attempted to develop more concrete alternatives.[103] The most prominent of these alternatives is the "baseline" test enunciated by the First Circuit BAP in *In re Bentley*.[104] *Bentley* looks to the "principles and structure of Chapter 13" as the "baseline against which to evaluate discriminatory provisions for unfairness."[105] The decision then enunciates four core principles: (1) absent an express grant of priority, unsecured creditors should share equally, (2) student loan obligations are not priority debts, (3) unless unsecured creditors are paid in full, the chapter 13 debtor must devote all disposable income to the plan, and (4) do the facts indicate that the debtor's interest in a "fresh start" trump the creditors' claim to a pro rata share.

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[100] *In re* Webb, 370 B.R. 418, 423 (Bankr. N.D. Ga. 2007).
[101] 142 B.R. 72, 74 (Bankr. W.D.N.Y. 1992).
[102] Bentley v. Boyajian (*In re* Bentley), 266 B.R. 229 (1st Cir. B.A.P. 2001).
[103] *See*, *e.g*., *In re* Brown, 152 B.R. 232 (Bankr. N.D. Ill.), *rev'd*, 162 B.R. 506 (N.D. Ill. 1993); *In re* Colfer, 159 B.R. 602 (Bankr. D. Me. 1993). The issue was approached by the Seventh Circuit in *In re* Crawford, 324 F.3d 539, 542 (7th Cir. 2003), which opined: "We haven't been able to think of a good test ourselves. We conclude, at least provisionally, that this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decision maker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of the relevant law, which in this case is Chapter 13 of the Bankruptcy Code."
[104] *Supra* note 28.
[105] *Id*. at 240.

Regardless of the test that is applied, most courts have concluded that discrimination based on nothing more than nondischargeability is unfair.[106] However, "if the discrimination in question benefits the very creditors who are being discriminated against," for example, by enabling the debtor to work, it may be considered fair.[107] Some courts have also found discrimination justifiable when, absent direct payments, the debtor would emerge from chapter 13 owing more on their student loans than they did before the case was filed.[108]

BAPCPA added a new wrinkle to this analysis by requiring that the projected disposable income of above-median income chapter 13 debtors be calculated with reference to the "means test" of § 707(b)(2), as opposed to the real numbers reflected on the debtor's schedules I and J. Section 707(b)(2) requires the debtor to use hypothetical amounts specified in National and Local Standards issued by the IRS, creating the possibility that a debtor's projected disposable income under § 707(b)(2) might be less than his actual discretionary income. When this occurs, it is possible for the above-median debtor to devote 100% of his projected disposable income to unsecured creditors in the plan and still retain sufficient excess "discretionary" income to make contract payments on his student loans. This strategy has withstood challenge, even when student loans are paid in full and the dividend to other unsecured creditors is as low as 0.86%.[109]

C. *United Student Aid Funds, Inc. v. Espinosa*: Discharge by Declaration

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[106] Groves v. LaBarge (*In re* Groves), 39 F.3d 212 (8th Cir. 1994); *In re* Gonzalez, 206 B.R. 239 (Bankr. S.D. Fla. 1997).

[107] *In re* Kalfayan, 415 B.R. 907, 910 (Bankr. S.D. Fla. 2009) (debtor's license to practice optometry was contingent on remaining current on her student loans).

[108] *Webb*, *supra* note 26.

[109] *In re* Abaunza, 452 B.R. 866 (Bankr. S.D. Fla. 2011) (plan did not unfairly discriminate when projected disposable income resulted in dividend of only 0.86%); *In re* King, 460 B.R. 708 (Bankr. N.D. Tex. 2011); *In re* Sharp, 415 B.R. 803 (Bankr. D. Colo. 2009); *In re* Orawsky, 387 B.R. 128 (Bankr. E.D. Penn. 2008).

Espinosa presents one final (albeit improper) strategy for dealing with student loan debt.[110] The debtor in *Espinosa* discharged the interest on his student loan debt in a chapter 13 plan without filing an adversary proceeding. Although the creditor had notice of the plan treatment, it did not file an objection to confirmation. The creditor then attempted to collect the interest three years after the debtor's discharge, and the debtor filed a motion asking the bankruptcy court to enforce its discharge order. The creditor responded with a cross-motion under Rule 60(b)(4) asking that the court to set aside the confirmation order as void.

In a unanimous opinion, the Supreme Court held that the confirmation order was a final judgment that was not rendered void by the bankruptcy court's "legal error" in discharging a student loan obligation without a finding of undue hardship. The bankruptcy court's error was not jurisdictional and did not violate the creditor's due process rights.[111] In reaching this holding, the Court stated that the bankruptcy court had an obligation to avoid this type of error by independently determining undue hardship, even without objection or appearance by the creditor. The Court also stressed that the specter of sanctions should deter "bad faith" practices by debtors and their counsel.

[110] 130 S. Ct. 1367 (2010).
[111] Section 523(a)(8)'s undue hardship requirement is a statutory precondition to discharge that does not limit the court's jurisdiction. And, despite the absence of a summons and complaint, due process was satisfied by the creditor's actual notice of the contents of the plan.