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CONCURRENT SESSION

Bad Math: Student Loan Challenges, Bankruptcy Alternatives and Discharge

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BAD MATH: STUDENT LOAN CHALLENGES, BANKRUPTCY ALTERNATIVES & DISCHARGE

No.	Document
1	Federal Student Loans: Practical Alternatives to Repayment of Student Loan Debt and Administrative Remedies
2	Discharging Student Loans
3	*Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395 (2nd Cir. 1987).
4	*In re Edwards*, 3:14-bk-16806-PS, 2016 WL 1317421, (Bankr. D. Ariz. Mar. 31, 2016)
5	*In re Christoff*, 527 B.R. 624 (9th Cir. BAP 2015)
6	523(a)(8)(A)(ii) and (b): *Isaksson*, 2:08-ap-00345-CGC (Bankr. D. Ariz. Mar. 20, 2009)
7	*An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard* by Jason Iuliano, 86 Am. Bankr. L.J. 495 (2012)
8	*Student Loan Bankruptcy and Meaning of Educational Benefit* by Jason Iuliano, 93 Am. Bankr. L.J. 277 (2019)
9	S. 1414, (116th Congress, 1st session) – A Bill to provide bankruptcy relief for student borrowers (May 9, 2019)

FEDERAL STUDENT LOANS:

PRACTICAL ALTERNATIVES TO REPAYMENT OF STUDENT LOAN DEBT & ADMINISTRATIVE REMEDIES

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I. GENERAL OVERVIEW OF STUDENT LOANS

A. Higher Education Act of 1965: In 1965, Congress, in response to a perceived need for financial assistance to students in higher education, passed the Higher Education Act of 1965 ("HEA"). The purpose of the HEA is to "keep the college door open to all students of ability," regardless of socioeconomic background.

B. Types of Student Loans:

1. **Federal Student Loans.** HEA governs two federally backed student loan programs: the Federal Family Education Loan Program ("FFEL Program") and the Direct Loan Program ("Direct Loan Program"). Under the Health Care and Education Reconciliation Act of 2010, Congress eliminated new loans under the FFEL Program, effective July 1, 2010. Total debt in the two federal student loan programs is around $1.5 trillion dollars.

   - **FFEL Program Loans:** Under the FFEL Program, eligible lenders made guaranteed loans on favorable terms to students or parents to help finance student education. The loans were guaranteed by guaranty agencies (state agencies or private non-profit corporations), which are ultimately reinsured by the United States Department of Education ("ED").

   - **Health and Human Services Loans**: The United States Department of Health and Human Services ("HHS") also administered a student loan program, Health Education Access Loan program, ("HEAL"), for borrowers engaged in health-related studies. This program is no longer active. Like FFEL Program loans, HEAL loans are also presumptively nondischargeable. Courts have construed the dischargeability standard of "unconscionability" for HEAL loans as being a "higher standard" than that of FFEL Program/Direct Loan Program loans, which require a showing of "undue hardship." On July 1, 2014, loan administration under the HEAL Program was transferred from HHS to ED. This has enabled HEAL loans to be eligible for consolidation along with FFEL Program loans in the Direct Loan program.

   - **Direct Loan Program Loans:** Under the Direct Loan Program, ED makes loans directly from the federal treasury to student and parent borrowers.

2. **Private Loans**: Loans made from traditional lenders, at commercial rates of interest. They are often taken out by borrowers who have exhausted their federal limits or for other reasons. Some differences include:
   - Co-signers are often required. *See* Consumer Financial Protection Bureau, "Mid-year update on student loan complaints," April 2014 ("Approximately 90% of private student loans were co-signed in 2011").
   - No federal dollars are at stake.
   - No comprehensive regulations apply to the servicing or administration of private student loans.
   - Private loans are not eligible for the administrative relief discussed below and may not be consolidated under federally backed consolidation programs. However, there are private consolidation programs available.
   - Since 2005, however, private loans that are "qualified education loans" under 26 U.S.C. § 221(d)(1) enjoy the presumption of nondischargeability under 11 U.S.C. § 523(a)(8).

II. NONBANKRUPTCY ADMINISTRATIVE RELIEF FOR STUDENT LOANS[1]

There are numerous administrative remedies for student loan borrowers to consider in lieu of seeking discharge under § 523(a)(8). Unlike relief under 11 U.S.C § 523(a)(8), borrowers may be entitled to administrative relief regardless of whether they've filed bankruptcy.

Most of these administrative options require administrative determinations and, thus, should not be the basis for claim objections or adversary proceedings in a bankruptcy context. Borrowers, who want to challenge or appeal from a ruling on an administrative remedy must seek relief though the HEA, the Administrative Procedures Act, and/or Federal District Court.

A. Total and Permanent Disability Discharge ("TPD"):

1. **Eligibility Criteria:** Borrowers may be eligible to have their federal student loan debt discharged because of a total and permanent disability. Eligibility Criteria: A person meets TPD eligibility if that individual (1) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death, (ii) has lasted for a continuous

[1]The provisions described herein are applicable to administrative relief available under the HEA. For full detail of requirements necessary for relief, see 34 C.F.R. §§ 682.100 *et seq.*, 685.100 *et seq*. These administrative options are available for both FFEL Program and Direct Loan Program loans unless otherwise noted.

period of not less than 60 months, or (iii) can be expected to last for a continuous period of not less than 60 months; or (2) has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability. 34 C.F.R. § 682.200(b); see also 34 C.F.R. 682.402.

2. **Requesting a TPD Discharge**: There are three ways to request agency review for a TPD discharge:

   a. **Doctor certification on a TPD application:** A medical doctor or doctor of osteopathy must certify that the borrower meets the definition of TPD as described in 34 C.F.R. § 682.200(b).

   b. **Social security award letter:** Borrowers who receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits may be able to use their Social Security Administration (SSA) award letter in lieu of obtaining a separate doctor certification on the TPD application. The SSA award letter must state that the borrower's next scheduled disability review will be *five or more years* from the date of the borrower's most recent SSA disability determination. Borrowers may also submit a Benefits Planning Query ("BPQY") if the SSA award letter is unavailable. The BPQY must also state that the next disability review will be *within five to seven years*. A BPQY summary can generally be obtained by calling 800.772.1213. Borrowers must still complete their section of the TPD application and submit it with their SSA award letter or their BPQY summary.

   c. **Certification of a service-connected disabilities:** Veterans who have a 100% service-connected disability are immediately eligible for discharge of their federal student loan debt without further doctor certification. Veterans only have to submit documentation from the U.S. Department of Veterans Affairs (VA) showing that the VA has determined that the borrower is unemployable due to a service-connected disability (an individual unemployability determination) or that the borrower has a service-connected disability that is 100% disabling.

3. **ED Notification and Application System**: Recognizing that Social Security designation is a good indicator of eligibility for a TPD discharge, ED developed a data match program to identify borrowers who also receive disability payments and have the specific designation of Medical Improvement Not Expected ("MINE") which would qualify them for a TPD. Approximately 387,000 borrowers were positively identified in

the first set of matches in December 2015 and March 2016. Beginning in April 2016, borrowers who were positively identified in the match began receiving a customized letter explaining that they are eligible for loan forgiveness and the steps needed to receive a discharge. Unlike other borrowers, those identified through the data match will not be required to submit documentation of their eligibility. Instead, they are eligible for a streamlined process under which they simply sign and return the completed application. Data matches are done quarterly now to ensure newly eligible borrowers are aware of this option.

4. **Processing of TPD applications**. Nelnet is the disability servicer on behalf of ED for all TPD applications. Borrowers can seek a TPD discharge of all federally-backed loans by submitting a single TPD discharge application directly to ED/Nelnet which will apply to all federal loan holders. Borrowers may initiate the TPD process by going to www.disabilitydischarge.com. Once informed of a TPD request, ED/Nelnet notifies each loan holder(s) and an automatic 120-day hold on collection activity begins.

   If the TPD request is approved, the account is immediately discharged by ED. However, for borrowers who verified their disabilities based on SSA documentation or physician certification, after the TPD request is approved, the loans are subject to monitoring for three years post-discharge. During this three-year period, borrowers cannot earn more individually than 100% of the federal poverty guidelines for a family of two (in 2019 = $16,910) and cannot obtain any new federal student loans. Typically, Nelnet (ED's Disability Servicer) will contact the borrower when the three-year mark is approaching to update the disability status and financial status to ensure that the borrower's discharge criteria has not changed. All TPD discharges after January 1, 2018 are non-taxable.

B. Closed School Discharge: Borrowers whose school closed before they could complete the program of study may be eligible for discharge. The borrower must show they were enrolled at the time of closure or that they withdrew from the school not more than 120 days prior to the date the school closed and that they were unable to complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.

C. False Certification/Identity Theft Discharge: A borrower's student loans can be discharged if a school: (1) falsely certified the borrower's (a) eligibility for a federal student loan on the basis of ability to benefit from the education, (b) eligibility generally, but because of a physical or mental condition, age, criminal record, or other reason, the borrower would not meet state requirements for employment in the occupation in which the borrower was being trained; (2) signed the borrower's name without authorization by the borrower on the loan application or promissory note; or (3) because of identity theft, another person obtained a federal student loan using the borrower's identity. 34 C.F.R. § 682.402(e).

D. Death Discharge: If an individual borrower dies, or the student for whom a parent received a PLUS loan dies, the obligation of the borrower is discharged from any additional payments. Borrower (or a representative) can produce an original or certified copy of the death certificate. The lender/guarantor may not collect from the student's estate or any other endorser.

E. Teacher Loan Forgiveness Program: Available to borrowers who took out loans after October 1, 1998 to borrowers and have taught full-time for five consecutive years at a designated low-income school or be a highly-qualified teacher (defined as having a B.A., full certification and other certain requirements, such as passing a rigorous state test). Teachers who meet the requirements in 34 C.F.R. § 685.217 are eligible for forgiveness of up to $17,500. Generally a borrower might be eligible for:

1. Up to $17,500 in loan forgiveness if:

- **a.** The borrower is a "highly qualified" full-time math or science teacher at the secondary school level; or
- **b.** The borrower is a "highly qualified" special education teacher whose primary responsibility was to provide special education to children with disabilities.

2. Up to $5,000 in loan forgiveness if the borrower did not teach math, science or special education but was a "highly qualified" full-time elementary or secondary teacher.

F. Public Service Loan Forgiveness: Borrowers who are employed full-time (defined as at least 30 hours per week or more – or whatever the employer considers FT) in the public service industry, including most local, state, federal, tribunal nation, or § 501(c)(3) corporations and who make 120 qualifying payments under and income-driven repayment, such as the IBR, ICR, PAYE, REPAYE, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven.[2] This is available only for Direct Loans. If FFEL Program borrowers, however, wish to take advantage of this program, they can consolidate their FFEL Program loans into the Direct Loan Program and become eligible. *See* 34 C.F.R. § 685.219. There is specific language in the tax code that exempts any forgiven debt from constituting taxable income

[2] Recently, Temporary Expanded PSLF (TEPSLF) was made possible by a $350 million appropriation through the Consolidated Appropriations Act, 2018, which expanded the list of qualifying repayment plans to graduated and extended prepayment plans, but funds are limited, and once funds under the opportunity are depleted, the program will end.

G. September 11 Survivors Discharge: Survivors of or eligible victims of the September 11 attacks may request discharge of their student loan debt. (Direct Loan Program loans only).

H. Miscellaneous Administrative Discharges Specific to <u>Perkins</u> Loans: In addition to the above-mentioned non-bankruptcy discharge options, borrowers may also request discharge or forgiveness of their Perkins Loans for a number of additional reasons, including, among others: certain education jobs, nurses, medical technicians, law enforcement, corrections officers, VISTA or Peace Corps volunteer, service in the U.S. Armed Forces, Head Start programs, firefighter, faculty member at Tribal College, and attorneys working in public defender organizations

I. Other Nonbankruptcy Relief:

1. **Loan Rehabilitation:** Federal regulations allow borrowers who default on repayment of their loan a one-time opportunity (unless prior rehabilitation was completed pre-2008) to bring their loans out of a default status and repair the negative credit information reported to credit bureaus. Payment amounts are set at a reasonable rate and borrowers must make nine consecutive on-time payments (within 20 days of the due date) over a 10-month period. Payments are presumptively set as 15% of the borrower's discretionary income – defined as the amount their AGI exceeds 150% of the federal poverty guidelines for their family size (the same calculation as the monthly payment amount under the IBR). If a borrower thinks he/she cannot pay that, he/she can fill out a form requesting a lower payment, as low as $5/month. However, a borrower should exercise caution in requesting a lower payment, as their payment after they complete their rehabilitation may increase, making it more likely the borrower will go back into default – and this time he/she would not be eligible to rehabilitate. For FFEL Program loans, after the borrower makes the required timely monthly payments under the new plan and requests rehabilitation, the guarantor must sell the loan to an eligible lender (or assigned to ED if this is not possible). 20 U.S.C. § 1078-6(a)(1)(A)(ii); 34 C.F.R. § 682.405(a)(1), (2)(ii). Upon the "sale" of the rehabilitated loan, collection costs are capitalized, but they are capped at 16% of the borrower's loan balance (compare this to a maximum of 18.5% of the loan balance if a borrower consolidates and if the borrower allows the loan to remain in default, the guarantor or ED typically adds approximately 24% of the loan balance in collection costs).

   Completing rehabilitation restores a borrower's loans to good standing and helps repair their credit report. It also stops collections activity and legal proceedings, prevents wage garnishment, and it may protect a borrower's state and federal tax refunds from IRS offsets. Once completed, the loans are restored to their pre-default status, so they are again eligible for deferment, forbearance, alternative repayment options, and title IV financial aid.[3]

2. **Consolidation:** Consolidation can benefit a defaulted borrower by helping them to regain eligibility for deferments, forbearances, and income-driven repayment options. It can also benefit a borrower if they want to take advantage of the Public Service Loan Forgiveness. *See* 34 C.F.R. § 685.220(d)(2)(i). Borrowers who have previously consolidated their loans in the FFEL Program may re-consolidate their loans (even if defaulted) into the Direct Loan Program but not vice-versa. Since July 1, 2010, consolidations are only available in the Direct Loan Program. Borrowers who are not in default may also consolidate their loans, which might be advantageous to certain borrowers – for example, those that might want to take advantage of the Public Service Loan Forgiveness (*see supra* Section II.F.) or the REPAYE income-driven option. Non-defaulted borrowers can also extend their payments out over up to a 30-year repayment time period.[4]

3. **Borrower Defense to Repayment:** These are generally school related issues. Borrowers may be eligible for forgiveness of their federal student loans used to attend a school if that school misled them or engaged in other misconduct in violation of certain laws. *See* 20 U.S.C. § 1087e(h). However, this option is technically only available through the Direct Loan Program. Under this process, a borrower <u>may</u> be eligible for loan forgiveness (a discharge) of his/her federal Direct Loans taken out to attend a school <u>if</u> that school committed fraud in some way to the student, or otherwise violated applicable state law related to the borrower's loans or the educational services paid for. This can potentially apply regardless of whether the school closed. The law requires borrowers to submit an

[3] A borrower will actually become re-eligible for T. IV aid after the 6th on-time payment, but will need to complete the payments in order to retain eligibility

[4] *See* 34 C.F.R. § 685.208(j). Presumptive repayment period if the Consolidation Loan enters ifs disbursed after July 1, 2006:

Loan Balance	Maximum Loan Term
Less than $7,500	10 years
$7,500 to $9,999	12 years
$10,000 to $19,999	15 years
$20,000 to $39,999	20 years
$40,000 to $59,999	25 years
$60,000 or more	30 years

application[5] in order to receive debt relief. For more information and how to apply, including an application, see the website: https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/borrower-defense.

[5] Borrowers who attended Corinthian Colleges (Everest, Heald, and WyoTech) with a first date of attendance between July 1, 2010, and Sept. 30, 2014, and are seeking federal student loan forgiveness through borrower defense will complete a Corinthian-specific application. For more information about forgiveness of federal student loan(s) used to attend Corinthian Colleges, go to https://studentaid.ed.gov/sa/about/announcements/corinthian.

III. INCOME DRIVEN REPAYMENT PROGRAMS

Both the FFEL Program and the Direct Loan Program have income-driven repayment options for borrowers based on income and family size. These payment options are available whether or not the borrower has filed bankruptcy. Most courts will focus on the most affordable payment amount available to the borrower when analyzing an undue hardship discharge case under the first prong and also relevant as to whether the borrower has shown good faith efforts to repay.

A. Income-Driven Payments: In addition to fixed, amortized payment terms, and graduated payment terms, there are several payments options that are based on a borrower's income and family size: the Income Based Repayment plan ("IBR") (available in both the FFEL and Direct Loan Program), the Income Contingent Repayment plan ("ICR"), the Pay As You Earn plan ("PAYE"), and the Revised Pay As You Earn plan ("REPAYE") (these last three options are available only in the Direct Loan Program). See also the summary chart at the end of the materials that show at a glance the different IDR payment options for each type of loan.7

1. Income Based Repayment plan ("IBR"):

a. What loans are eligible for the IBR? All non-defaulted FFEL Program loans are eligible, except Parent PLUS loans[6] or federal consolidation loans that contain underlying Parent PLUS loans. Defaulted student loans (unless they are defaulted FFEL Program loans and the borrower chooses to consolidate into the Direct Loan Program to take advantage of an income-driven payment plan or PSLF), PLUS loans, or federal consolidation loans that contain underlying PLUS loans or a mix of Stafford loans and PLUS loans are not eligible for the IBR in either the FFEL Program or the Direct Loan Program. Stand-alone Perkins loans are also not eligible for the IBR. However, a borrower may include an "add-on" Perkins loan in a consolidation loan that will then be IBR-eligible.

Borrowers who have defaulted FFEL Program loans may re-consolidate their defaulted loans into the Direct Loan Program and elect an IDR in the Direct Loan Program. (Re-consolidating removes the default because the borrower has a new loan). Borrowers also have a one-time opportunity to rehabilitate their loan to remove the default status and be eligible for the IBR in either the FFEL Program or the Direct Loan Program. *See supra* II.J.a.

b. IBR Eligibility: Borrowers who have IBR-eligible loans must also demonstrate partial financial hardship ("PFH").

[6] Parent PLUS loans are only eligible for one IDR option – the ICR – which is only available in the Direct Loan Program. Borrowers who choose to consolidate their Parent PLUS loan into a Direct Consolidation Loan on or after July 1, 2006 will also be eligible for ICR.

Borrowers can demonstrate PFH if the annual amount due on all eligible student loans under a 10-year repayment schedule is more than 15% of their adjusted gross income (AGI).

- TIP: Most borrowers whose total loan balance exceeds or is close to their annual earnings will satisfy the PFH requirement.

c. IBR Payment Calculation. The IBR payment is calculated using the borrower's AGI and family size. If the borrower earns less than 150% of the poverty level for their family size, the IBR payment will be $0. The required annual loan payment under the IBR is capped at 15% of earnings above 150% of the applicable poverty level. Because the monthly IBR payment is calculated as a percentage of the borrower's income, if the borrower's income drops, the monthly payment is reduced accordingly.

The IBR payment is recalculated annually based on household income. Married borrowers who file separate tax returns have their IBR payments based only on their own income, but still count each other and any dependents in the family size.

Borrowers may contact their lender/servicer at any time if they experience a change in financial circumstances that could affect their required IBR payment. The IBR repayment period is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven.[7]

- An exception to the 25-year requirement is if also eligible for the Public Service Loan Forgiveness Program. A borrower can repay under the IBR and only pay for a total of 10 years.

II. Interest Subsidy for IBR. Although interest continues to accrue at the contract rate in the IBR, the government will pay unpaid accrued interest on FFEL Program subsidized loans to the loan holder or will not charge the borrower interest on Direct Loan Program subsidized loans for up to three consecutive years from the date the borrower enters the IBR.

2. Pay As You Earn (PAYE): This program has very limited eligibility. PAYE is only available to borrowers who did <u>not</u> have any federal student loans before October 1, 2007 <u>and</u> who received a Direct Loan on or

[7] Under the Internal Revenue Code, student loan debt forgiven at the end of the IBR (and ICR, PAYE, and REPAYE discussed *infra*) term *may* constitute a taxable event. This is a nonissue in most cases because any forgiven debt is taxable only to the extent the borrower is solvent. *See* 26 U.S.C. § 108(a)(1)(B). It is unlikely that borrowers with large student loan debts forgiven will have assets that exceed the amount of debt forgiven.

after October 1, 2011. The payments are capped at 10% of the borrower's discretionary income (as defined by their AGI over 150% of the poverty guideline for their family size). The borrower must pay under the PAYE for 20 years and then the remaining balance is forgiven.

3. **Income Contingent Repayment (ICR):** Like the IBR, the ICR is recalculated annually and the payment amount is based on 20% of the difference between a borrower's AGI and 100% of the federal poverty level for the family size. If the AGI is below 100% of the poverty level for the borrower's family size, then the ICR payment is $0. The ICR is the only income-driven payment option available to PLUS loan borrowers. The ICR is based on household income unless the borrower files Married Filing Separately. After 25 years, any balance that is remaining is forgiven by the Secretary of Education. *See* II.F (10-year repayment term possible if eligible for Public Service Loan Forgiveness program).

4. **Revised Pay As You Earn (REPAYE):** REPAYE is the most favorable and is available for all Direct Loan borrowers (other than Parent PLUS loans). FFEL Program Borrowers must consolidate to take advantage of the REPAYE option. *See* 34 C.F.R. § 685.209(c).

a. **Payment Calculation.** Borrowers will pay only 10% of their discretionary income (still defined as AGI over 150% poverty guideline for family size). The calculations for REPAYE are based on total household income <u>whether or not</u> the borrower files Married Filing Jointly or Married Filing Separately. Borrowers must pay for 20 years before forgiveness of undergraduate debt. If the borrower has graduate debt, s/he is required to repay for 25 years.

b. REPAYE Interest Subsidy: If your calculated monthly payment does not cover all of the interest that accrues (negative amortization), ED will pay:

(i) 100% the remaining interest that is due on your subsidized loans for up to three consecutive years and 50% of the remaining interest after that during all other periods; <u>and</u>
(ii) 50% of the remaining interest that is due on your unsubsidized loans during all periods.

- **Don't Forget -- Public Service Loan Forgiveness.** One of the most powerful tools available to repay your student loans is using one of the income-driven repayment plans with the PSLF program. Borrowers who make 120 qualifying payments under the IBR, ICR, PAYE, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribunal nation, or § 501(c)(3) corporations. There is specific language in this regulation that exempts any forgiven debt from constituting a taxable event. IRC 108(f). *See supra* Section II.F.

5. Verification of Income and family size: All income-driven repayment options require borrowers to verify their income each year. They may do this by supplying their most recent income tax return or for borrowers who do not file, or are not required to file, a federal tax return, they may provide alternative documentation of their income such as pay stubs, letter(s) from employer(s) stating income, bank statements, etc. Untaxed income such as SSDI, SSI, child support, federal or state public assistance is not included in the IBR calculation. Borrowers who have no income or have only untaxed income may self-certify their income on the IBR request form. The reevaluation date is based on when the borrower initially entered the plan (anniversary date).

B. Alternative Payment Arrangements: Borrowers who believe that none of the payment options are suitable may request an alternative repayment plan from the Secretary of Education. *See* 34 C.F.R. § 685.208(l).

C. Deferments or Forbearances (suspension of payments): In addition to the different types of repayment plans, borrowers may seek deferment or forbearance. Deferment or forbearance may be granted for the specific bases stated in federal regulations, which include, but are not limited to, poor health, unemployment, economic hardship, federal student loan payments that are equal to or greater than 20% of monthly gross income, or other reasons acceptable to ED. 34 C.F.R. § 682.210; 682.211; 34 C.F.R. § 685.204; 685.205.

1. Deferment: During a deferment period, no interest accrues on subsidized loans, but interest continues to accrue on unsubsidized loans. The borrower may pay the accruing interest on any unsubsidized loans or have it added to the principal when the deferment expires. Mandatory for certain situations.

2. Forbearance: Forbearance postpones or reduces the monthly repayment for a limited, specific period, during which interest on subsidized and unsubsidized loans continues to accrue. If the interest is not paid during the forbearance, per Federal Regulations, it is also capitalized (added to the loan principle) when the forbearance period ends. Forbearances can be discretionary.

IV. ADMINISTRATIVE REMEDIES VS. BANKRUPTCY DISCHARGE

The majority view is that administrative programs, especially IDRs, while not dispositive, must be considered in the undue hardship analysis.

The following circuit-level cases have held that the diligent pursuit of income-driven repayment options are an important consideration in the undue hardship analysis: *Educ. Credit Mgmt Corp. v. Jesperson (In re Jesperson)*, 571 F.3d 775, 783 (8th Cir. 2009) ("When a debtor is eligible for the ICR, the court in determining undue hardship should be less concerned that future income may decline. The ICR formula adjusts for such declines, without regard to the unpaid student loan balance, which in most cases will avoid undue hardship"); *Educ. Credit Mgmt Corp. v. Mason (In re Mason)*, 464 F.3d 878, 885 (9th Cir. 2006) (debtor failed good faith prong in part because of failing to pursue the alternative payment arrangements with sufficient diligence); *Educ. Credit Mgmt Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 396-397 (4th Cir. 2005) (failure to seek out loan consolidation options and income-driven repayments which make the debt less onerous is an important inquiry in good faith); *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 682 (6th Cir. 2005) (although not necessarily a per se indication of bad faith, failure to take advantage of the ICR is certainly probative of his intent to repay and is a "difficult, although not necessarily insurmountable burden" to overcome); *Alderete v. Educ. Credit Mgmt Corp. (In re Alderete)*, 412 F.3d 1200, 1206 (10th Cir. 2005) (failing to consider alternative repayment options indicative of bad faith).

IDRs can also be relevant to the first prong in the *Brunner* analysis. The relevant inquiry is whether a plaintiff could make the monthly payment as required by the terms of his or her income-driven repayment plan in which he or she is already enrolled – or the most favorable repayment plan available to the borrower.

V. PRACTICE TIPS

A. Who's Got My Loans? One of the most important inquiries in the student loan industry is trying to identify the correct defendants. ED maintains an information repository called National Student Loan Data Systems (NSLDS). NSLDS is a database that contains information, including chain of custody, interest rate, loan type, loan status, etc., regarding every federal student loan a person has borrowed. Lenders, servicers, and guarantors have access to borrower NSLDS reports if they hold the loan. Borrowers may access their own NSLDS reports by going to www.nslds.ed.gov. They must use their FSA ID to access the NSLDS.

B. When Filing a Non-Discharge Complaint, Know *Whom* to Name: When initiating a dischargeability action, debtors should consult NSLDS to determine what entities hold a valid interest in their federally backed loans. Debtors often mistakenly name their student loan servicers in lieu of ED, the lender, and/or the guarantor likely because the servicer was the last entity who contacted them. Servicers do not hold any right, title, or interest in the loans and, therefore, are not proper parties in a dischargeability adversary proceeding.

For federally backed loans obtained through the Direct Loan Program, ED is usually—if not always—the only party to hold a valid interest in a Direct Loan. But, in the FFEL Program, debtors who have non-defaulted loans should be sure to name both the lender *and* the guarantor. Naming just the lender will be problematic because the guarantor has a contingent interest in the student loan debt and is a creditor in its own right. Thus, the guarantor is entitled to separate notice and a right to defend its rights separate and apart from the lender. *See Alfes v. Educ. Credit Mgmt. Corp. (In re Alfes),* 709 F. 3d 631 (6th Cir. 2013). In *Alfes*, the Sixth Circuit held that student loan guarantors had rights separate and apart from those received by assignment from the original lender. In affirming the district court, the court ruled that these guarantor rights were not extinguished by a default judgment against the lender while the lender held the loan.

VI. CONTACT INFORMATION

Questions?
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IDR Eligibility

Loan Type	REPAYE Plan	IBR Plan	ICR Plan	PAYE plan
Direct Loans (other than Parent PLUS)	eligible	eligible	eligible	Eligible, if a new borrower** as of 10-01-07 and received a disbursement after 10-01-11
Direct Parent Plus	not eligible	not eligible	eligible	not eligible
Direct Consolidation Loan that repaid Parent PLUS loans	not eligible	not eligible	eligible	not eligible
Direct Consolidation Loan (with no underlying Parent PLUS loans)	eligible	eligible	eligible	Eligible, if a new borrower** as of 10-01-07 and received a disbursement after 10-01-11
Federal FFEL Stafford Loans	Eligible if consolidated*	Eligible	Eligible if consolidated*	Unlikely.
FFEL Consolidation Loans (with no underlying Parent PLUS loans)	Eligible if consolidated*	Eligible	Eligible if consolidated*	Unlikely.
FFEL Parent PLUS loans	not eligible	not eligible	Eligible if consolidated*	Not eligible
FFEL PLUS loans made to graduate or professional students	not eligible	Eligible	Not eligible	Unlikely.
Defaulted FFEL Loan (consolidated or Stafford) but not Parent PLUS	Eligible if consolidated*	Eligible if consolidated*	Eligible if consolidated*	Unlikely.

*Means you must consolidate into a Direct Consolidation Loan, and then you are able to pay the Direct Consolidation Loan with the applicable IDR plan.

**"New borrower" means you do not have any outstanding balance on a Direct Loan or a FFEL loan as of the applicable date.

DISCHARGING STUDENT LOANS

I. DISCHARGE: 11 U.S.C. § 523(a)(8) provides that student loans can be discharged in bankruptcy only if excepting the debt from discharge would impose an "undue hardship" on the borrower:

§ 523 Exceptions to Discharge
(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

(ii) an obligation to repay funds received as an educational benefit, scholarship or stipend; or

(B) any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual

II. The *BRUNNER* TEST (2nd Cir. 1987) was adopted in the 9th Circuit in *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998); *see also Hedlund v. Educational Resources Institute Inc*. (*In re Hedlund*), 718 F.3d 848, 851 (9th Cir. 2013). The 1st Circuit and the 8th Circuit, have adopted a "totality of the circumstances" test.

A. Under the *Brunner* test, the debtor must show that:

1. he or she cannot maintain, based on current income and expenses, a "minimal" standard living for himself or herself and any 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. He or she has made good faith efforts to repay the loans.

B. **"Minimal" Standard of Living**: To satisfy the first prong of the *Brunner* test, Debtor must demonstrate more than that she is experiencing tight finances. *In re Nascimento*, 241 B.R. 440, 445 (9th Cir. B.A.P. 1999). "In defining undue hardship, courts require more than temporary financial adversity but typically stop short of utter hopelessness." *Id*.

C. **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 Non-exclusive factors outlined in *In re Nys*, 308 B.R. 436 (9th Cir. BAP 2004):

1. Serious mental or physical disability of Debtor or Debtors' dependents that prevents employment;
2. Debtor's obligations to care for dependents;
3. Lack of, or severely limited education;
4. Poor quality of education;
5. Lack of useable or marketable job skills;
6. Underemployment;
7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
8. Limited number of years remaining in work life to allow payment of the loan;
9. Age or other factors that prevent retraining/relocation to repay the loan;
10. Lack of assets, whether or not exempt, which could be used to repay loan;
11. Potentially increasing expenses that outweigh any potential appreciation in the value of the Debtor's assets and/or likely increases in the debtor's income; and
12. Lack of better financial options elsewhere.

D. Debtor has made **good faith efforts** to repay the loans. To determine good faith, the court measures the debtor's efforts to obtain employment, maximize income, minimize expenses, and negotiate a repayment plan. *In re Mason*, 464 F.3d 878, 884 (9th Cir. 2006). Whether a debtor made payments prior to filing for discharge is also a persuasive factor in determining whether she made a good faith effort to repay her loans. *In re Pena*, 155 F.3d at 1114; *In re Jorgensen, 479 B.R. at 89.*

II. RECENT DECISIONS:

A. 11 U.S.C. § 523(a)(8)(A)(i): *In re Edwards*, 3:14-BK-16806-PS, 2016 WL 1317421 (Bankr. D. Ariz. Mar. 31, 2016): $245,000 student loans discharged in a Chapter 7 case. Debts incurred to earn three degrees from Ottowa University in Secondary Education, Education Masters, and Professional Counseling.

1. **Minimal Standard of Living**: Debtor was a 56 year-old woman with two adult children. She earned $16-$28 per hour working as a substance abuse counselor and had an average income of around $15,000 per year. In 2011, she bought a 700 sq. ft mobile home in Cornville, Arizona, for $37,500 ($494 per month mortgage). In 2009 and 2010, she lived in a 20-year-old fifth wheel trailer with her husband. No health insurance. Making payments on a 2006 Toyota Corolla.
2. **Additional Factors Considered**:
   a) Debtor was not disabled, but she cared for her two adult children.
      (1) Eldest child, 34 years-old, had type 1 diabetes and renal failure, blindness, failing pancreas, and received only $844 per month in public assistance, which did not cover costs for medications and living expenses.
      (2) Younger child, 32 years-old, was a transwoman, had bi-polar, PTSD, and was a convicted felon had spent 15 years incarcerated, but was denied disability and lived with Debtor.
   b) Debtor was well educated and earned degrees from Ottowa University, but in a low-paying field.
   c) Debtor applied for other jobs but did not want to move to the Phoenix market where cost of living would be much higher and where she could not help care for her children.
   d) Debtor had no significant assets. The Bankruptcy Court found "[g]rim financial circumstances that will persist for the remainder of her life."
3. **Good Faith Efforts**: Debtor made 33 modest payments totaling $850 during the years 2011 through 2014. She made payments even when she could not pay her taxes. Owed $16,000 in non-dischargeable tax debt. She consolidated her loans and requested deferrals to avoid default.

B. 11 U.S.C. § 523(a)(8)(A)(ii): *In re Christoff*, 527 B.R. 624 (9th Cir. BAP 2015): Discharge granted in a Chapter 7 case where Meridian University, a for-profit university, offered the Debtor financial aid in the form of tuition credits; Debtor did not receive funds from the university.

1. Debtor signed an agreement that Meridian was "financing" $11,000 of the Debtor's tuition, and the Debtor signed a promissory note in favor of Meridian and promised to repay that amount in installments upon graduation or withdrawal from the school.

a) *Debtor withdrew from school and filed Chapter 7*. University filed an adversary alleging nondischargeability under § 523(a)(8)(A)(ii).

(1) Bankruptcy Court held that the debt "did not follow from 'funds received' either by her as the student or by [the university] from any other source" and was thus outside *§ 523(a)(8)(A)(ii). The Bankruptcy Court found that Meridian "simply agreed t be paid the tuition later . . . . It did not receive any funds, such as from a third party financing source.*

C. 11 U.S.C. § 523(a)(8)(B): *See Torbjorn Hjalmar Isaksson v. Nelnet, Inc., et al.,* Ariz. Bankr., March 20, 2009, 2:08-ap-00345-CGC, D.E. # 275: Lender bears the burden of proof to show that the loans are "qualified educational loans" as defined by section 221(d)(1) of the Internal Revenue Code of 1986. Analysis of IRC provisions provided.

III. ADDITIONAL CHALLENGES:

A. Debtors have limited access to counsel. Most student loan cases are filed pro-se.

B. The *Brunner* test is dauting and outdated. When *Brunner* was decided in 1987, tuition was much lower, loan options were limited, and the Bankruptcy Code treated student loans differently:

1. 1973: Student loans were nondischargeable for first 5 years unless undue hardship.
2. 1990: Revision – 5 years extended to 7 years.
3. 1998: 7 years eliminated and undue hardship requirement remained.
4. 2005: Nondischargeability extended to qualified educational loans, including private loans.

C. Today, students borrow large amounts to cover tuition, books, activity fees, room and board, etc. even if their degrees are unmarketable. Borrowers may be on the hook for life.

D. In Chapter 13 cases, borrowers have debt limits, debtors often cannot maintain current payments while interest and penalties continue to accrue, and in repayment unsecured debtors may object due to pro rata payments to student loan lenders.

IV. POSSIBLE CHANGES:

A. Legislative changes to have state funded schools.

B. Amend the Bankruptcy Code to presume that student loans are dischargeable or define and limit the repayment period.

C. Provide attorney's fees provision upon discharge where lenders pay fees when they unsuccessfully oppose discharge.

D. Limit the approved school list for federally backed student loans.

KeyCite Yellow Flag - Negative Treatment
Rejected by In re Healey, Bankr.E.D.Mich., August 17, 1993

831 F.2d 395
United States Court of Appeals,
Second Circuit.

Marie BRUNNER, Appellant,
v.
NEW YORK STATE HIGHER EDUCATION SERVICES CORP., Appellee.

No. 41, Docket 87–5013.
|
Argued Sept. 22, 1987.
|
Decided Oct. 14, 1987.

Synopsis
Chapter 7 debtor sought discharge of guaranteed student loans. The Bankruptcy Court, Howard Schwartzberg, J., determined that loans were dischargeable, and lender appealed. The United States District Court for the Southern District of New York, 46 B.R. 752, Charles S. Haight, Jr., J., reversed, and debtor appealed. The Court of Appeals held that: (1) for debt to be dischargeable on basis of “undue hardship,” debtor must show an inability to maintain minimal standard of living for self and dependents if forced to repay loans, that additional circumstances exist indicating that state of affairs is likely to persist for significant portion of repayment period of student loans, and that debtor has made good-faith efforts to repay loans, and (2) Chapter 7 debtor failed to establish that her current inability to find work would extend for a significant portion of student loan repayment period or that she had made a good-faith attempt to repay student loans, and thus failed to establish “undue hardship” as required for a discharge of loans.

Judgment of District Court affirmed.

West Headnotes (4)

[1] **Bankruptcy**
Clear Error

Court of Appeals is obliged to accept bankruptcy court’s undisturbed findings of fact unless clearly erroneous, but is not required to accept bankruptcy court’s conclusions as to legal effect of findings.

46 Cases that cite this headnote

[2] **Bankruptcy**
Conclusions of Law; De Novo Review

Whether discharging debtor’s student loans would impose undue hardship on her so as to make loans dischargeable required conclusion regarding legal effect of bankruptcy court’s findings as to her circumstances, and thus, bankruptcy court’s conclusion of “undue hardship” was properly reviewed by district court. Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.; Rules Bankr.Proc.Rule 810, 11 U.S.C.(1982 Ed.); Bankr.Code, 11 U.S.C.A. § 523 (a)(8)(B).

687 Cases that cite this headnote

[3] **Bankruptcy**
Hardship

For debt to be dischargeable on basis of “undue hardship,” debtor must show an inability to maintain, based on current income and expenses, minimal standard of living for self and dependents if forced to repay loans, that additional circumstances exist indicating that state of affairs is likely to persist for significant portion of repayment period of student loans, and that debtor has made good-faith efforts to repay loans. Bankr.Code, 11 U.S.C.A. § 523(a)(8), (a)(8)(B).

859 Cases that cite this headnote

[4] **Bankruptcy**

Educational Loans

Chapter 7 debtor failed to establish that her current inability to find work would extend for a significant portion of student loan repayment period or that she had made a good-faith attempt to repay her student loans, and thus failed to establish "undue hardship" as required for a discharge of loans, in light of lack of evidence that debtor had any dependents, that she was elderly or disabled, or that she had requested deferment of payment. Bankr.Code, 11 U.S.C.A. § 523(a)(8), (a)(8)(B).

801 Cases that cite this headnote

Attorneys and Law Firms

***396** Marie Brunner, pro se.

Frederick J. Schreyer, Albany, N.Y., for appellee.

Before LUMBARD, OAKES and KEARSE, Circuit Judges.

Opinion

PER CURIAM:

Marie Brunner, pro se, appeals from a decision of the United States District Court for the Southern District of New York, Charles S. Haight, Judge, which held that it was error for the bankruptcy court to discharge her student loans based on "undue hardship," 46 B.R. 752 (Bankr.D.C.N.Y.1985). We affirm.

[1] [2] While this court is obliged to accept the bankruptcy court's undisturbed findings of fact unless they are clearly erroneous, it is not required to accept its conclusions as to the legal effect of those findings. *Montco, Inc. v. Glatzer (In re Emergency Beacon Corp.),* 665 F.2d 36, 40 (2d Cir.1981) (citing *Queens Blvd. Wine & Liquor Corp. v. Blum,* 503 F.2d 202 (2d Cir.1974); R.Bankr.P. 810 (current version, *see* R.Bankr.P. 8013); *Bank of Pa. v. Adlman,* 541 F.2d 999, 1005 (2d Cir.1976)). Whether not discharging Brunner's student loans would impose on her "undue hardship" under 11 U.S.C. § 523(a)(8)(B) requires a conclusion regarding the legal effect of the bankruptcy court's findings as to her circumstances. Therefore, the bankruptcy court's conclusion of "undue hardship" properly was reviewed by the district court.

[3] As noted by the district court, there is very little appellate authority on the definition of "undue hardship" in the context of 11 U.S.C. § 523(a)(8)(B). Based on legislative history and the decisions of other district and bankruptcy courts, the district court adopted a standard for "undue hardship" requiring 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. For the reasons set forth in the district court's order, we adopt this analysis. The first part of this test has been applied frequently as the minimum necessary to establish "undue hardship." *See, e.g., Bryant v. Pennsylvania Higher Educ. Assistance Agency (In re Bryant),* 72 B.R. 913, 915 (Bankr.E.D.Pa.1987); *North Dakota State Bd. of Higher Educ. v. Frech (In re Frech),* 62 B.R. 235 (Bankr.D.Minn.1986); *Marion v. Pennsylvania Higher Educ. Assistance Agency (In re Marion),* 61 B.R. 815 (Bankr.W.D.Pa.1986). Requiring such a showing comports with common sense as well.

The further showing required by part two of the test is also reasonable in light of the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt. Predicting future income is, as the district court noted, problematic. Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is "undue."

[4] Under the test proposed by the district court, Brunner has not established her eligibility for a discharge of her student loans based on "undue hardship." The record demonstrates no "additional circumstances" indicating a likelihood that her current inability to find any work will extend for a significant portion of the loan repayment period. She is not disabled, nor elderly, and she has—so far as the record discloses—no dependents. No evidence ***397** was presented indicating a total foreclosure of job prospects in her area of training. In fact, at the time of the hearing, only ten months had elapsed since Brunner's graduation from her Master's program. 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.

It is true, however, that considerable time has elapsed since the original filing of Chapter 7 proceedings, and even since the hearing before the bankruptcy judge. We note that Judge Haight's order was without prejudice to Brunner's seeking relief pursuant to R.Bankr.P. 4007(a), (b).

Judgment affirmed.

All Citations

831 F.2d 395, 42 Ed. Law Rep. 535, Bankr. L. Rep. P 72,025

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Erkson, Bankr.D.Me., April 3, 2018

46 B.R. 752
United States District Court,
S.D. New York.

In re Marie BRUNNER, Debtor.
Marie BRUNNER, Plaintiff-Appellee,
v.
NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,
Defendant-Appellant.

No. 83 Civ. 4588–CSH.
|
Feb. 21, 1985.

Synopsis
Debtor sought discharge of guaranteed student loans. The Bankruptcy Court, Howard Schwartzberg, J., entered oral decision discharging the loans, and New York State Higher Education Services Corporation appealed. The District Court, Haight, J., held that evidence was insufficient to support finding that failure to discharge debtor's student loans would impose "undue hardship," and thus, it was error for Bankruptcy Court to discharge the loans.

Reversed.

West Headnotes (6)

[1] **Bankruptcy**
Hardship

Existence of the adjective "undue" in statutory exception to general rule of nondischargeability of student loans for five years after they first come due, permitting discharge if failure to discharge would impose "undue hardship" on debtor and debtor's dependents, indicates that Congress viewed garden variety hardship as insufficient excuse for discharge of student loans. Bankr.Code, 11 U.S.C.A. § 523(a)(8)(A, B).

90 Cases that cite this headnote

[2] **Bankruptcy**
Hardship

For purpose of discharge of guaranteed student loans, it is improper and antithetical to spirit of guaranteed loan program for court to consider, in connection with showing of good faith and circumstances beyond control of debtor, that the education for which the loans paid has been of little use to debtor. Bankr.Code, 11 U.S.C.A. § 523(a)(8)(A, B).

11 Cases that cite this headnote

[3] **Bankruptcy**
Educational Loans

It is proper to require debtor seeking to discharge guaranteed student loan to show that he or she has made good-faith efforts to repay the loan and that the forces preventing repayment are truly beyond his or her reasonable control. Bankr.Code, 11 U.S.C.A. § 523(a)(8)(A, B).

45 Cases that cite this headnote

[4] **Bankruptcy**
Hardship

Obtaining discharge of student loans in bankruptcy prior to five years after they first come due requires a three-party showing: that debtor cannot, based on current income and expenses, maintain "minimal" standard of living for himself of herself and his or her dependents if forced to repay the loans; that this state of affairs is likely to persist for significant portion of repayment period of the loans; and that debtor has made good-faith efforts to repay the loans.

Bankr.Code, 11 U.S.C.A. § 523(a)(8)(A, B).

132 Cases that cite this headnote

[5] **Bankruptcy**
Educational Loans

Bankruptcy court's finding that debtor who sought discharge of guaranteed student loans possessed a "psychological impairment" was clearly erroneous since, although debtor testified that she was consulting a therapist for treatment of anxiety and depression due in part to her unemployment, there was no evidence in the record that her depression and anxiety impaired her capacity to work. Bankr.Code,11 U.S.C.A. § 523(a)(8)(A, B); Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

12 Cases that cite this headnote

[6] **Bankruptcy**
Hardship Not Found

Evidence that debtor, who was an apparently healthy, presumably intelligent, and well-educated woman with no dependents, was unemployed and was at most unable to meet her medical expenses and pay off her guaranteed student loans was insufficient to support finding that failure to discharge her loans would impose "undue hardship," and, inasmuch as primary reason for requesting discharge was unemployment and debtor had not requested deferment of payment, a remedy open to those unable to pay because of prolonged unemployment, it was error for bankruptcy court to discharge the loans. Bankr.Code, 11 U.S.C.A. § 523(a)(8)(A, B).

59 Cases that cite this headnote

Attorneys and Law Firms

***753** Marie Brunner, pro se.

Barbara C. North, Albany, N.Y., for defendant-appellant.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

This is an appeal from an April 12, 1983 oral decision of Hon. Howard Schwartzberg, Bankruptcy Judge, discharging appellee Marie Brunner's student loans pursuant to 11 U.S.C. § 523(a)(8)(B). Section 523(a)(8)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(8)(A), declares such loans nondischargeable for five years after they first come due, but § 523(a)(8)(B) creates an exception to the general rule if the failure to discharge would "impose an undue hardship on the debtor and the debtor's dependents." Judge Schwartzberg found such undue hardship and discharged appellee's student loans. Appellant New York State Higher Education Services Corp. ("HESC"), guarantor of the loans, contends that this was error.

Appellee received a Bachelor of Arts degree in 1979 and a Master's degree in Social Work in May, 1982. Approximately seven months after receiving her Master's degree appellee filed for personal bankruptcy, and her outstanding debts, exclusive of approximately $9,000 in student loans, were discharged. Two months later, upon expiration of the nine month grace period suspending repayment of the student loans incurred during her undergraduate and graduate education, appellee filed this adversary action seeking discharge of her accumulated student loans. Following a brief oral hearing at which appellee described her shaky finances and her unsuccessful efforts to find work following her graduation, Judge Schwartzberg issued a decision from the bench discharging the loans. HESC, which had assumed the loans from Anchor Savings Bank following appellee's default, takes this appeal from that finding. Appellee's counsel below has apparently deserted her, for no responsive brief was filed on her behalf. It is assumed that she opposes the appeal.

I.

[1] "Undue hardship" is undefined in the Bankruptcy Code. The existence of the adjective "undue" indicates that Congress viewed garden-variety hardship as insufficient excuse for a discharge of student loans, but the statute otherwise gives no hint of the phrase's intended meaning. The question has produced a daunting proliferation of decisions in the Bankruptcy Courts, but there is little appellate authority.[1] The statutory history has thus provided the lodestone for most interpretations.

Congress itself had little to say on the subject. The initial House bill deleted any reference to student loans, while the Senate bill included language similar to that present in the final bill. *See* H.R. 8200, 95th Cong., 1st Sess. (1977), *reprinted in* Collier on Bankruptcy, Appendix 3 (15th Ed.1979), at III–1 (hereafter "Collier"); S. ***754** 2266, 95th Cong., 2d Sess. (1978), *reprinted in* Collier, *supra,* Appendix 3, at VII–1, 417. The Senate Report which accompanied the bill, however, is mute on the issue of undue hardship, noting merely that the bill "follows generally current law and excepts from discharge student loans until such loans have been due and owing for five years." The final compromise bill accepted the Senate's language, but the report of the compromise committee—printed only as the remarks of the two Congressional sponsors of the bill—again ignores undue hardship. *See, e.g.,* 124 Cong.Rec.H. 11096, 95th Cong., 2d Sess. (daily ed. Sept. 28, 1978), *reprinted in* Collier,*supra,* Appendix 3, at IX–101.

The phrase "undue hardship" was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States ("the Commission"). The Commission's report provides some inkling of its intent in creating the exception, intent which in the absence of any contrary indication courts have imputed to Congress. The Commission noted the reason for the Code provision: a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts." Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93–137, Pt. I, 93d Cong., 1st Sess. (1973) at 140 n. 14, *reprinted in* Collier, *supra,* Appendix 2, at PI–i. This "rising incidence" contravened the general policy that "a loan ... that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt." *Id.* at 140, n. 15. The Commission implemented this policy by delaying dischargeability for five years, a time period which, it was anticipated, "gives the debtor an opportunity to try to meet his payment obligation." After five years, the exception is lifted in recognition of the fact that "in some circumstances the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments." *Id.* at 140, n. 16. As a calculation of "undue hardship," the Commission envisioned a determination of whether the amount and reliability of income and other wealth which the debtor could reasonably be expected to receive in the future could maintain the debtor and his or her dependents at a minimal standard of living as well as pay off the student loans. *Id.* at 140–41, n. 17.

Most courts have accepted that a debtor must at least satisfy the "minimal standard of living" test before a discharge of his or her student loans will be granted. *See, e.g., In re Johnson,* 5 B.C.D. 532, 537 (Bankr.E.D.Pa.1979); *In re Andrews,* 661 F.2d 702, 704 (8th Cir.1981). That is, before receiving a discharge of student loans the debtor is required to demonstrate that, given his or her current income and expenses, the necessity of making the monthly loan payment will cause his or her standard of living to fall below a "minimal" level. Indeed, if the calculation of future earnings and expenses were an exact science, a similar showing extended into the future might be all that would be necessary to justify discharge. After all, it is not unreasonable to hold that committing the debtor to a life of poverty for the term of the loan—generally ten years—imposes "undue" hardship.

Predicting the future, however, is never so easy. Minimum necessary future expenses may be ascertained with some precision from an extrapolation of present needs, but unpredictable changes in circumstances such as illness, marriage, or childbirth may quickly wreak havoc with such a budget. Even more problematic is the calculation of future income. It is the nature of § 523(a)(8)(B) applications that they are made by individuals who have only recently ended their education. Their earning potential is substantially untested, and because they are inexperienced they are in all likelihood at the nadir of their earning power. They may, like appellee, have had difficulty ***755** in securing employment immediately after graduation. Extrapolation of their current earnings is likely to underestimate substantially their earning power over the whole term of loan repayment.

It is no doubt for this reason that many courts have required more than a showing on the basis of current finances that loan repayment will be difficult or impossible. Perhaps the best articulation of this doctrine is that of Judge Lifland of the Bankruptcy Court of this district, who wrote that "dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *In re Briscoe,* 16 B.R. 128, 131 (Bankr.S.D.N.Y.1981).[2] Stated otherwise, the debtor has been required to demonstrate not only a current inability to pay but additional circumstances which strongly suggest that the current inability to pay will extend for a significant portion of the repayment period of the loan.

In addition to Judge Lifland's language, this test has been formulated as the necessity of showing of "unique" or "exceptional" circumstances. *See, e.g., In re Densmore,* 8 B.R. 308, 309 (Bankr.N.D.Ga.1979); *In re Rappaport,* 16 B.R. 615, 617 (Bankr.D.N.J.1981). Such circumstances have been found most frequently as a result of illness, *e.g., In re Norman,* 25 B.R. 545, 550 (Bankr.S.D.Cal.1982), a lack of usable job skills, *e.g., In re Seibert,* 10 B.R. 704 (Bankr.S.D.Ohio 1981), the existence of a large number of dependents, *In re Clay,* 12 B.R. 251 (Bankr.N.D.Iowa 1981), or a combination of these. *In re Diaz,* 5 B.R. 253 (Bankr.W.D.N.Y.1980); *Shoberg v. Minnesota Higher Education Coordinating Council,* 41 B.R. 684, 687 (Bankr.D.Minn.1984); *In re Dresser,* 33 B.R. 63 (Bankr.D.Me.1983).

[2] **[3]** Some courts, following the lead of *In re Johnson, supra,* 5 B.C.D. at 740, have required a showing of "good faith" prior to discharge. There is no specific authority for this requirement, but the need for some showing of this type may be inferred from comments of the Commission report. In discussing the discharge of loans after five years, when a showing of undue hardship is no longer required, the Commission noted that such discharge is fair because the debtor may be unable to repay his or her debts due to "factors beyond his reasonable control." *Report, supra,* at 140 n. 16. If external circumstances were seen as justifying discharge after five years, it is likely that only such circumstances should be permitted to justify discharge prior to that time. The propriety of a requirement of good faith is further emphasized by the stated purpose for § 523(a)(8): to forestall students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans. *Id.* at 140, n. 14.[3] ***756** Thus it is proper to require a debtor to show that he or she has made good faith efforts to repay the loan and that the forces preventing repayment are truly beyond his or her reasonable control. *See In re Rappaport, supra,* 16 B.R. at 617.

The effect of these requirements is to make student loans a very difficult burden to shake without actually paying them off. While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program. When making such loans, the government (as guarantor) is unable to behave like ordinary commercial lenders, who may, after investigating their borrowers' financial status and prospects, choose to deny as well as grant credit and may adjust the interest rate which they charge according to their judgment as to the likelihood of repayment. The government has no such luxury. It offers loans at a fixed rate of interest, and it does so almost without regard for creditworthiness. Indeed, because it bases its loan decisions in part on student need, it arguably offers loans selectively to the worst credit risks.

Because of this enlightened social policy, those whose past work or credit record might foreclose them from the commercial loan market are able to obtain credit at subsidized rates to advance their education. Those who might obtain loans only at exhorbitant rates are similarly able to obtain low cost, deferred loans. In return for this largesse—and it is undeniable that guaranteed student loans have extended higher education to thousands who would otherwise have been forced to forego college or vocational training—the government exacts a *quid pro quo.* Through § 523(a)(8) it commits the student to repayment regardless of his or her subsequent economic circumstances. In return for giving aid to individuals who represent poor credit risks, it strips these individuals of the refuge of bankruptcy in all but extreme circumstances. *See Johnson v. Edinboro State College,* 728 F.2d 163, 164 (3d Cir.1984) (Section 523(a)(8) represents a conscious Congressional choice to override the normal "fresh start" goal of bankruptcy). This is a bargain each student loan borrower strikes with the government. Like all bargains, it entails risk. It is for each student individually to decide whether the risks of future hardship outweigh the potential benefits of a deferred-payment education.[4]

[4] In conclusion, obtaining a discharge of student loans in bankruptcy prior to five years after they first come due requires a three-part showing: 1) that the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the loans, 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and 3) that the debtor has made good faith efforts to repay the loans.

II.

It remains to apply these principles of law in review of the decision at hand. Under Bankruptcy Rule 8013, the "clearly erroneous" standard of review is applicable to findings of fact by a Bankruptcy Judge, but "the district court is not bound by the clearly erroneous standard when reviewing the bankruptcy court's application of a legal standard to facts reasonably found." *In re Penn-Dixie Industries, Inc.,* 9 B.R. 936, 938 (S.D.N.Y.1981).

The debtor's testimony at the hearing below revealed the following. Appellee gained a Bachelor's degree in Psychology in 1979 and a Master's degree in Social Work in 1982. Her age was not specified, ***757** but she first entered college in 1972. She has supported herself since that time through a variety of full- and part-time jobs, student loans, and educational stipends. She has no dependents. During the decade prior to the hearing, her greatest annual income was $9,000.

No specific testimony about appellee's annual expenses was elicited other than that her rent is $200 per month. At the time of the hearing she was receiving $258 per month in public assistance, $49 per month in food stamps, and Medicaid. She had been receiving this aid for approximately four months prior to the hearing. Her testimony as to her source of support prior to that time was vague. At the time of the hearing, she possessed a bank account holding $200, but two months prior to the hearing she withdrew $2,400 from her savings to purchase a used car. Upon her filing for bankruptcy four months prior to the hearing, her student loans constituted 80% of her total indebtedness.

Appellee testified that she had sent out "over a hundred" resumes in search of employment in her chosen field of work but was unsuccessful. She noted that many of her classmates found themselves similarly unable to find such jobs. The extent to which she had attempted to find work outside her field was unclear. In response to her lawyer's inquiry as to whether she had sought clerical or other jobs, she replied, "I don't have secretarial skills, but I have applied for any position that I could find." She did not recount any specific jobs which she had sought and been refused. On cross-examination she conceded that she had done clerical work in the past. Although appellee was seeing a therapist for treatment of anxiety and depression due in part to her unemployment, she testified that she was capable of working.

In a brief oral ruling, the bankruptcy judge found that "she is not presently employed; prospects in the future do not look bright ... there does not appear to be any great demand for psychologists or social workers, or at least ... there is not anything available. She has a psychological impairment, as well as a lack of future employment opportunity.... I find ... that the paucity of income that the debtor receives from public assistance would not be available to her to repay, and it would work an undue hardship upon her to have to dip into those funds." As a consequence, the judge discharged the loans.

[5] At the outset, it appears that the judge's finding that appellee possesses a "psychological impairment" is clearly erroneous. Although appellee testified that she was consulting a therapist, there is no evidence in the record that her depression and anxiety impair her capacity to work. She has no "impairment" in any relevant sense of the word.

[6] Even in the absence of this finding, appellee appears to be a woman who is unlikely to find a job in her chosen field of work in the near future. However, she is an apparently healthy, presumably intelligent, and well-educated woman. Although she claimed to be unable to find any other type of work, the evidence presented at the hearing is too thin to support a finding that her chances of finding any work at all are slim, and I do not read the bankruptcy judge's decision as so finding. She has no dependents or any other extraordinary burdens which would impair her finding other work, or, once it is found, make it unlikely that she can both support herself and pay off her student loans.

In short, appellee at most proved that she is currently—or was at the time of the hearing—unable both to meet her minimal expenses and pay off her loans.[5] This ***758** alone cannot support a finding that the failure to discharge her loans will impose undue hardship. *See, e.g., In re Briscoe, supra,* 16 B.R. at 131; *In re Henry,* 4 B.R. 495 (Bankr.S.D.N.Y.1980); *Panteli v. New York State Higher Education Services Corp.,* 41 B.R. 856, 858 (Bankr.S.D.N.Y.1984). Nothing in the record supports a finding that it is likely that her current inability to find any work will extend for a significant part of the repayment period of the loan or that she has "a total incapacity now and in the future to pay [her] debts for reasons not within [her] control." *In re Rappaport, supra,* 16 B.R. at 617. She is skilled, apparently capable, well, and without dependents. Nor has she adequately demonstrated good faith in attempting to pay off her loans. She filed for discharge within a month of the date the first payment of her loans came due. She has made virtually no attempt to repay, nor has she requested a deferment of payment, a remedy open to those unable to pay because of prolonged unemployment. *See, e.g.,* 34 C.F.R. § 674.34(d)(2) (1984). Inasmuch as this is her primary reason for requesting discharge, initial resort to the less drastic remedy of deferment would have been more appropriate than bankruptcy.

It was error for the bankruptcy court to discharge appellee's student loans. The decision of the bankruptcy judge is reversed. In compliance with the suggestion of *In re Andrews, supra,* 661 F.2d at 705 n. 5, the action is remanded with the direction that appellee's loans be declared nondischargeable without prejudice to her seeking such relief again pursuant to Rule 409(a)(1), R.Bankr.P.

It is SO ORDERED.

All Citations

46 B.R. 752, 12 Collier Bankr.Cas.2d 137, 23 Ed. Law Rep. 573, Bankr. L. Rep. P 70,278

Footnotes

1 The sole authority from the Courts of Appeals appears to be *In re Andrews,* 661 F.2d 702 (8th Cir.1981); the only published decision from the district courts is a summary affirmance, *In re Wells v. People ex rel. Illinois State Scholarship Commission,* 37 B.R. 687 (N.D.Ill.1984).

2 This position has gained a number of adherents. *See, e.g., In re Moorman,* 44 B.R. 135, 137 (Bankr.W.D.Ky.1984); *In re Reid,* 39 B.R. 24, 26 (Bankr.E.D.Tenn.1984); *In re Love,* 33 B.R. 753, 755 (Bankr.E.D.Va.1983); *In re Holzer,* 33 B.R. 627, 632 (Bankr.S.D.N.Y.1983) (Berk, B.J.); *In re Lezer,* 21 B.R. 783, 788 (Bankr.N.D.N.Y.1982).

3 In connection with the showing of good faith and circumstances beyond the control of the debtor several courts have permitted debtors to discharge their loans upon a showing that the education for which the loans paid has been of little use to them. *See, e.g., In re Littell,* 6 B.R. 85 (Bankr.D.Or.1980); *In re Connolly,* 29 B.R. 978, 982 (Bankr.D.Fla.1983); *In re Powelson,* 25 B.R. 274, 276 (Bankr.D.Neb.1982). Consideration of this factor is not only improper, it is antithetical to the spirit of the guaranteed loan program. As described in more detail *infra,* the loan program grants aid regardless of the financial stability of the debtor or the wisdom of his or her individual choice to pursue further education. Consideration of the "value" of the education in making a decision to discharge turns the government into an insurer of educational value. Those students who make wise choices prosper; those who do not seek to discharge their loans in bankruptcy. This is wholly improper.
The courts which consider this factor seem to view it as a way to punish institutions for forcing on students loans which are not in their best interests. *See, e.g., In re Powelson, supra,* 25 B.R. at 275. Regardless of whether such an attitude is proper, the courts' chosen remedy is ineffectual. The burden is borne not by the institution but by taxpayers, who absorb the cost of the default. As noted in *Powelson,* a student loan *is* an investment, but it is for the borrower, not the taxpayers, to evaluate the wisdom of the investment and bear the risks and burden if the investment proves improvident.

4 The government is not out to make life as unpleasant as possible for borrowers who suffer financial difficulties. Deferment and cancellation are available under appropriate circumstances. *See* 34 C.F.R. §§ 674.34, 674.34a, 674.51–59 (1984) (National Direct Student Loan program).

5 Even this is uncertain. The bankruptcy judge failed to require, and appellee failed to submit, a statement of expenses and income. The testimony at the hearing, accepted at face value, indicates that appellee had been surviving for several months on monthly income of $107 in food stamps and cash above the cost of her rent. From this $107 appellee must have paid for food, clothing, utilities, entertainment, and the costs of registering, insuring, and maintaining a $2,400 car. It seems incredible that this sum could stretch so far, indicating that appellee had sources of income which she failed to reveal. It must be remembered that although appellee's budget was this thin, she nevertheless felt financially secure enough to spend her life savings on a car one to two months prior to the hearing.

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(NOT FOR PUBLICATION)
United States Bankruptcy Court,
D. Arizona.

In re Rita Gail Edwards, Debtor.
Rita Gail Edwards, Plaintiff,
v.
Educational Credit Management Corporation,
Defendant.

Case No: 3:14–bk–16806–PS
|
Adversary No. 3:15–ap–26–PS
|
Signed March 31, 2016

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UNDER ADVISEMENT ORDER

DANIEL P. COLLINS, UNITED STATES BANKRUPTCY JUDGE

***1** Before this Court is the complaint of Plaintiff, Rita Gail Edwards ("Debtor"), to determine the dischargeability, under 11 U.S.C. § 523(a)(8),[1] of student loans owed by Debtor to Defendant, Educational Credit Management Corporation ("ECMC" or "Defendant"), in the amount of $243,506.35.[2] The Court now finds Debtor's obligations to Defendant are wholly dischargeable.[3]

I. BACKGROUND

A. Procedural History

Debtor filed her voluntary chapter 7 bankruptcy petition on November 10, 2014 ("Petition Date"). She filed her Schedule F reflecting an unsecured, undisputed obligation to Defendant's predecessor-in-interest in the amount of $227,499.00 (Administrative Docket Number ("Adm.DE") 22). On January 12, 2015, Plaintiff commenced this adversary proceeding with the filing of her Complaint (DE 1)[4] to determine the dischargeability of Debtor's student loans. An Answer was filed on February 12, 2015 (DE 11). Defendant Nelnet Loan Servicing was replaced as a party Defendant by the State of Colorado, Department of Higher Education, Colorado Student Loan Program dba College Assist ("College Assist") by order of the Court dated March 5, 2015 (DE 18). Defendant U.S. Department of Education was dismissed from this Adversary Proceeding on April 14, 2015 (DE 28). Defendant College Assist was replaced by ECMC as party defendant, pursuant to this Court's order of January 16, 2016 (DE 53).

The parties filed their Joint Pretrial Statement ("JTPS") (DE 42) on December 10, 2015. On January 19, 2016, the Court entered its order (DE 54) approving the parties' agreed motion (DE 49) to amend the JTPS. On February 16, 2016, the Court held a trial on this matter. At the conclusion of the trial, the Court took this matter under advisement.

B. The Evidence

Two witnesses testified at trial: Jennifer Skerbinc and Debtor.

1. *Jennifer Skerbinc.* Ms. Skerbinc is a Litigation Specialist for ECMC. She testified that the amount owed by Debtor to Defendant totaled $245,327. She reviewed Debtor's adjusted gross income, as reflected in Debtor's 2015 federal tax return (Exhibit 8)[5]. Ms Skerbinc then reviewed the "REPAYE" and Income Based Repayment ("IBR") student loan repayment programs. Both of these student loan repayment programs call for an annual review of an obligor's income and expenses. Absent such

proof, each program assumes a 5% annual increase in the obligor's earnings. Both "programs" call for a 25 year repayment program and both call for forgiveness of indebtedness of an obligor's student loans if she successfully completes 25 years of payments. The primary differences between these two programs are that the IBR program requires proof of the obligor's hardship and calls for payment of 15% of the obligor's discretionary income. The REPAYE program requires no proof of hardship and calls for payment of 10% of obligor's discretionary income.

***2** Based on Debtor's presumed 2015 adjusted gross income of $30,622, Ms. Skerbinc testified that Debtor's initial payments under the REPAYE program would be $56 per month but would be $84 per month for the first 12 months under the IBR program.

2. *Rita Gail Edwards.* Debtor is an intelligent, well-spoken, 56–year–old single woman with two adult children. The eldest, Regina Sebert, is a 34–year–old single woman who suffers from type 1 diabetes, a disease which has caused blindness, failing kidneys, and a failing pancreas. She lives on her own and receives $844 per month in public assistance, which amount is insufficient to cover her living expenses and medical needs. Debtor's other child is Seth Sebert, a 32–year–old transwoman known as "Asia." Asia is a convicted felon, has bipolar disorder, post-traumatic stress and a host of other maladies. Asia has lived with Debtor since November 2014, but has spent the bigger end of the past 15 years in correctional institutions. Although Asia receives food stamps, she has been denied disability benefits. However, Debtor is hopeful that Asia's disability appeal will reverse this denial. According to Debtor, Asia is intelligent but is so debilitated by her numerous psychological challenges that, for the foreseeable future, she is not likely to produce any meaningful support for herself or her mother's household. The father of Regina and Asia died in 1990.

Debtor has three degrees from Ottawa University, in Secondary Education (B.A.1996), Education (Masters 2000) and Professional Counseling (Masters 2002). The student loans at issue were obtained to pay for Debtor's education and living expenses while pursuing these degrees at Ottawa.

Debtor's post-graduate employment includes jobs in education and various forms of counselling for wages ranging from $16 to $28 per hour. Debtor and her then husband both lost their jobs during the recession in 2009. In 2009, Debtor formed a sole proprietorship named SET Counselling ("SET") which provides a host of counselling services in Northern Arizona. Her tax returns from 2010 to 2014 reflect annual income ranging from $26,625 to $638 for an average annual income of $14,157.80. In 2015, Debtor generated adjusted gross income of $30,622. At the time of trial, Debtor's monthly take home income was generally about $2,200 per month and her expenses were around $2,500 per month.[6] Defendant challenges the reasonableness of certain expenses of the Debtor including recreation ($50 per month), term insurance ($27) and two payments ($403 per month) related to her 2015 purchase of a 2006 Toyota with 115,000 miles. One of the car loans calls for a monthly payment of $153 to an arm's-length creditor but another $250 per month is due to Debtor's mother and step-father who, post-petition, released their lien against a vehicle Debtor traded in so she could acquire the Toyota. Debtor has approximately 1.5 years of payments left on each of these loans.

Debtor has applied for numerous jobs in the past four years, to no avail. Her SET employment enables her to be relatively close to her children so she can attend to their needs while also providing the flexibility to take them to medical appointments and provide for their other daily demands. Regina, of course, cannot drive. Debtor receives no governmental aid nor does she receive income from any source beyond her work with SET.[7]

***3** Debtor's student loans were consolidated in 2006 after which time she requested and obtained several forebearances. See Exhibits 31 (dated December 16, 2010), 32 (dated February 13, 2010) and 34 (dated February 22, 2011). Debtor made loan payments on her student loans in 2011 (at least four, totaling $143.47), 2012 (at least 9, totaling $201.39), 2013 (at least 13, totaling $333.40) and 2014 (at least 7, totaling $179.62) for an aggregate of at least 33 payments totaling $857.88. Although Debtor made these loan payments, she failed to pay her income taxes between 2012 and 2015. She now owes unpaid taxes in excess of $16,000, a portion of which she is repaying at the rate of $150 per month.

Debtor lives with Asia in a tiny mobile home in Cornville, Arizona. She bought this mobile home for $37,500 in April 2011 and pays $494 per month towards the mortgage. Prior to acquiring the mobile home, she lived for two years in a 20–year–old fifth wheel trailer with her then husband. At her current residence she sometimes turns off the water heater for several months at a time in order to trim expenses. Debtor has no health insurance but is being assessed for health insurance under the Affordable Health Care Act. Although her 2015 tax return (Exhibit 8) has apparently not yet been filed, she expects it will produce an additional federal tax bill in excess of $6,000.[8]

II. JURISDICTION

This adversary proceeding is a core matter over which the Court has jurisdiction. 28 U.S.C. §§ 157(B)(2)(1) and 1334.

III. ISSUE

Has Debtor proven by a preponderance of the evidence that her student loans owed to Defendant are to be wholly or partially discharged under § 523(a)(8) of the Code?

IV. LAW

Section 523(a) of the Code states in relevant part, as follows:

> (a) A discharge under section 727 ... 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
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (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;

Although § 523(a)(8) references "undue hardship," that term is not defined in the Code. The Southern District of New York announced its definition of undue hardship in *Brunner,* 46 B.R. 752 (S.D.N.Y. 1985) (Aff'd by 831 F.2d 395(2nd Cir. 1987)). The Ninth Circuit, in turn, adopted *Brunner's* three-prong undue hardship test in the case of *In re Pena,* 155 F.3d 1108 (9th Cir. 1998).

The *Brunner* test is as follows:

1. The Debtor is not presently capable of maintaining a " 'minimal' standard of living for herself and her dependents if forced to repay the [student] loans." *Brunner,* 831 F.2d at 396;

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." *Id.*; and

3. "That the debtor has made good faith efforts to repay the [student] loans ...." *Id.*

Debtor "bears the burden of proving by a preponderance of the evidence, all of the" three prongs of the *Brunner* test. *In re Birrane,* 287 B.R. 490, 494 (9th Cir. B.A.P. 2002). *See also In re Refino,* 245 F.3d 1083, 1087 (9th Cir. 2001).

Discharge litigation under § 523(a)(8) is not necessarily a winner-takes-all proposition. "Bankruptcy courts may exercise their equitable authority under § 105(a) to partially discharge student loans." *In re Jorgensen,* 479 B.R. 79, 86 (9th Cir. B.A.P. 2012); *see also In re Saxman,* 325 F.3d 1168, 1173 (9th Cir. 2003). The Court's discretion extends to both the amount discharged and the repayment terms for the undischarged portion. *Jorgensen,* 479 B.R. at 86. However, even if the student loan discharge is partial, the Debtor still must satisfy all three prongs of the *Brunner* test. *Id.* and *Saxman,* 325 F.3d at 1174.

A. *Brunner Prong No. 1—Minimal Standard of Living*

***4** To satisfy the first prong of the *Brunner* test, Debtor must demonstrate more than that she is experiencing tight finances. *In re Nascimento,* 241 B.R. 440, 445 (9th Cir. B.A.P. 1999). "In defining undue hardship, courts require more than temporary financial adversity but typically stop short of utter hopelessness." *Id.*

B. *Brunner Prong No. 2—Additional Circumstances*

In describing the second prong of the *Brunner* test, the

Ninth Circuit B.A.P. has noted:

> Additional circumstances are any circumstances beyond the more current inability to pay, that show the inability to repay is likely to persist for a significant portion of the repayment period. *In re Nys,* 308 B.R. at 444. "The circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay." *Id.* A court may consider a number of factors not limited to the following: the debtor's age, training, physical and mental health, education, assets, ability to obtain a higher paying job or reduce expenses. *Id.*

Jorgensen, 479 B.R. at 88. The "additional circumstances" test is, "by its nature, case-by-case." *Nys,* 308 B.R. 436, 444 (9th Cir. B.A.P. 2004) aff'd 446 F.3d 938 (9th Cir. 2006). The *Nys* court cites a non-exclusive list of twelve factors to review in determining whether a debtor has satisfied the second prong of the *Brunner* test:

> 1. Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; *Brunner,* 831 F.2d at 396;
>
> 2. The debtor's obligations to care for dependents; *Id.*;
>
> 3. Lack of, or severely limited education; *Pena,* 155 F.3d at 1114;
>
> 4. Poor quality of education[9];
>
> 5. Lack of usable or marketable job skills; *Birrane,* 287 B.R. at 497;
>
> 6. Underemployment;
>
> 7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
>
> 8. Limited number of years remaining in work life to allow payment of the loan; *Brunner,* 831 F.2d at 396;
>
> 9. Age or other factors that prevent retraining or relocation as a means for payment of the loan;
>
> 10. Lack of assets, whether or not exempt, which could be used to pay the loan;
>
> 11. Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income;
>
> 12. Lack of better financial options elsewhere.

Nys at 446–447.

C. *Brunner Prong No. 3—Good Faith*

In reviewing the third prong of the *Brunner* test, the Ninth Circuit B.A.P. has stated that:

> To determine good faith, the court measures the debtor's efforts to obtain employment, maximize income, minimize expenses, and negotiate a repayment plan. *In re Mason,* 464 F.3d 878, 884 (9th Cir. 2006). Whether a debtor made payments prior to filing for discharge is also a persuasive factor in determining whether she made a good faith effort to repay her loans. *In re Pena,* 155 F.3d at 1114.

In re Jorgensen, 479 B.R. at 89.

In his concurring opinion in *In re Roth,* 490 B.R. 908, 920–923 (9th Cir. B.A.P. 2013) Judge Pappas acknowledges that courts in the Ninth Circuit are bound by *Brunner* and *Pena* but makes impassioned and persuasive arguments as to why the Ninth Circuit should revisit this outdated test. Loyola Law School Prof. Anne Wells takes up Judge Pappas' torch and provides further background into the history of student loan dischargeability policies, statutes, case law and changed conditions in the market place. Ann E. Wells, *Replacing Undue Hardship With Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy,* 33 Cal. Bankr.J. 313–344 (2016). Among other things, Prof. Wells notes that, as of March 13, 2015, student loan debt in the United States totaled more than $1.25 trillion. *Id.* This amount is more than the combined national debts of Austria and Belgium. *Id.* At the end of 2012, Americans in their 50's owed $112 billion and those in their 60's owed $43 billion. *Id.* at 319. In short, student loan debt is a gigantic issue in the United States, and not just for students in their 20's.

V. ANALYSIS

A. *Minimum Standard of Living*

***5** At present, Debtor is not just living hand to mouth, she is barely eeking out an existence. She lives in a tiny mobile home in a small but affordable Northern Arizona town. Her vehicle, while apparently serviceable, is an old high mileage compact car. Debtor does not live an extravagant life. She periodically shuts off her water heater in an effort to reduce expenses.

Defendant criticizes several of Debtor's monthly expenditures (e.g., recreation, term insurance and car payments). This Court, however, finds each of these expenses to be reasonable under the Debtor's circumstances. Debtor's term insurance provides an appropriate safety net for her children should Debtor pass away. The insurance premiums are nominal ($27 per month). Debtor's $50 per month entertainment expenses are hardly lavish. Debtor's car payments reflect the fact that she could not afford to buy a car for cash, that she had an outstanding balance on her trade-in, and that two lien payments were necessary to acquire the Toyota Corolla. Despite her efforts to minimize expenses, Debtor has been unable to timely pay her income tax bills. Debtor cannot presently maintain a minimal standard of living if she were forced to repay her student loans.

Debtor's financial difficulties are not merely a temporary state of affairs. Debtor's tax returns since 2010 reveal the prolonged nature of her financial hardship. These returns do not reveal that her two children have long suffered from their current ailments and both are dependent upon financial assistance which their mother supplies. For quite some time in the past and for the foreseeable future could not and will not be able to maintain a minimal standard of living if she were forced to repay her student loans.

B. *"Additional Circumstances"*

This Court will address the second prong of the *Brunner* test by walking through the twelve steps program announced by the Ninth Circuit B.A.P. in *Nys*.

1. *Disabilities of Debtor or Her Dependents.* The Debtor is not physically or emotionally handicapped. In view of her monumental life challenges, this Court was impressed by how diligent, stable and well-adjusted she appeared to the Court. That said, Debtor is very restricted by the demands of motherhood and the realities of her income earning potential. Although Regina receives some state assistance, it is not enough to cover her cost of care. Debtor has for years been supplementing Regina's modest revenue and will need to continue doing so for the remainder of her life. As to Asia, at present, she appears to be wholly dependent upon her mother's income. Asia may be physically capable of performing some level of work but this Court was persuaded by Debtor's credible testimony to the effect that Asia is so affected by psychological issues that she is not likely to generate any meaningful income for a long time, maybe for the rest of her life. Regina's and Asia's conditions do not prevent Debtor from working but their needs have inhibited and will continue to inhibit Debtor's working hours and geographical location.

2. *Caring for Dependents.* See paragraph 1, above.

3. *Educational Limitations.* Debtor is well educated. For years she has been actively employed in her field of education. However, under the very best of circumstances, Debtor's education would not likely qualify her for a lucrative salary. The Court finds Debtor is making a reasonable level of income with the education and training she has acquired.[10]

***6** 4. *Quality of Education.* Debtor holds one undergraduate and two graduate degrees from Ottawa University. Ottawa is not exactly a name brand university but this Court was not supplied with evidence which would enable the Court to criticize the merits of the education supplied by this non-profit university.

5. *Job Skills.* Debtor has usable and marketable job skills but there is a limit to the earning capacity these skills can produce. Debtor could admittedly make more money in a bigger market place (e.g. Phoenix), but her expenses would also increase dramatically. Moreover, Debtor would not be in a position to care for her dependent[11] children as she is presently.

6. *Underemployment.* Debtor is somewhat underemployed at present. She does, however, periodically apply for regional jobs as they become known to her. Her underemployment is through no fault of her own. Nor, as Defendant suggests, has Debtor chosen to do less than she is capable of doing in the workplace.

7. *No More Lucrative Job Skills.* Debtor is and has long been actively employed in her chosen educational field. She is not likely to earn more anytime soon, especially since she must care for her two children. Unfortunately, Debtor does not possess other skills which would qualify

her for more lucrative employment in another discipline.

8. *Work Years Remaining.* Debtor is 56 years old, a year younger than the author of this opinion. While some would say the 50's are the new 40's, we all know otherwise. Debtor likely has another eight years of maximum earning potential and maximum job performance. Our culture has long pegged age 65 as the logical retirement age. This Court anticipates Debtor will likely retire at 65. The student loan repayment programs discussed by defendant's witness, Ms. Skerbinc, call for a 25–year payment regimen.[12]

9. *Retraining Prospects.* Debtor is already highly trained and skilled in her chosen field. To suggest she change careers at age 56 is not reasonable. More importantly, piling on additional student loan debt would be the Debtor's only means of acquiring new skills. Accumulating more student loans is the last thing Debtor needs. Devoting one to three more years in study would also be unwise if Debtor has only eight working years left in her.

10. *Lack of Assets.* Debtor owns a very modest home, a well-worn vehicle and an education that produces a minimal standard of living. She lacks the assets or means to pay all or even most of her student loans.

11. *Increasing Expenses.* Debtor has done a remarkable, even heroic, job trimming her expenses. There is no evidence that her mobile home will appreciate in value but this Court is well aware that Cornville has long been a sleepy rural community and that 600 sq. ft. mobile homes do not generally appreciate, nor do 10–year old Toyota Corollas.

***7** 12. *Lack of Better Options Elsewhere.* As noted in section V(B)(5) above, Debtor could and likely would earn more in a major metropolitan area, if a 56–year old woman could find the right job. However, her living expenses would also increase and she would likely need to find and pay for a replacement caregiver for Regina. Debtor is also convinced that the distractions of a bigger city will cause Asia to once again find herself in trouble with the law. Phoenix surely does hold a greater number of distractions than does Cornville.

In hindsight, it is a shame that Debtor ever incurred these student loan debts. While her Ottowa University education may have given her the tools and credentials to work in an emotionally satisfying role and may have provided a well needed skilled counselor in her rural community, the predictable economic reward was never likely to justify the massive economic burden she incurred. Debtor, of course, is not blameless in this regard. She signed these loan obligations and promised to pay the balances. However, she was married and may very well have reasonably anticipated a different overall financial future for her and her family.

In summary, Debtor does not satisfy each and every one of the twelve *Nys* factors, but she does satisfy most of them. This Court finds that additional circumstances do exist in Debtor's life such that her grim financial circumstances are likely to persist for the remainder of her life. Short of acquiring a winning Powerball ticket, this Court finds the Debtor's dire financial straits will persist through and beyond the date she turns 65.

C. *Debtor's Good Faith Repayment Efforts*

Since the student loans at issue were consolidated in 2006, Debtor made at least 33 payments on these loans. One could call these payments nominal but they were in accordance with her agreement with Defendant's predecessor(s) and those payments were in accordance with her financial means. Significantly, while Debtor was making these student loan payments, she was unable to pay her income taxes. She now owes $16,000 in non-dischargeable tax debt. Debtor should not be forced to repay her student loans if doing so causes her to amass unpaid income tax liability. Debtor has satisfied the third prong of the *Brunner* test.

Defendant notes in the JTPS at page 22, that Debtor's home loan will be fully matured in 2021,[13] assuming she does not refinance or buy a replacement home before then. Debtor will be 62 years old at that time. Her $494 monthly payment may then be concluded but it is not unreasonable to believe she will need to commit that monthly financial freedom to other obligations, including deferred maintenance to the mobile home, a newer car, etc.

VI. CONCLUSION

Debtor has satisfied her burden of proof on each of the three *Brunner* tests. Moreover, this Court concludes a partial discharge is not appropriate under the circumstances as this Court finds that Debtor does not, and most likely will not, have the capacity to repay any portion of her student loans. The Court, therefore, wholly discharges the student loans at issue under 11 U.S.C. § 523(a)(8).

So ordered.

All Citations

Slip Copy, 2016 WL 1317421

Footnotes

1 Unless otherwise indicated, all Chapter, Section and Rule references are to the Bankruptcy Code ("Code"), 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037.

2 This aggregate balance is claimed by Defendant to be owed as of December 11, 2015. While Debtor does not agree with this amount, this issue is not contested by Debtor in this Adversary Proceeding.

3 This Order sets forth the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

4 DE shall hereafter refer to docket entries in the adversary file in this case.

5 It is the Court's understanding that this tax return, while signed by the Debtor on January 11, 2016, had not been filed as of the date of the trial.

6 While the JTPS reflects an agreed gross income of $2,840 per month for the past six months and expenses of $2,504 per month, the Debtor's testimony made it clear that these figures failed to include her income tax bills of about $600 per month.

7 Debtor has been divorced twice but neither former spouse pays her support of any kind. Asia does receive food stamps totaling $190 per month.

8 This amount is part of the $16,000 tax debt referred to above.

9 *See Pena,* 155 F.3d at 1114 (educational training for a job in an over-saturated market); *Cota,* 298 B.R. at 418 (school's incompetency); *Speer v. Educ. Credit Mgmt. Corp* (*In re Speer*), 272 B.R. 186, 187 (Bankr.W.D.Tex. 2001) (trade school had improperly trained debtor and few graduates obtained jobs).

10 The more puzzling question is how Debtor ever qualified for $250,000 in student loans to pursue a course of study that was never likely to enable her to produce sufficient income to service her student loans. This, of course, is part of the student loan crisis addressed in Prof. Wells' article and Judge Pappas' concurrence referenced above.

11 Although Regina cannot be claimed as a dependent for tax purposes, this Court finds she is nevertheless materially (albeit partially) dependent on her mother's care and income.

12 Even if Debtor were required to adhere to a 25–year repayment schedule (a prospect this Court finds unreasonable to expect of a 56–year old woman), the discharge she could receive under these programs would leave her with significant debt forgiveness income. *See Roth,* 490 B.R. at 923.

13 This is not a stipulated fact under the JTPS nor does the Court recall this "fact" being introduced into evidence.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Kashikar, 9th Cir.BAP (Cal.), April 28, 2017

527 B.R. 624
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Tarra Nichole CHRISTOFF, Debtor.
Institute of Imaginal Studies dba Meridian
University, Appellant,
v.
Tarra Nichole Christoff, Appellee.

BAP No. NC–14–1336–PaJuTa.
|
Bankruptcy No. 13–10808.
|
Adversary No. 13–3186.
|
Argued and Submitted on Feb. 19, 2015.
|
Filed March 27, 2015.

Synopsis
Background: University that Chapter 7 debtor attended using tuition credits provided by university sued for determination that debtor's obligation to repay university was excepted from discharge, except on showing of "undue hardship," as debt for "funds received as an educational benefit, scholarship, or stipend." The United States Bankruptcy Court for the Northern District of California, Dennis Montali, J., 510 B.R. 876, entered summary judgment in favor of debtor, and university appealed.

[Holding:] The Bankruptcy Appellate Panel, Pappas, J., held that, as matter of first impression, debtor's obligation to university was not "obligation to repay funds received as an educational benefit, scholarship, or stipend."

Affirmed.

West Headnotes (9)

[1] **Bankruptcy**
Conclusions of law; de novo review

Bankruptcy Appellate Panel (BAP) reviews bankruptcy court's grant of summary judgment de novo.

1 Cases that cite this headnote

[2] **Bankruptcy**
Conclusions of law; de novo review

Bankruptcy Appellate Panel (BAP) would review de novo bankruptcy court's application of legal standard in determining whether debt was excepted from discharge, except on showing of "undue hardship," as debt for "funds received as an educational benefit, scholarship, or stipend." 11 U.S.C.A. § 523(a)(8)(A)(ii).

3 Cases that cite this headnote

[3] **Bankruptcy**
Construction and Operation

Any analysis of the Bankruptcy Code begins with statutory text.

Cases that cite this headnote

[4] **Statutes**
Context
Statutes
Statutory scheme in general

Words of statute must be read in their context and with view to their place in overall statutory scheme.

Cases that cite this headnote

[5] **Statutes**
Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
Statutes
Statutory scheme in general

If statutory language is unambiguous and statutory scheme is coherent and consistent, judicial inquiry must cease.

Cases that cite this headnote

[6] **Bankruptcy**
Debts and Liabilities Discharged

Dischargeability exceptions must be limited to those plainly expressed in the Bankruptcy Code. 11 U.S.C.A. § 523(a).

1 Cases that cite this headnote

[7] **Bankruptcy**
Educational Loans

While Chapter 7 debtor's obligation to pay a for-profit university back for tuition credits that it extended to her to allow her to take classes at university by paying less than her full tuition upfront was obligation to repay university for educational benefits that it had extended to her, this was not enough to trigger dischargeability exception for debtor's "obligation to repay funds received as an educational benefit, scholarship, or stipend," which did not apply to debtor's obligation to repay any educational benefit, scholarship, or stipend, but only educational benefits, scholarships, or stipend that took the form of "funds received" by debtor. 11 U.S.C.A. § 523(a)(8)(A)(ii).

6 Cases that cite this headnote

[8] **Bankruptcy**
Educational Loans

Debtor must receive actual funds in order for debt to be excepted from discharge as one for "funds received as an educational benefit, scholarship, or stipend." 11 U.S.C.A. § 523(a)(8)(A)(ii).

5 Cases that cite this headnote

[9] **Bankruptcy**
Educational Loans

Dischargeability exception recognized by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) amendments to the Bankruptcy Code for debtor's "obligation to repay funds received as an educational benefit, scholarship, or stipend" is separate education-related dischargeability exception, that is delinked from the phrases "educational benefit or loan" and "any other educational loan" in separate provisions of same statute. 11 U.S.C.A. § 523(a)(8)(A)(i, ii), (a)(8)(B).

7 Cases that cite this headnote

Attorneys and Law Firms

***625** Scott D. Schwartz of Rust, Armenis & Schwartz, P.C., San Francisco, CA, argued for Appellant Institute of Imaginal Studies d/b/a Meridian University.

Lindsay R. Torgerson of Wine Country Family Law & Bankruptcy Office, Cloverdale, CA, argued for Appellee Tarra Nichole Christoff.

Before: PAPPAS, JURY, and TAYLOR, Bankruptcy Judges.

OPINION

PAPPAS, Bankruptcy Judge.

This appeal raises an important issue of first impression concerning the scope of the exception to discharge for student debts in bankruptcy. Creditor Institute of Imaginal Studies d/b/a Meridian University ("Meridian") appeals the summary judgment of the bankruptcy court determining that the debt owed to Meridian by chapter ***626** 7[1] debtor Tarra Nichole Christoff ("Debtor") was not excepted from discharge pursuant to § 523(a)(8)(A)(ii). Based upon the plain language of the Bankruptcy Code, we AFFIRM.

I. FACTS[2]

A. *Relationship of the Parties.*

Meridian is a for-profit California corporation which operates a private university licensed under California's Private Post Secondary Education Act of 2009, Cal. Educ.Code § 94800, *et seq.* If a graduate of Meridian fulfills other post-graduate requirements, the graduate may obtain a license from California to practice as an independent, unsupervised psychologist.

Debtor applied for admission to Meridian in 2002. Meridian agreed to admit Debtor and offered her $6,000 in financial aid to pay a portion of the tuition for that school year. Under this arrangement, Debtor did not receive any actual funds from Meridian, but instead she received a tuition credit. Debtor signed an enrollment agreement acknowledging Meridian's offer to "finance" $6,000 of the tuition, and she signed a promissory note in favor of Meridian evidencing her obligation. The promissory note provided that the debt for the tuition credit was to be paid by Debtor in installments of $350 per month after Debtor completed her course work or withdrew from Meridian. Interest accrued on the unpaid balance of the note at nine percent per annum, compounded monthly.

In 2003, Debtor submitted a similar application, and Meridian granted her a financial aid award of $5,000 for that school year. As before, Debtor signed a promissory note for $5,000. Again, Debtor did not receive any funds but instead received a tuition credit. The promissory note contained payment terms identical to those in the prior note.

Debtor completed her course work at Meridian, and Debtor's note payments began in October 2005. After making several payments on the notes, in 2009, Debtor sought a deferral of her payments for a period of one year. Meridian granted the extension. Also in 2009, Debtor withdrew from Meridian without completing her dissertation, a requirement for obtaining her degree.

After the extension expired, Debtor did not pay the amounts due under the two promissory notes. Thereafter, Meridian unsuccessfully attempted to collect the balance due from Debtor. Eventually, Meridian and Debtor agreed to submit Meridian's claims to arbitration under a provision in the enrollment agreement. In July 2012, an arbitrator ordered Debtor to pay Meridian the unpaid balance due on the promissory notes, $5,950, plus accrued interest.

B. *The Bankruptcy Case and Adversary Proceeding.*

Debtor filed a chapter 7 bankruptcy petition on August 19, 2013. Debtor listed Meridian in schedule F as an unsecured, nonpriority creditor. Meridian commenced an adversary proceeding against Debtor seeking a determination by the bankruptcy court that the debt owed by ***627** Debtor to Meridian was excepted from discharge pursuant to § 523(a)(8).

On April 30, 2014, Meridian filed a motion for summary judgment. In its motion, Meridian conceded that Debtor's debt did not qualify for an exception to discharge under either § 523(a)(8)(A)(i) or (a)(8)(B).[3] However, it argued that the debt was excepted from discharge under § 523(a)(8)(A)(ii). Debtor disputed that this Code provision applied to her debt to Meridian.[4] The parties appeared at a motion hearing on May 30, 2014, presented their arguments, and the bankruptcy court took the issues under advisement.

On June 11, 2014, the bankruptcy court entered a Memorandum Decision in which it held that Debtor's debt to Meridian did not qualify for an exception to discharge under § 523(a)(8)(A)(ii). *Inst. of Imaginal Studies dba Meridian Univ. v. Christoff (In re Christoff),* 510 B.R. 876, 884 (Bankr.N.D.Cal.2014). In making this ruling, the bankruptcy court noted that the question raised by the motion was an issue of first impression in the Ninth Circuit following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[5] After a thorough review of amended § 523(a)(8) and the cases addressing the issue, the bankruptcy court concluded:

> [b]ecause Debtor's obligations under applicable documents were to pay the amount under the [p]romissory [n]otes, and thereafter the arbitration award, but did not flow from 'funds received' either by her as the student or by Meridian from any other source, the debt is not covered by [§ 523(a)(8)(A)(ii)] and is therefore eligible for discharge in Debtor's discharge.
>
> *In re Christoff,* 510 B.R. at 884.

Interpreting the "funds received" requirement in § 523(a)(8)(A)(ii), the bankruptcy court explained that "Meridian simply agreed to be paid the tuition later ... [i]t did not receive any funds, such as from a third party financing source." *Id.* at 879. The bankruptcy court therefore concluded that, while the transactions between Debtor and Meridian were clearly loans, § 523(a)(8)(A)(ii) does not extend to loans but, instead, grants an exception to discharge for "an obligation to repay funds received." *Id.* at 879. The bankruptcy court observed that BAPCPA had amended the prior version of § 523(a)(8) and had created a "newly separated [§ 523(a)(8)(A)(ii), which] refers to an 'obligation to repay funds received as an educational benefit, scholarship[,] or stipend,' without reference to educational loans or any other kind of loan." *Id.*

Meridian filed a notice of appeal concerning the Memorandum Decision on June 26, 2014. The bankruptcy court, on July 2, 2014, entered an order granting summary judgment in favor of Debtor and denying Meridian's motion for summary judgment; it also entered a judgment incorporating these rulings. On July 11, 2014, Meridian filed an amended notice of ***628** appeal to include the order and judgment entered by the bankruptcy court.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the bankruptcy court erred in holding that the Meridian debt was not excepted from discharge under § 523(a)(8)(A)(ii) because it was not an obligation for "funds received."

IV. STANDARDS OF REVIEW

[1] We review a bankruptcy court's grant of summary judgment de novo. *The President & Bd. of Ohio Univ. v. Hawkins (In re Hawkins),* 317 B.R. 104, 108 (9th Cir. BAP 2004), *aff'd,* 469 F.3d 1316 (9th Cir.2006); *Thorson v. Cal. Student Aid Comm'n (In re Thorson),* 195 B.R. 101, 103 (9th Cir. BAP 1996) (citing *Jones v. Union Pac. R.R. Co.,* 968 F.2d 937, 940 (9th Cir.1992)). According to Civil Rule 56, made applicable to adversary proceedings in Rule 7056, summary judgment is appropriate if there is a showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Civil Rule 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A trial court, in the exercise of its discretion, may grant a summary judgment for a nonmovant pursuant to Civil Rule 56(f)(1).

[2] "We review de novo the bankruptcy court's application of the legal standard in determining whether a student loan debt is dischargeable." *Educ. Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen),* 479 B.R. 79, 85 (9th Cir. BAP 2012) (citing *Rifino v. United States (In re Rifino),* 245 F.3d 1083, 1087 (9th Cir.2001)). "To the extent the bankruptcy court interpreted statutory law, we review the issues of law de novo." *In re Thorson,* 195 B.R. at 103.

V. DISCUSSION

A. *Arguments of the Parties.*

Meridian argues that the bankruptcy court erred when it interpreted § 523(a)(8)(A)(ii) to require that actual funds be received by a debtor in order for a debt to qualify for an exception to discharge under that provision. According to Meridian, "funds received," as that language is used in § 523(a)(8)(A)(ii), is the equivalent to "loans" received by the debtor, as described in the other provisions of §

523(a)(8). To support this argument, Meridian cites to *McKay v. Ingleson,* 558 F.3d 888 (9th Cir.2009), and to *Johnson v. Mo. Baptist Coll. (In re Johnson),* 218 B.R. 449 (8th Cir. BAP 1998), a decision cited and relied upon by the Ninth Circuit in *McKay.* Meridian argues that the bankruptcy court erred in distinguishing these cases because those decisions determined that a "loan" under § 523(a)(8) required no funds to be transferred to a debtor. Meridian argues that since the terms "loan" and "funds received" are synonymous as used in § 523(a)(8), *McKay* and *In re Johnson* control the outcome in this case.

Debtor points to the difference in the language employed by Congress to delineate what types of student debts are excepted from discharge under § 523(a)(8). While § 523(a)(8)(A)(i) and (B) indeed make "loans" nondischargeable in bankruptcy, absent undue hardship, § 523(a)(8)(A)(ii) applies to a different type of debt: a debtor's "obligation to repay funds received as an educational benefit, scholarship, or stipend [.]" Because Congress ***629** did not refer to "loans" in this subsection of the Code, Debtor urges that it was intended to apply to a distinctly different type of debt, an obligation to repay the creditor for "funds received." Therefore, Debtor argues, it is inappropriate to borrow from the logic of the cases construing the "loan" language used in the other student debt exceptions to construe the meaning of "funds received" in § 523(a)(8)(A)(ii).

We agree with Debtor.

B. *Statutory Interpretation and Exceptions to Discharge.*

[3] [4] [5] Any analysis of the Bankruptcy Code begins with the text of the statute. *Ransom v. FIA Card Servs., N.A.,* 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011); *Danielson v. Flores (In re Flores),* 735 F.3d 855, 859 (9th Cir.2013) (en banc) (citing *Miranda v. Anchondo,* 684 F.3d 844, 849 (9th Cir.2012)). "Furthermore, 'the words of [the Code] must be read in their context and with a view to their place in the overall statutory scheme.' " *In re Flores,* 735 F.3d at 859 (quoting *Gale v. First Franklin Loan Servs.,* 701 F.3d 1240, 1244 (9th Cir.2012)). "If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease." *Fireman's Fund Ins. Co. v. Plant Insulation Co. (In re Plant Insulation Co.),* 734 F.3d 900, 910 (9th Cir.2013) (citations and internal quotation marks omitted).

[6] Courts must limit the provisions granting exceptions to discharge to those plainly expressed in § 523(a). *Bullock v. BankChampaign, N.A.,* ––– U.S. ––––, 133 S.Ct. 1754, 1760, 185 L.Ed.2d 922 (2013) (noting the "long-standing principle that exceptions to discharge should be confined to those plainly expressed") (internal quotations marks and citations omitted); *Hawkins v. Franchise Tax Bd. of Cal.,* 769 F.3d 662, 666 (9th Cir.2014) (reminding that "the Supreme Court has interpreted exceptions to the broad presumption of discharge narrowly"); *Sachan v. Huh (In re Huh),* 506 B.R. 257, 263 (9th Cir. BAP 2014) (en banc) (stating "the exception to discharge provisions of the Bankruptcy Code are interpreted strictly in favor of debtors"); *Benson v. Corbin (In re Corbin),* 506 B.R. 287, 291 (Bankr.W.D.Wa.2014) (observing, in a § 523(a)(8) case, that "[c]ourts construe exceptions to discharge strictly against a creditor and liberally in favor of the debtor").

C. *The Pre–BAPCPA § 523(a)(8).*

The student debt exception to discharge, embodied in § 523(a)(8), has been amended several times over the years, most recently by BAPCPA in 2005.

Prior to BAPCPA, § 523(a)(8) provided that a bankruptcy discharge would not apply to a debt for:

> an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit, or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

In re Hawkins, 317 B.R. at 108 (quoting § 523(a)(8)).

Interpreting this version of § 523(a)(8), the Panel stated,

> [g]enerally speaking, debts that are potentially nondischargeable under

> § 523(a)(8) fall into two categories: 1) debts for educational benefit overpayments or loans made, insured, or guaranteed by a governmental unit or nonprofit institution; or 2) debts for ***630** obligations to repay funds received as an educational benefit, scholarship[,] or stipend.

Id. at 109 (citing *Mehlman v. N.Y. City Bd. of Educ. (In re Mehlman),* 268 B.R. 379, 383 (Bankr.S.D.N.Y.2001)).

In *In re Hawkins,* the Panel examined an agreement between the debtor and Ohio University wherein the debtor agreed, in exchange for admission to the University's medical school, that when she completed her studies she would practice medicine in Ohio for at least five years after licensure. 317 B.R. at 107. If she failed to do this, the agreement provided that she would pay liquidated damages to the University. *Id.* The debtor graduated but promptly moved to a different state. *Id.* The University sued the debtor in state court and obtained a money judgment for the liquidated damages specified in the agreement. *Id.* The debtor filed for chapter 7 relief, and the University sought a determination from the bankruptcy court that the judgment debt was excepted from discharge under § 523(a)(8). *Id.* at 108. Applying § 523(a)(8) to these facts, the Panel addressed both categories of debt covered by the discharge exception. *Id.* at 110–11.

First, the Panel concluded that the agreement between the debtor and the University was not an "educational loan" because "while an educational loan need not include an actual transfer of money ... to [the d]ebtor, in order for it to fall within the definition of ... § 523(a)(8), the loan instrument must sufficiently articulate definite repayment terms and the repayment obligation must reflect the value of the benefit actually received [by the debtor], rather than some other ill defined measure of damages or penalty." *Id.* at 110 (emphasis deleted).

Next, the Panel considered whether the agreement created a debt for "an obligation to repay funds received as an educational benefit." *Id.* at 112. The Panel quickly concluded that it did not, "because the plain language of this prong of the statute requires that a debtor receive actual funds in order to obtain a nondischargeable educational benefit." *Id.* (citing *Cazenovia Coll. v. Renshaw (In re Renshaw),* 229 B.R. 552, 555 n. 5 (2d Cir. BAP 1999), *aff'd,* 222 F.3d 82 (2d Cir.2000)). The University appealed the BAP's decision and the Ninth Circuit affirmed, adopting the opinion of the BAP as its own. *See Ohio Univ. v. Hawkins (In re Hawkins),* 469 F.3d 1316, 1317 (9th Cir.2006) ("We adopt the opinion of the BAP, which is reported at 317 B.R. 104, and affirm its judgment.").

A few years later, the Ninth Circuit again addressed whether an agreement between a student and a college constituted a "loan" for purposes of the pre-BAPCPA version of § 523(a)(8). In *McKay v. Ingleson,* 558 F.3d 888, 889 (9th Cir.2009), the court reviewed an agreement between the debtor and Vanderbilt University that deferred payment of the debtor's tuition and costs of other "educational services" to monthly bills to be sent to the debtor. *Id.* If the debtor did not pay the bills as they became due, a late fee would be assessed. *Id.* The debtor did not pay the bills as agreed and later filed for bankruptcy relief. A couple of years after the debtor received her discharge, the University sued the debtor in state court to recover the amounts owed under the agreement. In response, the debtor commenced an adversary proceeding against the University in the bankruptcy court claiming that the University violated the discharge injunction of § 524(a) by prosecuting the state court action. *Id.* The bankruptcy court, and later the district court on appeal, concluded that no violation of the discharge injunction occurred because the debt at issue was excepted from discharge ***631** under § 523(a)(8). *Id.* The Ninth Circuit affirmed, reasoning that the agreement between the parties was a nondischargeable "loan" under § 523(a)(8), and that it did not matter that no actual money had changed hands between the parties under their arrangement. *Id.* at 890. In explaining its decision, the court cited to *In re Johnson,* 218 B.R. 449 (8th Cir. BAP 1998). *Id.* The court also cited to the BAP's opinion in *In re Hawkins* for the proposition that the amount of the loan must be based on the amount of benefit the debtor received; the court concluded that the "loan" in *McKay* complied with that requirement. *Id.* at 891.

In re Johnson, the decision relied upon by the Ninth Circuit in *McKay,* addressed what constituted a "loan" under the pre-BAPCPA version of § 523(a)(8): "Since the parties stipulate that the [c]ollege is a non-profit institution and that the credit was extended for educational purposes ... the only issue presently on appeal is whether the [c]ollege's extension of credit was a loan." *In re Johnson,* 218 B.R. at 450–51. *In re Johnson* focused on a debt represented by a promissory note, executed to evidence the debtor's obligation to a college to pay for tuition, books, and other expenses. *Id.* at 450. The debtor defaulted on the note and filed a chapter 13 case. *Id.* The college filed an adversary proceeding in the debtor's bankruptcy case asking the bankruptcy court to declare that the debt represented by debtor's note was excepted from discharge. *Id.* The bankruptcy court concluded that the debt was a "loan" for purposes of § 523(a)(8), and the Eighth Circuit BAP agreed. *Id.* The panel rejected the debtor's argument that the note was not a "loan" because no funds had ever been given to him by the college:

> [W]e conclude[ ] that the arrangement between [the debtor] and the [c]ollege constitutes a loan.... [B]y allowing [the debtor] to attend classes without prepayment, the [c]ollege was, in effect, 'advancing' funds ... to [the debtor] ... [and i]t is immaterial that no money actually changed hands.

Id. at 457.

It is important to note that the BAP in *In re Johnson,* as relied upon by the Ninth Circuit in *McKay,* acknowledged that another avenue may have existed for the college to obtain an exception to discharge under § 523(a)(8), characterizing the note as "an obligation to repay funds received as an educational benefit"; however, the panel determined it need not venture down that path because the debt arising from the agreement with the debtor was determined to be an educational benefit "loan" made by a nonprofit or a governmental unit.[6] 218 B.R. at 450. By contrast, in *In re Hawkins,* the Panel was required to decide whether the agreement before it created "an obligation to repay funds received as an educational benefit" because it had concluded the agreement was not a "loan" under the statute. 317 B.R. at 112. In addressing this issue, the Panel stated "the plain language of this prong of the statute requires that a debtor *receive actual funds* in order to obtain a nondischargeable benefit." *Id.* (citations omitted; emphasis added). The Panel found this requirement was not satisfied because no "actual funds" were received by the debtor in consideration of her admission and education at the medical school. *Id.*

D. *Enter BAPCPA.*

As a result of the Code amendments in BAPCPA, since 2005, § 523(a)(8) has provided ***632** that a debtor may not discharge a debt:

> 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 nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> (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.[7]

As can be seen, many of the statute's former attributes survived BAPCPA's revisions. On the other hand, there were some additions to its text, and there was also a clear restructuring of the statute.

Since enactment of BAPCPA, neither the Ninth Circuit nor this Panel has published decisions interpreting § 523(a)(8)(A)(ii). And only one published decision, other than the bankruptcy court's decision at issue in this appeal, was located from bankruptcy courts in the Ninth Circuit interpreting § 523(a)(8)(A)(ii). *Benson v. Corbin (In re Corbin),* 506 B.R. 287 (Bankr.W.D.Wa.2014).[8] In *In re Corbin,* the bankruptcy court explained that, post-BAPCPA, this Code provision:

> protects four categories of educational claims from discharge: (1) loans made, insured, or guaranteed by a governmental unit; (2) loans made under any program partially or fully funded by a governmental unit or nonprofit institution; (3) claims for funds received as an educational benefit, scholarship, or stipend; and (4) any "qualified educational loan" as that term is defined in the Internal Revenue Code.
> 506 B.R. at 291 (citing *Rumer v. Am. Educ. Servs. (In re Rumer),* 469 B.R. 553 (Bankr.M.D.Pa.2012)). The bankruptcy court explained that § 523(a)(8)(A)(ii) "was added, covering loans made by nongovernmental and profit-making organizations...." *Id.* at 296. Canvassing the out-of-circuit bankruptcy court decisions, the court noted that they "pay no attention to who the lender is, but focus instead [under § 523(a)(8)(A)(ii)] on whether, in the plain language of the subsection, the obligation is 'to repay funds received as an educational benefit' as reflected by the debtor's agreement and intent to use the funds at the time the obligation arose." *Id.* at 296–97 (citing *Roy v. Sallie Mae (In re Roy),* 2010 WL 1523996 (Bankr.D.N.J. Apr. 15, 2010); *Carow v. Chase Student Loan Serv. (In re Carow),* 2011 WL 802847 (Bankr.D.N.D. Mar. 2, 2011); *Skipworth v. Citibank Student Loan Corp. (In re*

Skipworth), ***633** 2010 WL 1417964 (Bankr.N.D.Ala. Apr. 1, 2010)).

Given the lack of case law, the bankruptcy court set out to apply post-BAPCPA § 523(a)(8)(A)(ii) to the facts before it. *In re Corbin* involved cash advances from a third-party lender to the debtor to attend college made, in part, because the debtor's coworker had agreed to co-sign the loan. 506 B.R. at 290. The lender later notified the co-signer that the debtor was not paying the loan. *Id.* The co-signer paid the loans and sued the debtor in state court to recover the amounts he had paid the lender. *Id.* The debtor then filed a bankruptcy case, and the co-signer commenced an adversary proceeding against the debtor arguing that the debt owed by the debtor to the co-signer was excepted from discharge under both § 523(a)(8)(A)(i) and (a)(8)(A)(ii). *Id.* The bankruptcy court declined to hold that this arrangement qualified for an exception from discharge under § 523(a)(8)(A)(i) based upon Ninth Circuit authority on subrogated claims. *Id.* at 295–96 (citing *Nat'l Collection Agency v. Trahan,* 624 F.2d 906 (9th Cir.1980)). However, the bankruptcy court concluded that the debt was excepted from discharge under § 523(a)(8)(A)(ii), reasoning that because the debtor

> intended to and did use the funds she received to pay for educational expenses ... this [c]ourt concludes that the provisions of an accommodation, in order to secure for a student funds for the purpose of paying educational expenses, gives rise to an obligation on the part of the debtor to repay funds received as an educational benefit once the co-signer is required to honor its obligation to pay the debt.

Id. at 297–98.

Of course, the *In re Corbin* debtor actually received funds from the lender to pay for her education; the facts here are different.

E. *Application of § 523(a)(8)(A)(ii) to Meridian's Debt*

[7] We agree with the bankruptcy court that the language of § 523(a)(8) is plain and that it must be read in context with a view to the overall statutory scheme. Moreover, as instructed by the Supreme Court and Ninth Circuit, we must construe § 523(a) narrowly, limiting this discharge exception to those debts described in the statute. *Bullock,* 133 S.Ct. at 1760; *Hawkins,* 769 F.3d at 666; *In re Huh,* 506 B.R. at 263. Finally, we must construe the provisions of § 523(a)(8) that were found in the pre-BAPCPA version of that statute in accord with the Ninth Circuit authorities interpreting them. Doing all this, we conclude that the debt represented by Meridian's arbitration award against Debtor is not excepted from discharge under § 523(a)(8)(A)(ii). As a result, the bankruptcy court did not err in granting summary judgment to Debtor, and denying Meridian's motion for summary judgment.

[8] Section 523(a)(8)(A)(ii) plainly provides that a bankruptcy discharge will not impact "an obligation to repay funds received as an educational benefit, scholarship, or stipend." It is undisputed that the agreements between Meridian and Debtor constitute an "obligation to repay" "educational benefits" provided by Meridian to Debtor. However, § 523(a)(8)(A)(ii) requires more. To except a debt from discharge under this subsection, the creditor must demonstrate that the debtor is obliged to repay a debt for "funds received" for the educational benefits. The phrase "funds received" has been interpreted by the BAP, in an opinion which was as adopted by the Ninth Circuit as its own, to require "that a debtor *receive actual* ***634** *funds* in order to obtain a nondischargeable benefit." *In re Hawkins,* 317 B.R. at 112 (emphasis added); *accord In re Oliver,* 499 B.R. 617, 625 (Bankr.S.D.Ind.2013) (holding under § 523(a)(8)(A)(ii), "[i]n order to be obligated to *repay* funds received, [the] [d]ebtor had to have received funds in the first place.") (emphasis in original). Because the *In re Hawkins* decision construed the very same language of the statute implicated here, we conclude that *In re Hawkins* controls the outcome in this case notwithstanding that BAPCPA later amended § 523(a)(8). *See Ball v. Payco–General Am. Credits, Inc. (In re Ball),* 185 B.R. 595, 597 (9th Cir. BAP 1995) ("We will not overrule our prior rulings unless a Ninth Circuit Court of Appeals decision, Supreme Court decision or subsequent legislation has undermined those rulings."). That the arrangement between the parties in *In re Hawkins* was dissimilar to the agreement in this case is of no consequence, and renders that decision no less binding, concerning the proper construction of § 523(a)(8)(A)(ii). This is so because *In re Hawkins* construed the very same statutory language implicated here, and because the Panel and the Circuit have concluded that this language requires that "a debtor receive actual funds." *Id.* at 112.

[9] This result is bolstered by the changes made to § 523(a)(8) by Congress in BAPCPA. As noted above, the

exact wording used in amended § 523(a)(8)(A)(ii) was formerly a part of § 523(a)(8). However, BAPCPA set off the "obligation to repay funds received" language from the other provisions of § 523(a)(8) in a new subsection. We agree with the bankruptcy court, that in restructuring the discharge exception in this fashion, Congress created "a separate category delinked from the phrases 'educational benefit or loan' in § 523(a)(8)(A)(i) and 'any other educational loan' in § 523(a)(8)(B)." *In re Christoff,* 510 B.R. at 882. Put another way, "new" § 523(a)(8)(A)(ii), now standing alone, excepts from discharge only those debts that arise from "an obligation to repay funds received as an educational benefit," and must therefore be read as a separate exception to discharge as compared to that provided in § 523(a)(8)(A)(i) for a debt for an "educational overpayment or loan" made by a governmental unit or nonprofit institution or, in § 523(a)(8)(B), for a "qualified education loan."

Meridian's arguments conflating "loan" as used in § 523(a)(8)(A)(i) and (a)(8)(B), and as interpreted by *McKay* and *In re Johnson* with "an obligation to repay funds received" as provided in § 523(a)(8)(A)(ii), are unconvincing. According to Meridian, "[t]here is no reason why the word 'funds' should not be interpreted in the same light that 'loans' has been interpreted in prior cases in the Ninth Circuit...." Appellant's Op. Br. at 14. In effect, Meridian argues that we should read § 523(a)(8)(A)(ii) to say "loans received" as opposed to "funds received." But this we must not do. *See Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted). Instead, we must presume that, in organizing the provisions of § 523(a)(8) as it did in BAPCPA, Congress intended each subsection to have a distinct function and to target different kinds of debts.[9]

***635** We are also unpersuaded by Meridian's reliance on those bankruptcy cases that, perhaps inadvertently, imprecisely quote the provisions of the discharge exception statute as applying to "loans received," as opposed to the "obligation to repay funds received" dealt with by § 523(a)(8)(A)(ii). *See, e.g., In re Rumer,* 469 B.R. at 561 (stating "loans received as an educational benefit, scholarship, or stipend" are excepted from discharge); *see also Beesley v. Royal Bank of Canada (In re Beesley),* 2013 WL 5134404 (Bankr.W.D.Pa. Sept. 13, 2013) (quoting *Rumer* and its misstatement of the law); *Liberty Bay Credit Union v. Belforte (In re Belforte),* 2012 WL 4620987 (Bankr.D.Mass.2012) (same). In addition, as observed by the bankruptcy court, the other cases relied upon by Meridian are distinguishable because they all dealt with cases where the debtor actually received funds. *See, e.g., In re Corbin,* 506 B.R. at 287; *Brown v. Rust (In re Rust),* 510 B.R. 562 (Bankr.E.D.Ky.2014); *Maas v. Northstar Educ. Fin., Inc. (In re Mass),* 497 B.R. 863 (Bankr.W.D.Mich.2013); *In re Beesley,* 2013 WL 5134404; *In re Belforte,* 2012 WL 4620987; *In re Carow,* 2011 WL 802847; *Sensient Techs. Corp. v. Baiocchi (In re Baiocchi),* 389 B.R. 828 (Bankr.E.D.Wis.2008). Finally, while we have reviewed the other decisions cited by Meridian that, arguably, reach a different conclusion than we do here, because the courts' analysis and reasoning in those cases is not fully developed, we find them unpersuasive. *See In re Roy,* 2010 WL 1523996; *The Rabbi Harry H. Epstein School, Inc. v. Goldstein (In re Goldstein),* 2012 WL 7009707 (Bankr.N.D.Ga. Nov. 25, 2012).

Simply put, because Debtor did not actually receive any funds, Meridian's debt is not excepted from discharge under § 523(a)(8)(A)(ii).

VI. CONCLUSION

The bankruptcy court did not err in granting summary judgment to Debtor. We therefore AFFIRM the decision of the bankruptcy court.

All Citations

527 B.R. 624, 73 Collier Bankr.Cas.2d 689, 315 Ed. Law Rep. 900, Bankr. L. Rep. P 82,795, 15 Cal. Daily Op. Serv. 3688, 2015 Daily Journal D.A.R. 3591

Footnotes

1 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037. "Civil Rule" references are to the Federal Rules of Civil Procedure 1–86.

2 This recitation of the undisputed facts is taken primarily from the bankruptcy court's decision, which neither of the parties has challenged.

3 We agree that Meridian cannot take advantage of these discharge exceptions because it was neither a governmental unit nor a nonprofit institution as required for an exception under § 523(a)(8)(A)(i), nor was the debt in this case a "qualified education loan" as defined by the Internal Revenue Code, a condition for an exception to discharge under § 523(a)(8)(B).

4 The parties agreed that if the bankruptcy court determined that the Meridian debt qualified for an exception to discharge under § 523(a)(8)(A)(ii), Debtor would be allowed to amend her answer and plead that she could not repay the debt without an "undue hardship".

5 Pub.L. No. 109–8, 119 Stat. 23.

6 Of course, the college/creditor in *In re Johnson* was a nonprofit organization. *See In re Johnson,* 218 B.R. at 450. (stating the "parties stipulate that the [c]ollege is a non-profit institution"). Similarly, Vanderbilt University is a nonprofit institution.

7 Under § 523(a)(8)(B) to be a "qualified education loan" under 26 U.S.C. § 221(d)(1), it must, among other things, be a debt for a "qualified higher education expense," as defined by 26 U.S.C. § 221(d)(2), which is the "costs of attendance ... at an eligible educational institution." An "eligible educational institution" is one as defined by 26 U.S.C. § 25A(f)(2), which provides an " 'eligible educational institution' means an institution—(A) which is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088) ... (B) which is eligible to participate in a program under title IV of such Act." An "eligible program" is further defined at 20 U.S.C. § 1088(b).

8 In addition, only one unpublished decision in this circuit has tackled this chore. In a case that involved Meridian, relying heavily upon the bankruptcy court's decision here, the bankruptcy court declined to grant an exception to discharge. *Inst. of Imaginal Servs. v. Coelho (In re Coelho),* No. 13–10975, 2014 WL 3858514 (Bankr.N.D.Ca. Aug. 4, 2014).

9 On this point, we agree with Debtor's counsel's statement at oral argument that § 523(a)(8)(A)(ii) is not a "catch-all" provision designed to include every type of credit transaction that bestows an educational benefit on a debtor. Instead, this subsection includes a condition, distinct from those in the other subsections of § 523(a)(8), that must be fulfilled. *In re Hawkins* held that this unique requirement, that "funds [be] received" by the debtor, mandates that cash be advanced to or on behalf of the debtor. In light of the many programs available to students which provide cash benefits to students, like veteran's educational benefits, stipends for teaching assignments, and cash scholarships, it is not absurd to assume that Congress intended the scope of § 523(a)(8)(A)(ii) to target obligations other than those arising from traditional student loans.

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UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

TORBJORN HJALMAR ISAKSSON,	**In Chapter 7 proceedings**
	Case No. 2-08-bk-03998-CGC
TORBJORN HJALMAR ISAKSSON, Plaintiff, vs. **NELNET, Inc., et al.** Defendants.	**Adv. No. 2-08-ap-00345-CGC**
	ORDER RE: MOTIONS FOR SUMMARY JUDGMENT AND CROSS MOTIONS FOR SUMMARY JUDGMENT

I. Introduction

Debtor graduated from the Medical University of Americas in May 2007 with a Doctor of Medicine. Thereafter, various entities lent him approximately $75,000 to fund his residency at the University of Nebraska Medical Center ("Hospital") Family Residency Program ("Residency Program"). The Debtor quit the Residency Program within a month and, still unlicensed, has not entered another residency program. With purported income of only $100 per month, the Debtor defaulted on his loans. Soon thereafter, he filed this Chapter 7 case on April 11, 2008 and then brought this adversary proceeding to determine that the Residency Program loans are dischargeable on the grounds that the loans do not meet the statutory requirements for nondischargeability under 11 U.S.C. §523(a)(8).[1]

[1] The Debtor makes no claim of undue hardship under Section 523(a)(8) but rather bases his claim on the definitions in subparagraphs (A) and (B).

The lenders, some nonprofit, some for-profit, disagree, claiming that the loans are educational loans or an educational benefit as defined under §523(a)(8) making them nondischargeable.

Motions for summary judgment and cross motions for summary judgment were filed by the Debtor and the lenders.[2] The motions raise a seemingly simple question: Are the loans "educational loans" under the Bankruptcy Code and therefore nondischargeable?

II. Facts

A. Dr. Isaksson

Debtor received his Doctor of Medicine on May 25, 2007. Soon thereafter, he changed his name from Robert Pack, Jr., to Torbjorn Isaksson. In anticipation of entering into a residency program, the Debtor took out residency and relocation loans from College Loan Corporation ("CLC"), Access Group, Inc. ("Access"), Nelnet, Inc. ("Nelnet"), Lutheran Education Assistance Resource Network ("LEARN"), and MRU Holdings, Inc. ("MRU").[3] Each loan was for approximately $15,000.[4]

On March 20, 2007, the Debtor was accepted into the Residency Program with a start date of July 1, 2007. The State of Nebraska issued a temporary educational permit to him; as a medical resident, he was not eligible to hold a full medical license. By August 1, 2007, the Debtor was no longer employed as a resident physician and has not to date entered another residency program or obtained a license to practice medicine.

B. The Loans

<u>i. LEARN</u>

LEARN is an Ohio nonprofit Corporation offering, promoting, underwriting and/or guaranteeing the repayment of educational loans to individuals. LEARN, Liberty Bank and Student

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[2] There are separate proceedings regarding loans taken to attend medical school. The motions before the Court only involve loans taken to fund the Debtor's residency.

[3] In some cases the loans were taken directly from these entities; in others the entities did not make the loan directly, but are now the party in interest seeking nondischargeability.

[4] Although some of the lenders claim the Debtor acted fraudulently by borrowing $15,000 from 5 lenders despite his promise only to borrow $15,000 from one lender, no claim under Section 523(a)(2) was brought by any of the lenders within the time period set by Rule 4007(c).

Loan Xpress, Inc. are participants in a program under which the Debtor obtained a Residency Xpress Loan ("LEARN Loan") in February 2007. Key provisions of the program and LEARN Loan include:

Originator:	Student Loan Xpress ("SLX")
Lender:	Liberty Bank ("Liberty")
Buyer of Loan	SLX
Guarantor	LEARN
Holder:	LEARN
Amount:	$15,000
Key Contract Language	Under section (I)(2) of the LEARN Loan all proceeds will be used only for educational purposes.

ii. Access

Access is a Delaware nonprofit corporation. Access and National City Bank are participants in a program under which the Debtor obtained an Access Group Medical Residency Loan ("Access Loan") in June 2007. Key provisions of the program and Access Loan include:

Originator:	Access
Lender:	National City Bank ("National City")
Buyer of Loan:	Access
Guarantor:	Access.
Holder:	Access.
Amount:	$15,000
Key Contract Language:	Section L(9) states that the loan is an educational loan.

iii. CLC

CLC is a for-profit company. In June 2007, Debtor executed a MEDPreferred Medical Residency and Relocation Loan Application and Promissory Note in the amount of $15,000.00 (the "CLC Loan"). Key Provisions of the CLC Loan include

Lender:	Regents Bank, NA
Buyer:	CLC
Holder:	CLC
Amount:	$15,000
Key Contract Language:	The purpose of the loan is to fund higher education; States that it is nondischargeable under bankruptcy law; States that it was incurred as defined by IRC 221(d).

iv. MRU

MRU is a for-profit company providing both federal and private student loans. In June 2007, the Debtor obtained a Medical Residency Loan from MRU funded by Doral Bank ("MRU Loan"). Key provisions of the MRU Loan include:

Lender: Doral Bank
Buyer: MRU
Guarantor: MRU
Holder MRU
Amount: $15,957.45
Key Contract Language: The promissory note associated with the MRU Loan refers to "academic year" and "school" but does not state that the loan is for educational purposes. Additionally, there is an alleged loan program agreement between Doral Bank and MRU under which the MRU Loan is made "for the purpose of financing a Borrower's costs of higher education, including specifically, but not limited to tuition and related expenses."

v. Nelnet

Nelnet is a for-profit corporation. In July 2007, Debtor obtained a $15,000 residency and relocation loan provided for the purposes of covering the expenses incurred related to completing the Debtor's residency ("Nelnet Loan"). Key provision of the Nelnet Loan include:

Lender: Nelnet
Holder: Nelnet
Key Contract Language: Nothing in the loan documents provided by Nelnet indicate that the loan was for educational purposes.

In its Scheduling Memorandum at paragraph 5, Nelnet admitted that the loan was not issued for the purpose of covering tuition at the educational institution, therefore according to Nelnet, the Nelnet Loan does not require certification from the school.

III. Analysis

A. Motion for Summary Judgment

Summary judgment shall be granted where no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. Rule 56(c); Fed. R. Bankr. P. Rule 7056(c). "[T]he mere existence of some alleged factual dispute . . . will not defeat [a] . .

. motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The moving party bears the initial burden of demonstrating to the court that no genuine issue of material fact exists and to further show that the moving party is entitled to judgment in their favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to show that there are specific facts creating a genuine issue for trial. *Id.* at 324. However, when the nonmoving bears the burden of proof, "the burden on the moving party may be discharged by 'showing'- that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

B. Burden of Proof

All parties agree that the Section 523(a)(8)[5] is the applicable statute. The burden of proof is upon the creditor to show that its loan is within the scope of loans protected by the nondischargeable provisions of Section 523(a)(8).[6] *In re Naranjo*, 261 B.R. 248, 254 (Bankr.E.D.Cal. 2001); Barry Russell, *Bankruptcy Evidence Manual* § 301.58(F) (2008) (citing to *In re Woody*, 345 B.R. 246 (10th Cir.BAP 2006); *In re Frushour*, 433 F.3d 393 (4th Cir.2005); *In re Barrett*, 337 B.R. 896 (6th Cir. BAP 2006); *In re Alderete*, 412 F.3d 1200 (10th Cir. 2005)). The specific burden a creditor bears depends on whether it is a nonprofit or for-profit organization. A nonprofit must meet the statutory requirements of Section 523(a)(8)(A)(i) whereas a for-profit must meet the requirements of Section 523(a)(8)(A)(ii) or (8)(B).

C. Nonprofit

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[5] Section 523(a)(8) reads:

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-- … 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

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(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;

[6] In the more common situation, the burden then shifts to the debtor to prove undue hardship, a determination not necessary in this case.

Loans involving nonprofit institutions are governed by Section 523(a)(8)(A)(i) which requires the creditor to prove that it is the holder of 1) an educational loan 2) made under a program 3) funded in whole or in part by a nonprofit institution.

This three-legged stool makes sense in the context of how and why student loans are made. The student loan program exists, as a matter of public policy, to provide a readily available source of funding for educational purposes without the requirement of satisfying normal underwriting standards. *See* Robert B. Milligan, *Putting an End to Judicial Lawmaking: Abolishing The Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U. Cal. Davis L. Rev. 221, 251 (Fall 2000) (citing to *In re Brunner*, 46 B.R. 752, 756 (D.C.N.Y 1985)). Funds are available to borrowers not because of their financial wherewithal but because they are pursuing an education. Thus, one of the typical provisions in such loans is payment deferral during the time the borrower is actively engaged in the educational process. However, private lenders, such as Liberty in the case of the LEARN Loan or National City in the case of the Access Loan, will be unlikely to provide such funding in the absence of a guarantee of payment from the government or a third party nonprofit institution established for that purpose. And, in order to induce the nonprofit third party to make the guarantee, the loan is generally excepted from discharge in bankruptcy. Finally, private lenders will be further incentivized to lend if the loans are originated and serviced by yet another third party (SLX in the LEARN program), thereby relieving the private lender of the administrative burden.

While this general background is useful in understanding the system, the critical inquiry in a case like this, of course, must be based upon the language of the statute.

The undisputed evidence is that LEARN, a nonprofit institution, guaranteed Liberty Bank's loan to Debtor, which was made pursuant to a program whose purpose was to promote accessibility of educational funding to students. Similarly, the undisputed evidence is that Access, a nonprofit institution, originated, bought and guaranteed National City Bank's loan to the Debtor, which was made pursuant to a program whose purpose was to promote accessibility of educational funding to students. There is no serious question whether the necessary "programs" existed; the two critical issues are whether lenders participated in the "funding" and whether the obligation is an "educational loan."

i. "Funded"

a. LEARN

The language of the statute requires that a loan be made under a program *funded* by a nonprofit institution. The question, therefore, is whether LEARN's guarantee of the Liberty loan is sufficiently equivalent to "funding" the loan so as to bring the LEARN loan within the protection of the statute. The answer is yes.

The language of the statute requires not that the loan must "be funded by a nonprofit institution, but that the program pursuant to which the loan was made be funded in part by a nonprofit institution." *In re Pilcher*, 149 B.R. 595, 598 (9th Cir.BAP 1993). A critical part of funding the program among LEARN, Liberty and SLX was LEARN's guarantee in the event of default. Although the funds initially came from Liberty, a key component of that funding was LEARN's guarantee, as was made abundantly clear when, upon Debtor's default, LEARN paid and is now the holder of the loan. The term "funded," as used in the statute, is inclusive enough to embrace all aspects of the lending process, including not only the initial funding but also the existence of the guarantee and LEARN's performance under that guarantee. This reading is consistent with Congress' intent to "to curb abuses of the educational loan system by restricting the ability of a student to discharge an educational loan by filing bankruptcy shortly after graduation, and to safeguard the financial integrity of educational loan programs." See *Pilcher*, 149 B.R. at 598. Thus, despite Debtor's argument to the contrary, the statute does not require that LEARN actually funded the loan; rather, the key factor is that it participated in a program under which its loan guarantees were part of the funding process.

b. Access

The answer to the question of whether Access participated in the "funding" of the program is equally clear. Access is the party that originated, bought, guaranteed and now holds the Access Loan. It is true that National City initially lent the funds, but as discussed above, "funding" includes all aspects of the lending process including origination, buying and guaranteeing a loan. Here Access was an active participant in the program which funded the Access Loan.

ii. "Educational loan"

The Debtor argues that the LEARN and Access Loans are not "educational loans" because: 1) they are not a "qualified educational loan" because the Residency Program does not include a cost of attendance and 2) the Debtor was not a student in the Residency Program, but instead was an employee of the Hospital. Under the Debtor's theory, Section §523(a)(8) is simply inapplicable to any residency and relocation loans. The Debtor is wrong.

The term "loan" for student loans should be interpreted broadly. *In re McKay*, 366 B.R. 144, 147 (Bankr.D.Or. 2007). "A majority of courts has adopted a test that determines the educational nature of the loan by focusing on the substance of the transaction which resulted in the obligation." *In re Niles*, 334 B.R. 495, 501 (Bankr.D.Mass. 2005). "The fact that the [d]efendant had already completed medical school does not, by itself, disqualify the subject debt from consideration under §523(a)(8)." *Id.* at 504 (citing to *In re Rosen*, 179 B.R. 935 (Bankr.D.Or. 1995). Educational obligations are "not limited to education received at institutions of higher or post-secondary education." *Rosen* at 938.

Here, both the LEARN Loan and Access Loan are educational in nature. In medical terms, residency is "period of advanced medical training and *education* that normally follows graduation from medical school." *Merriam-Webster's Medical Dictionary* 714 (Roger W. Pease, Jr. ed. 2005) (emphasis added). In a bankruptcy context, an apprenticeship program is an educational program. *Rosen* at 940. A residency program is the medical equivalent of an apprenticeship or similar post-classroom training. Under the Tax Code, loans made for participation in residency programs are educational loans. *See* IRC §221(d)(2). Regardless of the viewing angle, a residency loan is an educational loan.

Additionally, the Debtor knew or should have known that the LEARN Loan and Access Loan were educational loans when he applied for them. A claim by a debtor that a loan was not for educational purposes was "wholly without merit in light of her acknowledgment" in the note that funds would be used "only for educational purposes." *In re Sears* 393 B.R. 678, 680 (Bankr. W.D.Mo. 2008). The LEARN Loan and Access Loan state clearly that they were made for educational purposes.

There is no material dispute that LEARN and Access are nonprofit institutions that contributed to funding programs that made educational loans to the Debtor. Therefore, LEARN and Access are entitled to summary judgment.

D. For-Profit

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

Prior to amendments added by BAPCPA in 2005, only student loans made or guaranteed by the government or made under a program funded by the government or a nonprofit institution (as discussed above) were within the scope of Section 523(a)(8). The new Section 523(a)(8)(B) changed that paradigm, introducing, for the first time, nondischargeable protection for loans made by for-profit institutions without government or nonprofit participation. In this case, the loans made by CLC, MRU and Nelnet fall within this category.

To meet the requirements of Section 523(a)(8)(B), a for-profit loan must be a "qualified educational loan" within the meaning of IRC §221(d)(1).[7] That section, in turn, refers to the definition of "qualified higher education expenses" contained in IRC §221(d)(2)[8] which in turn

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[7]Under IRC §221(d)(1) qualified educational loan:

means 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.

[8]Under IRC §221(d)(2) qualified higher educational expenses:

means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087ll, as in effect on the day before the date of the enactment of the Taxpayer Relief Act of 1997) at an eligible educational institution, reduced by the sum of--
(A) the amount excluded from gross income under section 127, 135, 529, or 530 by reason of such expenses, and
(B) the amount of any scholarship, allowance, or payment described in section 25A(g)(2).

For purposes of the preceding sentence, the term "eligible educational institution" has the same meaning given such term by section 25A(f)(2), except that such term shall also include an institution conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care refers to 20 USC § 1087ll to define "cost of attendance."[9] Pursuant to IRC 221(d)(1) a qualified

facility which offers postgraduate training.

[9]Under 20 USC 1087ll cost of attendance means (emphasis added):

(1) tuition and fees normally assessed a student carrying the same academic workload *as determined by the institution*, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;

(2) an allowance for books, supplies, transportation, and miscellaneous personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer, for a student attending the institution on at least a half-time basis, *as determined by the institution*;

(3) an allowance (*as determined by the institution*) for room and board costs incurred by the student which--

(A) shall be an allowance determined by the institution for a student without dependents residing at home with parents;

(B) for students without dependents residing in institutionally owned or operated housing, shall be a standard allowance determined by the institution based on the amount normally assessed most of its residents for room and board; and

(C) for all other students shall be an allowance based on the expenses reasonably incurred by such students for room and board;

(4) for less than half-time students (*as determined by the institution*), tuition and fees and an allowance for only-

(A) books, supplies, and transportation (*as determined by the institution*);

(B) dependent care expenses (determined in accordance with paragraph (8)); and

(C) room and board costs (determined in accordance with paragraph (3)), except that a student may receive an allowance for such costs under this subparagraph for not more than 3 semesters or the equivalent, of which not more than 2 semesters or the equivalent may be consecutive;

(5) for a student engaged in a program of study by correspondence, only tuition and fees and, if required, books and supplies, travel, and room and board costs incurred specifically in fulfilling a required period of residential training;

(6) for incarcerated students only tuition and fees and, if required, books and supplies;

(7) for a student enrolled in an academic program in a program of study abroad approved for credit by the student's home institution, reasonable costs associated with such study (*as determined by the institution* at which such student is enrolled);

(8) for a student with one or more dependents, an allowance based on the estimated actual expenses incurred for such dependent care, based on the number and age of such dependents, except that--

(A) such allowance shall not exceed the reasonable cost in the community in which such student resides for the kind of care provided; and

(B) the period for which dependent care is required includes, but is not limited to, class-time, study-time, field work, internships, and commuting time;

(9) for a student with a disability, an allowance (*as determined by the institution*) for those expenses related to the student's disability, including special services, personal assistance, transportation, equipment, and supplies that are reasonably incurred and not provided for by other assisting agencies;

(10) for a student receiving all or part of the student's instruction by means of telecommunications technology, no distinction shall be made with respect to the mode of instruction in determining costs;

(11) for a student engaged in a work experience under a cooperative education program, an allowance for reasonable costs associated with such employment (*as determined by the institution*);

(12) for a student who receives a loan under this or any other Federal law, or, at the option of the institution, a conventional student loan incurred by the student to cover a student's cost of attendance at the institution, an allowance for the actual cost of any loan fee, origination fee, or insurance premium charged to such student or such parent on such loan, or the average cost of any such fee or premium charged by the Secretary, lender, or guaranty agency making or insuring such loan, as the case may be; and

(13) at the option of the institution, for a student in a program requiring professional licensure or certification, the one-time cost of obtaining the first professional credentials (*as determined by the institution*).

educational loan must also be made to an eligible student. Under IRC § 221(d)(3)[10] eligible student is defined by IRC §25A(b)(3).[11] Under Section 25A(b)(3) an eligible student must maintain at least half the normal full time work load and must meet the requirements of 20 U.S.C. 1091(a)(1).[12] Under Section 1091(a)(1), the student must be enrolled at an eligible institution under 20 U.S.C. 1094.[13] In order to be an eligible institution under Section 1094(a) the institution must enter into "a program participation agreement." A determination whether these loans fall within the protections of Section 523(a)(8) requires a journey through this statutory minefield.

First, the Debtor disputes that the lenders lent the money for "qualified higher education expenses," arguing that he was an employee of the Hospital, not a student. This misses the point. Under the hanging paragraph of IRC §221(d)(2), a qualified educational expense includes a "residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training." That describes the

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[10] IRC § 221(d)(3) reads:

Eligible student.--The term "eligible student" has the meaning given such term by section 25A(b)(3).

[11] IRC § 25A(b)(3) reads:

Eligible student.--For purposes of this subsection, the term "eligible student" means, with respect to any academic period, a student who--
(A) meets the requirements of section 484(a)(1) of the Higher Education Act of 1965 (20 U.S.C. 1091(a)(1)), as in effect on the date of the enactment of this section, and
(B) is carrying at least 1/2 the normal full-time work load for the course of study the student is pursuing.

[12] 20 U.S.C. 1091(a)(1) reads:

In order to receive any grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42, a student must--be enrolled or accepted for enrollment in a degree, certificate, or other program (including a program of study abroad approved for credit by the eligible institution at which such student is enrolled) leading to a recognized educational credential at an institution of higher education that is an eligible institution in accordance with the provisions of section 1094 of this title, except as provided in subsections (b)(3) and (b)(4) of this section, and not be enrolled in an elementary or secondary school

[13] 20 USC 1094 reads:

(a) Required for programs of assistance; contents

In order to be an eligible institution for the purposes of any program authorized under this subchapter and part C of subchapter I of chapter 34 of Title 42, an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall, except with respect to a program under subpart 4 of part A of this subchapter, enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements: [requirements omitted].

Residency Program for which the Debtor sought and obtained the loans. Therefore, costs associated with the Residency Program constitute "qualified higher education expenses".

However, this does not end the inquiry. The Court must further determine the lenders lent the money for the "cost of attendance" as defined under 20 USC § 1098ll. "The cost of attendance is a necessary component of a higher education expense under Section 1087ll." *In re Rogers*, 374 B.R. 510, 515 (Bankr.E.D.N.Y. 2007). Here, the for-profit lenders have not met their burden of proof. With the exceptions of subsections 5, 6, 8, 10 and 12 (none of which applies to this debtor), the institution, here the Residency, <u>must determine the cost of attendance</u>. This record is void of any evidence that the institution did so.

Further, the Debtor claims that he was not an eligible student. To be an eligible student, a loan must be made to an eligible institution that has entered into a program participation agreement. 20 U.S.C. 1094. Again, the record is simply silent on this issue.

It is important to remember that the lenders bear the burden of proof to show that the loans are "qualified educational loans" under Section 523(a)(8). *Naranjo* at 254. Because they have the burden they must produce some sort of evidence to support their claim even when they are the nonmoving party. *Celotex* at 425. A review of the record shows that the lenders have not met their burden.

The lenders have made no showing that the Residency Program made any determination regarding the "cost of attendance" or that the Residency Program is an eligible institution. The burden of proof is upon the creditor to show that a student loan is nondischargeable, material elements of which are that the loan was provided to cover "cost of attendance" as determined by the institution and that the institution was an eligible institution that entered into a program participation agreement. The creditors have neither done so nor made any attempt to do so.[14] There is no

[14]The Debtor attached a September 12, 2008 letter from the Hospital's GME administrator stating that it does not certify any loans and that residency and relocation loans are consumer loans rather than educational loans. However, this exhibit is without adequate foundation and is hearsay to the extent it is submitted to prove the truth of the matter asserted. Therefore, the Court will not consider it. Nonetheless, proof on this issue is the defendants' burden so the fact that the Debtor's evidence is inadmissible is irrelevant to the outcome.

suggestion under Rule 7056(f) that additional discovery was needed to obtain this missing information. Therefore, the for-profit loans of CLC, MRU and NelNet are dischargeable as not within the protections of Section 523(a)(8)(B).

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

Alternatively, the for-profit lenders argue that the loans should not be discharged because they are "educational benefit[s]" under Section 523 (a)(8)(A)(ii).

This section has a curious pedigree. Prior to BAPCPA's extension of nondischargeability status to for-profit loans, the language of Section 523(a)(8)(A)(ii) was not a separate subsection of the statute but rather simply an additional clause describing the type of obligations within the scope of the statute. And, of course, prior to BAPCPA, the protections of Section 523(a)(8) only extended to loans made or guaranteed by the government or pursuant to a nonprofit program. The for-profit lenders argue, in effect, that by separating the language into a new subsection, Congress intended to create an entirely new and broad category of non-dischargeable obligations for the benefit of both for-profit and nonprofit lenders in addition to the carefully circumscribed provisions of Section 523(a)(8)(B). Under this interpretation, "educational benefit[s]" include loans, such as the for-profit obligations in this case, as well as any other such benefits construed in the broadest possible sense.

This construction of the statute makes no sense. First, there is no suggestion in the legislative history that Congress intended to wipe away the case law that previously interpreted this language to include within its scope not only obligations courts had previously found to be "educational benefit[s]" but also loans. To the contrary, the legislative history states clearly that "Section 220 of the Act amends section 523(a)(8) of the Bankruptcy Code to provide that a debt for a qualified education (as defined in section 221(e) of the Internal Revenue Code) is nondischargeable . . . . "

The term "educational benefit" occurs in two distinct places in Section 523(a)(8) and the context of each is very instructive.[15] First, "educational benefit **overpayments**" are linked with

[15] "[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 1504 (1989).

"loans" in subsection A(i); this makes perfect sense as each of these terms describes a fixed obligation to repay. An "overpayment" suggests that the debtor received something to which he or she was not entitled and therefore must repay. A "loan" is universally understood as fixed obligation to repay sums advanced by a lender.

The second use of the phrase is quite different. Subsection (A)(ii) makes nondischargeable an obligation to repay funds received as an "educational benefit, scholarship or stipend." The common meaning of each of the two latter words is the receipt of money for which there is ordinarily no obligation to repay, a stipend being "a regular allowance paid to defray living expenses; esp: a sum paid to a student under the terms of a fellowship or scholarship" *Webster's Third New International Dictionary* 2245 (Philip Babcock Gove ed. 1993) and a "scholarship" being "a sum of money or its equivalent offered ... to enable a student to pursue his studies at school, college or university." *Webster's Third New International Dictionary* 2031 (Philip Babcock Gove ed. 1993). If all goes well, the student receives the stipend and scholarship as grants with no corresponding obligation to repay. However, there are often circumstances where the right to retain the funds is subject to divestment, for example, if a student fails to enroll in classes or fails to maintain a specified academic record. In those cases, the resulting obligation to repay is covered by A(ii).[16]

The case law is consistent with the conclusion that an "educational benefit", whether in the context of an "overpayment" or otherwise, is something quite distinct from a loan. For example, "[a]n 'educational benefit overpayment' is an overpayment from a program such as the GI Bill under which where students receive periodic payments while they are enrolled in school, but if the students receive payments after they have left the school, that is an educational benefit overpayment." *In re Murphy*, 282 F.3d 868, 871 fn. 7 (5th Cir. 2002) (quoting *Cazenovia College v. Renshaw (In re Renshaw)*, 229 B.R. 552, 556 & n. 8 (BAP 2d Cir.1999), aff'd, 222 F.3d 82 (2d Cir.2000)). *See also*

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[16]Of course, the Debtor here did fail to finish the residency for which he received the money. However, since he received the funds as a loan and not as a stipend or educational benefit, section A(ii) is not applicable.

New Mexico Inst. of Mining and Tech. v. Coole (In re Coole), 202 B.R. 518, 519 (Bankr.D.N.M.1996); *Alibatya v. New York Univ. (In re Alibatya)*, 178 B.R. 335, 338 (Bankr.E.D.N.Y.1995); *Johnson v. Va. Commonwealth Univ. (In re Johnson),* 222 B.R. 783, 786 (Bankr.E.D.Va.1998).[17] Simply put, in construing what a statutory term means, it is the Court's duty to look "at the ordinary meaning of such term." *McKay v. Ingleson*, --- F.3d ---, 2072, 2009 WL 426312 (9th Cir. Feb, 23 2009). Loans are completely unlike benefits under the GI Bill. It would not be ordinary to view them as a benefit rather than a fixed obligation.

Finally, if loans are merely a subset of the broad category of "educational benefit," there would be no need for the detailed treatments of Sections 523 (a)(8)(A)(i) or (B). "A statute should not be construed in a way that renders phrases meaningless, redundant, or superfluous." *London-Marble v. Sterling*, 2008 WL 2705374 (D.Ariz. July 9, 2008) (quoting *In re Meinhart*, 211 B.R. 750 (Bankr.D.Colo. 1997). If interpreted as urged, the term educational loan in (a)(8)(A) and (B) would be completely swallowed by education benefit in Section 523(a)(8)(A)(ii).

For all of these reasons, the for-profit lenders cannot prevail under Section 523(a)(8)(A)(ii).

IV. Conclusion

Therefore:

1. Summary judgment is granted in favor of defendants LEARN and Access and against Plaintiff; and

2. Summary judgment is granted in favor of Plaintiff and against defendants CLC, MRU and NelNet.

Counsel for the prevailing defendants is to submit a form of judgment. The Court will prepare a form of judgment for the claims on which Plaintiff has prevailed.

DATED: March 20, 2009

[17] *But see In re Micko*, 356 B.R. 210 (Bankr. D. Ariz. 2006). *Micko* is distinguishable from the case here. In *Micko* the parties agreed "that the loans conferred an 'educational benefit' upon the [debtor]." *Id.* at 212. Therefore, the dispute centered on whether there was an obligation to repay the funds received. *Id.* Here, there is no agreement that the loans conferred an "educational benefit."

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

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An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard

by

*Jason Iuliano**

For years, academics have argued that the undue hardship standard for discharging student loans in bankruptcy is both unduly burdensome and applied in an inconsistent manner. By reviewing a nationwide sample of student loan bankruptcy disputes, this study shows that neither criticism is warranted. First, judges grant a hardship discharge to nearly forty percent of the debtors who seek one. Second, successful debtors differ from their unsuccessful counterparts in three important respects. They are (1) less likely to be employed, (2) more likely to have a medical hardship, and (3) more likely to have lower annual incomes the year before they filed for bankruptcy. The real failing of the student loan discharge process is lack of participation by those in need. Incredibly, only 0.1 percent of student loan debtors who have filed for bankruptcy attempt to discharge their student loans. That statistic is even more surprising in light of this article's finding that a debtor does not need to hire an attorney to be successful. In fact, debtors without attorneys were just as likely to receive hardship discharges of their student loan debt as were those debtors who had counsel. Ultimately, the low rate at which debtors request hardship discharges shows that, although the system is broken, many of its flaws stem from a failing not previously discussed in the literature.

INTRODUCTION

Every week, it seems, newspapers publish profiles of recent graduates who cannot afford to pay back their loans.[1] Given the sheer amount of out-

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[1]*See, e.g.*, Mary Pilon, *The $555,000 Student-Loan Burden*, WALL ST. J. (Feb. 13, 2010), http://online.wsj.com/article/SB10001424052748703389004575033063806327030.html; Kathy M. Kristof, *Students Learn Too Late the Costs of Private Loans*, L.A. TIMES (Dec. 27, 2008), http://articles.latimes.com/2008/dec/27/business/fi-collegedebt27.

standing federal and private student loan debt ($1 trillion)[2] and the high ten-year default rate (10%),[3] these profiles are representative of a substantial number of graduates. The recent recession has only further exacerbated the problem.

Generally, one solution to insurmountable debts is to declare bankruptcy. However, student loans cannot be discharged through normal bankruptcy proceedings.[4] Instead, Congress requires debtors to file an adversary proceeding.[5] During the adversary proceeding, debtors have the additional burden of proving that repaying their student loans would constitute an "undue hardship."[6] More specifically, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 states that a bankruptcy proceeding "does not discharge an individual debtor from any [educational] debt . . . unless excepting such debt from discharge under this paragraph would impose an *undue hardship* on the debtor and the debtor's dependents."[7] Because Congress failed to define "undue hardship," courts have been forced to provide their own interpretations.[8]

Although judges devised numerous tests,[9] in recent years, the *Brunner* standard has come to dominate the field. This test, first set forth in *Brunner v. New York State Higher Education Services Corp.*,[10] requires the debtor to establish the following three elements:

(1) that the debtor cannot maintain, based on current income and ex-

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[2] *Student Loan Debt Clock*, FINAID, http://www.finaid.org/loans/studentloandebtclock.phtml (last visited June 1, 2012). To better understand the size of this figure, one need only observe that Americans now have more student loan debt than credit card debt. *See* Susan Tompor, *Student Loan Debt Exceeds Credit Card Debt in USA*, USA TODAY (Sep. 10, 2010), http://www.usatoday.com/money/perfi/college/2010-09-10-student-loan-debt_N.htm.

[3] NAT'L CTR. FOR EDUC. STATISTICS, DEALING WITH DEBT (2006), *available at* http://nces.ed.gov/pubs2006/2006156.pdf.

[4] *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C. § 523(a)(8)) (2006).

[5] An adversary proceeding is a lawsuit within a bankruptcy case. In the context of student loans, an adversary proceeding occurs when a debtor sues an educational creditor and attempts to prove that repayment would constitute an undue hardship. *See* FED. R. BANKR. P. 7001.

[6] *Id.*

[7] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C. § 523(a)(8)) (2006) (emphasis added). Although the Code has been amended numerous times since then, this undue hardship standard has been in effect since the 1970s.

[8] Judges have frequently lamented this responsibility. *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("As an additional irritation, the statute Congress crafted gives the Courts absolutely no guidance as to what would constitute 'undue hardship' other than a Webster's dictionary."); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 736 (Bankr. D. Me. 2000) ("Without express statutory definition, 'undue hardship' has proved an eely notion. Courts have long struggled to articulate its content.").

[9] For a description of the more notable tests, see B.J. Huey, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge §523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 101-12 (2002).

[10] 831 F.2d 395 (2d Cir. 1987) (per curiam).

penses, 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.[11]

Detailed treatment of these provisions can be found elsewhere.[12] For present purposes, the reader need only know that the three prongs require the debtor to show (1) a current inability to repay the loans, (2) a future inability to repay the loans, and (3) a good faith effort to repay the loans.[13] When interpreting these elements, many courts have held that the debtor must have more than "temporary financial adversity," but the situation need not be one of "utter hopelessness."[14]

The *Brunner* test has been officially adopted in nine circuits.[15] The two holdouts are the First and Eighth Circuits. Whereas the Eighth Circuit employs a more holistic totality of the circumstances test,[16] the First Circuit has not settled the issue, thus allowing lower courts to use either approach.[17] Although the tests are doctrinally quite distinct, my analyses did not find any statistically significant differences between outcomes in *Brunner* circuits and the Eighth Circuit. Identical debtors filing in a *Brunner* circuit and a totality of the circumstances circuit should expect similar outcomes.[18] For this reason, the article will focus its discussion on the *Brunner* standard.

In the legal literature, scholars have devoted substantial time to arguing both the merits of the *Brunner* test and Congress' decision to impose the undue hardship standard on student loans.[19] Nearly all authors agree that

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[11]*Id.* at 396.

[12]*See, e.g.*, Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 196-200 (2009).

[13]I borrow this terminology from Pardo & Lacey, *infra* note 18, at 496.

[14]Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 495 (B.A.P. 9th Cir. 2002); U.S. Aid Funds, Inc. v. Nascimento (*In re* Nascimento), 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999).

[15]*See* Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 514 n.34 (2008).

[16]Huey, *supra* note 9, at 106-08.

[17]*See* Noah Schaffer, *Bankruptcy - Student loans - Undue hardship*, MASS. LAW. WKLY. (Oct. 20, 2010), http://masslawyersweekly.com/2010/10/20/bankruptcy-student-loans-undue-hardship-4.

[18]This finding is supported by previous research. *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 487 (2005).

[19]*See, e.g.*, Huey, *supra* note 9, at 112-28; Charles Booker, *The Undue Hardship of Education*, 39 J.L. & EDUC. 273, 278-79 (2010) (suggesting a modification to the second prong of the *Brunner* test); Robert B. Milligan, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 254 (2000) (arguing that Congress should "[r]eplac[e] the undue hardship exception with a bright-line rule of non-dischargeability coupled with the Department of Education's Income Contingent Repayment Plan [to] bring uniformity and efficiency to this area of

the undue hardship requirement is both unduly burdensome and inconsistently applied.[20] Instead of rehashing these debates via normative arguments, this paper uses quantitative analysis to determine whether the undue hardship standard warrants such harsh criticism. To date, this area has been largely unexplored. In the past few years, Rafael Pardo and Michelle Lacey have conducted the most extensive empirical work on student loan discharges.[21]

In their first empirical study of student loan discharge, Pardo and Lacey examined published court opinions[22] and found three statistically significant differences between debtors who received discharges and those who did not. Successful debtors (1) had lower monthly incomes, (2) had lower monthly expenses, and (3) were more likely to have a medical problem or have a dependent with a medical problem.[23] Given the few dissimilarities between successful and unsuccessful discharge seekers, they concluded that the undue

bankruptcy law"); Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 469-76 (1996); Jeffrey L. Zackerman, *Discharging Student Loans in Bankruptcy: The Need for a Uniform "Undue Hardship" Test*, 65 U. Cin. L. Rev. 691, 701-25 (1997) (recommending the adoption of the *Brunner* test).

[20]*See, e.g.*, Edward Paul Canterbury, *The Discharge of Student Loans in Bankruptcy: A Debtor's Guide to Obtaining Relief*, 32 OHIO N.U. L. REV. 149, 149 (2006) (The undue hardship standard "has produced unpredictable and unfair results due to Congress' failure to adequately define the contours of the standard."); Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783, 784 (2004) (claiming that "many bankruptcy courts have interpreted undue hardship harshly and narrowly"); Jennifer L. Frattini, *The Dischargeability of Student Loans: An Undue Burden*, 17 BANKR. DEV. J. 537, 538 (2001) (arguing that "inequitable and detrimental effects . . . can result from judicial interpretations of undue hardship"); Katheryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code*, 33 LAW & PSYCHOL. REV. 151, 165 (2009) ("The current body of case law may contain standards, but the way in which these standards are applied leads to decisions that are not uniform and many times unfair."); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Student Loans?*, 71 TUL. L. REV. 139, 149 n.64 (1996) ("The variations [of the undue hardship test] that exist from court to court are staggering. Even courts purporting to use the same test will differ in the subtleties with which the test is applied."). Even courts have claimed that undue hardship analysis is not uniformly applied. *See* Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("[T]he application of this standard requires each court to apply its own intuitive sense of what 'undue hardship' means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied.").

[21]*See* Pardo & Lacey, *supra* note 12; Pardo, *supra* note 15; Pardo & Lacey, *supra* note 18.

[22]*See* Pardo & Lacey, *supra* note 18, at 433-38.

[23]*See* Pardo & Lacey, *supra* note 18, at 481-86 ("The percentage of unhealthy debtors among the discharge group is substantially higher than among the nondischarge group. Furthermore, within the subset of unhealthy debtors, the discharge group includes a greater proportion of debtors who suffered from a work-limiting medical condition. Finally, among those debtors with dependents, the proportion of those responsible for an unhealthy family member is more than twice as large in the discharge group."); *see also* Pardo, *supra* note 15, at 516-23 (In this follow-up article, Pardo reexamined the set of published court opinions. He once again showed that debtors with medical conditions are substantially more likely to receive discharges. Pardo concluded the article by arguing that financial characteristics should play a more prominent role in discharge outcomes.).

hardship standard is applied inconsistently and is largely based on a judge's personal sentiments.[24] Unfortunately, because judges choose not to publish opinions for most adversary proceedings, this study's generalizability is rather limited.[25] Indeed, for more than ninety percent of the proceedings in my sample, judges declined to publish a court opinion.

In a more recent piece, Pardo and Lacey examined student loan discharges in the Western District of Washington.[26] Seeking to fill some gaps in their original study, they looked beyond published opinions, this time relying on filings in adversary proceedings. Because that method is not limited to judicial opinions, it yields a sample that is more representative of the population of student loan debtors who sought discharges. However, the results are only generalizable to the extent that this single district is representative of the nation as a whole.[27] In that study, Pardo and Lacey found that discharge decisions largely depend upon which judge rules on a given case. Additionally, they found that debtors with "highly experienced" attorneys were more likely to obtain discharges. The influence of these nondoctrinal case characteristics on discharge outcomes led Pardo and Lacey to conclude that financial hardship is a less important factor than it should be.[28]

My study expands upon prior research in several respects. First, I draw my data from a nationwide sample of adversary proceedings. This broader geographic scope means that my results are more generalizable. In addition, this method allowed me to determine how frequently people in bankruptcy actually attempt to discharge their student loans. The answer was surprising: barely 0.1 percent of student loan debtors in bankruptcy sought to discharge their educational debts. This figure illustrates the central flaw in the system: 99.9 percent of bankrupt student loan debtors do not even try to discharge their student loans.

Second, I include all adversary proceeding outcomes in my study. Existing research has been limited to cases that were either settled or reached a trial verdict.[29] However, because default judgments and dismissals occur nearly as often as settlements and trial verdicts, omitting these alternative

[24]*See* Pardo & Lacey, *supra* note 18, at 486 ("Our comparison of the factual circumstances of the discharge group and the nondischarge group has demonstrated that courts have not applied the law in a consistent fashion . . . the outcome of undue hardship determinations has generally been based on differing judicial perceptions of what the law commands.").

[25]Pardo and Lacey acknowledge the limitations inherent in this study. Pardo & Lacey, *supra* note 18, at 433-34.

[26]*See* Pardo & Lacey, *supra* note 12.

[27]Pardo and Lacey argue that the Western District of Washington is "a microcosm of the rest of the nation." *Id.* at 200. They make this claim based on their finding that the district is similar to the nation along three metrics: (1) the level of higher education attained by persons over age 25, (2) the amount of undergraduate student debt, and (3) the bankruptcy rate. *Id.* at 201.

[28]*See* Pardo & Lacey, *supra* note 12, at 229-35.

[29]*See* Pardo & Lacey, *supra* note 12, at 210-14 (After eliminating certain procedural positions and case

outcomes leaves the researcher with an incomplete view of student loan discharge.[30] After all, someone whose case was dismissed received just as little relief as a person who lost at trial. Likewise, a default judgment provides the same amount of relief as a trial victory. In fact, it is even better for debtors because they do not have to spend time litigating the dispute.

This article's third contribution is that it compares the financial and demographic characteristics of discharge seekers with those of non-discharge seekers. Throughout this paper, I refer to those debtors who filed an adversary proceeding with the hope of discharging their student loan debt as "discharge seekers." Likewise, I use "non-discharge seekers" to signify the debtors who filed for bankruptcy but did not seek to discharge their student loans.

The comparison between these two groups reveals that tens of thousands of non-discharge seekers are as bad off financially as the typical discharge seeker. This suggests that many more debtors could obtain relief if they filed an adversary proceeding to request a discharge. Instead of arguing about the burdensome nature of the undue hardship standard, academics, policymakers, journalists, and consumer advocates alike should encourage more non-discharge seekers to file adversary proceedings to discharge their student loans.

My study's final contribution is its examination of whether differences exist among three broad groups of discharge-seeking debtors: those who received (1) no discharges, (2) partial discharges, or (3) full discharges. Previous research used much finer distinctions and was, therefore, unable to find much consistency in decisions. By examining coarser gradients, I make it easier to determine whether any financial or demographic characteristics are truly predictive of receipt of a discharge. I chose the three aforementioned groupings because they closely align with a judge's decision-making process. When ruling on a student loan case, judges must generally decide whether the debtor should receive any relief, and if so, whether the debtor should get a full or partial discharge.[31]

Given the small sample size available, it is difficult to find meaningful differences between debtors who received similar amounts of relief. After all, even the most eloquent judge would find it hard to articulate precisely why

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dispositions, Pardo and Lacey reduced the number of adversary proceedings in their sample from 115 to forty-six. Their analysis then focused on these forty-six proceedings.).

[30]My sample contained ninety dismissals and four default judgments for a total of ninety-four. By contrast, there were sixty-seven settlements, four summary judgments, and forty trial verdicts, for a total of 111. By choosing to exclude dismissals and default judgments, Pardo and Lacey disregarded approximately half of the observations.

[31]Although the vast majority of circuits allow for partial discharges, the Third Circuit has taken an "all or nothing" approach and refuses to grant them. Some circuit courts have not addressed the issue, and therefore, district court judges in these circuits have been left to decide the issue themselves. *See e.g.*, *In re* Kapinos, 243 B.R. 271 (W.D. Va. 2000) (citing to an extensive list of court opinions allowing for partial discharges).

there were minor differences in discharge percentages between two debtors. Admittedly, having a sufficiently large sample size would resolve this problem. Unfortunately, there are simply not enough student loan discharges to iron out that issue. Prior to my research, the most comprehensive study examined just 46 cases.[32] Even at 207 cases, my sample size is too small for a regression to detect fine-grade differences in discharge outcomes.

However, by using the three groups identified above, my regressions do identify three variables that are predictive of discharge: (1) whether the debtor has a medical hardship, (2) whether the debtor is employed, and (3) the debtor's income the year before filing bankruptcy. These variables match the first two prongs of the *Brunner* test quite closely[33] and show that there is some degree of consistency in the judicial decisions. Debtors in bad economic positions *are* more likely to get relief. This finding of judicial consistency bolsters my argument that the major flaw in the system is not inconsistent application of the undue hardship standard, but rather the fact that 99.9 percent of student loan debtors in bankruptcy never attempt to get a discharge.

Given that the cost of pursuing a student loan discharge is relatively low compared to the cost of filing bankruptcy, this statistic is even more surprising. Add on the fact that there is no statistically significant difference in outcomes between debtors without attorneys and debtors with attorneys,[34] and one cannot help but wonder why more people in bankruptcy do not seek to discharge their student loans. Ultimately, it seems that bankruptcy filers' lack of accurate knowledge of the system is the main problem.

Part I of this paper details the methodology behind my data collection, and Part II presents the study's findings. First, I compare the attributes of discharge seekers and non-discharge seekers. Then I estimate regression models to determine which variables are correlated with receipt of a discharge. Part III discusses the implications of my findings.

I. METHODOLOGY

To locate adversary proceedings for this study, I used Public Access to Court Electronic Records (PACER),[35] an online, government-run database that stores case information for U.S. bankruptcy courts. Although each court maintains its own database, the PACER Case Locator permits searches that

[32]Pardo & Lacey, *supra* note 12, at 214.

[33]The first two prongs require a current inability to repay and a future inability to repay. *See supra* text accompanying note 11.

[34]In my sample, forty-three percent of debtors without attorneys received a discharge versus thirty-eight percent of debtors with attorneys.

[35]PACER Public Access to Court Electronic Records, https://pcl.uscourts.gov (last visited Sept. 11, 2012).

encompass multiple judicial districts. This multi-district search allowed me to collect a nationwide sample.

My first step was to restrict the search fields to bankruptcy cases filed in the year 2007. I chose 2007 because, at the time of data collection (October 2010), it was the most recent year for which nearly all of the proceedings had been resolved. As of the date of this writing (June 2011), only one student loan adversary proceeding from the 2007 sample was still pending.

Through use of the party name field, I further limited the results to adversary proceedings involving major education lenders. This step was necessary because PACER's search capabilities are quite limited. Notably, no way exists to restrict results to student loan discharges or even to locate adversary proceedings more generally.

Given PACER's deficiencies, the most efficient way to gather a nationwide sample of student loan debtors was to limit the search by specific education loan holders. Because of their dominance of the student loan market, I restricted the search results to cases involving at least one of the ten largest education loan holders: Sallie Mae, Citi Student Loans, National Education Loan Network, Wells Fargo Education Financial Services, Pennsylvania Higher Education Assistance Agency, Wachovia Education Finance, JP Morgan Chase Bank, College Loan Corporation, and Student Loan Xpress.[36] I ran a separate search for each of these creditors using the "Party Name" field.

Collectively, in 2007, these ten lenders held 71.2 percent of all student loans.[37] In addition to the companies already listed, I also searched for "Educational Credit Management Corporation." Because this entity is the nation's largest guarantor of education loans and plays a role in more than half of all student loan cases,[38] leaving it out would have led me to severely undercount the true number of cases.[39]

For every adversary proceeding in the search results, I opened the docket report and looked at the Nature of Suit. The Nature of Suit is a designation that the courts use to classify the matter in dispute.[40] If the Nature of Suit

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[36]*Largest Education Lenders (FY2007)*, FINAID (Apr. 14, 2008), http://www.finaid.org/loans/biglendersfy2007.phtml.

[37]*Id.*

[38]*See* Pardo & Lacey, *supra* note 12, at 209 (finding that Educational Credit Management Corporation was involved in fifty-eight percent of the student loan proceedings in their study).

[39]In many proceedings, only Educational Credit Management Corporation, and not the actual debt holder, appeared on the docket.

[40]Student loan proceedings have the following Nature of Suit designation: "63 Dischargeability - 523(a)(8), student loan." Individual district court databases do have a limited "Nature of Suit" search function. Unfortunately, it is impossible to search by the Nature of Suit code for student loan cases. This is likely because the relevant Nature of Suit code only appears on the adversary proceeding docket, not on the docket for the main bankruptcy case.

indicated the debtor was seeking to discharge student loans, I included the proceeding in my sample.

Only 217 adversary proceedings involved a debtor pursuing a student loan discharge. For each of these 217 proceedings, I collected approximately fifty variables related to the debtor's financial and demographic characteristics and the proceeding's disposition. To construct this dataset, I compiled information from both the student loan adversary proceeding and its associated bankruptcy case.[41] Most of the financial and demographic variables were available on Schedules A-J.[42] I gathered the remaining variables by examining the complaint in the adversary proceeding. When available, I also collected data from final settlement agreements and judicial opinions.

Although most debtors filed only one adversary proceeding, four debtors filed separate complaints against each of their student loan creditors. So no person would be counted multiple times and skew the results, I consolidated these multiple filings into single observations. Because the judge and financial information for each debtor remained constant across the multiple filings, this was a simple process. It required aggregating the amount of educational debt sought to be discharged and doing the same for the amount of debt that actually was discharged. Taking these steps brought the four debtors who filed multiple proceedings into conformity with the rest of my sample.

I excluded six cases from the sample because PACER lacked the schedules required to code a usable observation. These empty dockets, which Pardo and Lacey have dubbed "skeleton proceedings",[43] occur for cases that were commenced before a given court began accepting electronic filings.[44] Finally, I eliminated one case because it was still pending as of this writing. Due to these measures, my final dataset declined from 217 to 207 observations.

In my sample, a broad swath of the judiciary is represented. Cases are distributed among the circuits in the following manner: First - 6.8%, Second - 5.8%, Third - 7.7%, Fourth - 3.9%, Fifth - 5.8%, Sixth - 11.6%, Seventh - 5.8%, Eighth - 16%, Ninth - 18.8%, Tenth - 9.7%, Eleventh - 7.7%, and

[41]The adversary proceeding contains filings directly related to the student loan dispute. The associated bankruptcy case contains broader and more detailed financial information that is related to the debtor's general bankruptcy petition.

[42]These schedules present a detailed picture of debtors' financial positions at the time they file for bankruptcy. The information contained in each schedule is as follows: (A) real property, (B) personal property, (C) property claimed as exempt, (D) creditors holding secured claims, (E) creditors holding unsecured priority claims, (F) creditors holding unsecured nonpriority claims, (G) executory contracts and unexpired leases, (H) codebtors, (I) current income of individual debtor(s), and (J) current expenditures of individual debtor(s).

[43]I borrow the term from Pardo & Lacey, *supra* note 12, at 203 n.113.

[44]*See* Pardo & Lacey, *supra* note 12, at 203.

D.C. - 0.5%. One hundred and twenty-nine judges and seventy-three of the ninety-four judicial districts are represented.

Although the bulk of my study relies upon these 207 student loan proceedings, the 2007 Consumer Bankruptcy Project, which is a national sample of consumer bankruptcy cases,[45] proved invaluable in making the findings detailed in Part II.A.

II. FINDINGS

A. Who Pursues a Discharge?

This section examines which debtors actually pursue student loan discharges. The first subpart shows that the overwhelming majority of bankruptcy filers with student loans do not attempt to discharge them. The second subpart compares debtors who sought relief with those who did not. Similarities between the two groups indicate that tens of thousands more bankruptcy filers would likely be successful if they tried to discharge their student loans in adversary proceedings.

1. *The Potential Filers*

In 2007, the year of this study's focus, there were 822,590 consumer bankruptcy filings.[46] Of these debtors, approximately 238,446 (29%) owed student loans. To arrive at this number, I calculated the percentage of debtors in the Consumer Bankruptcy Project[47] who had student loans. I then multiplied that figure (29%) by the total number of consumer bankruptcy filings (822,590). The result was 238,446.

Next, I needed to approximate how many debtors in bankruptcy owed student loans to the creditors in my study (i.e. the ten largest student loan holders and Educational Credit Management Corporation). To do so, I made the assumption that student loan borrowers file for bankruptcy at similar rates regardless of which entity is currently holding their loans.[48] I then multiplied the estimated number of student loan borrowers in bankruptcy (238,446) by 71.2 percent, the percentage of student loan debt held by the

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[45]The principal investigators of the project are David Himmelstein, Melissa Jacoby, Robert Lawless, Angela Littwin, Katherine Porter, John Pottow, Teresa Sullivan, Deborah Thorne, Elizabeth Warren, and Steffie Woolhandler.

[46]*See Quarterly Non-business Filings by Chapter (1994-2010)*, Am. Bankr. Inst., http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=54477 (last visited Sept. 11, 2012).

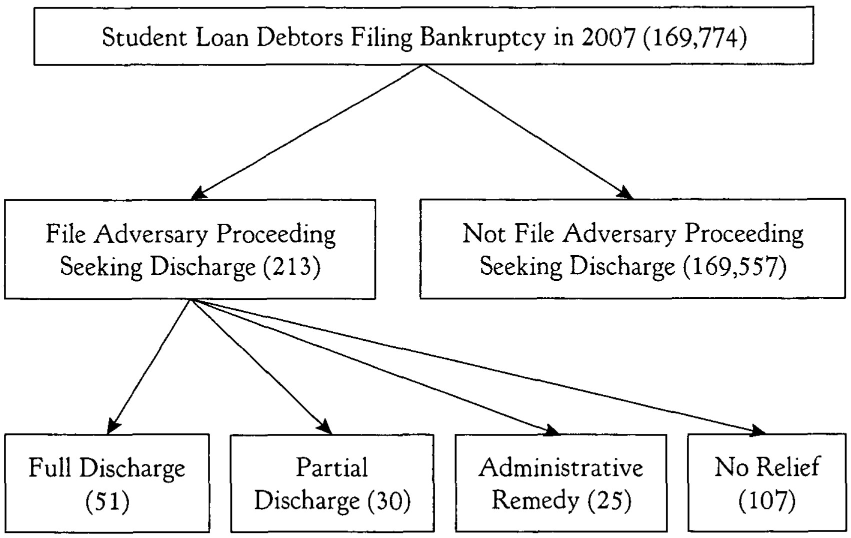
[47]For a discussion of the representativeness of the Consumer Bankruptcy Project, see Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 Am. Bankr. L.J. 349, 353-56 (2008).

[48]Some may argue that this assumption is untenable if, for instance, certain student-loan creditors have better repayment plans or are more likely to permit forbearance. However, because student loans are generally but one part of a person's decision to file for bankruptcy, the leniency of student loan creditors will be determinative in very few cases.

creditors in my study. The resulting figure estimates that, in 2007, there were 169,774 bankrupt debtors who owed student loans to at least one of the ten lenders in my study. Because I designed my searches to capture anyone from this population who sought to discharge their student loans, this number also estimates the entire population of bankruptcy filers eligible to be in my sample. Of these 169,774 debtors, only 217 (0.1%) filed an adversary proceeding for the purpose of discharging their student loans.

Those debtors who did file adversary proceedings were relatively successful. Half of them received some type of relief. More specifically, the remedies were as follows: fifty-one (25% of the entire sample) full discharges, thirty (14%) partial discharges, and twenty-five (12%) administrative repayment plans. Despite the availability of these remedies, debtors who received any form of relief constituted less than 0.1 percent of student loan borrowers in bankruptcy. Figure 1 uses a flow chart to depict this information visually.

Figure 1: The Path of Student Loan Debtors in Bankruptcy



The chart shows data for all cases filed in 2007 that involved the following student loan creditors: Sallie Mae, Citi Student Loans, National Education Loan Network, Brazos Group, Wells Fargo Education Financial Services, Pennsylvania Higher Education Assistance Agency, Wachovia Education Finance, JP Morgan Chase Bank, College Loan Corporation, Student Loan Xpress, and Educational Credit Management Corporation. In 2007, these entities held 71.2 percent of all student loans.

At a glance, three theories could explain why such a small percentage of bankrupt debtors seek to discharge their student loans. First, lenders may be granting discharges outside of the bankruptcy process. However, because federally guaranteed loans can be discharged only by bankruptcy courts, this out-of-bankruptcy discharge is restricted to private loans and therefore, unlikely to be a common occurrence. Less than fifteen percent of borrowers have private student loans, and most of those take out private loans only after they have exhausted the federally guaranteed options.[49] In addition, private lenders have little reason to negotiate with borrowers. After all, they can easily dissuade debtors from filing by just directing them to the widespread media reports that contend student loans are all but impossible to discharge.

A second possible reason for such a low filing rate is that debtors might frequently turn to administrative remedies for assistance. Indeed, in my sample, twenty-five borrowers ultimately pursued an administrative remedy, with the most popular being the William D. Ford Income Contingent Repayment Plan.[50] Such remedies, however, are poor substitutes for bankruptcy discharges. Whereas bankruptcy relief is immediate, administrative remedies require debtors to make payments on their loans for twenty-five years before receiving a discharge, and even after that time is up, the discharged debt is treated as taxable income.[51] For these reasons, I categorize administrative remedies as a form of "no relief" in the rest of this article.

A third reason why debtors might decline to file adversary proceedings is that they simply do not think they will be able to discharge their student loans in bankruptcy. For years, the message in both popular media and academic journals has been that it is extremely difficult to meet the undue hardship threshold.[52] One article in *The New York Times* went so far as to

[49] *Private Loans: Facts and Trends*, THE PROJECT ON STUDENT DEBT (July 2011), *available at* http://projectonstudentdebt.org/files/pub/private_loan_facts_trends.pdf.

[50] Administrative remedies are generally only available for federal loans. For more information on the William D. Ford Income Contingent Repayment Plan, see *Income Contingent Repayment*, FINAID, http://www.finaid.org/loans/icr.phtml (last visited Sept. 11, 2012); *see also* 34 C.F.R. § 685.209 (2008).

[51] Letter from Eric Solomon, Assistant Sec'y for Tax Policy, Dep't of the Treasury, to Sander Levin, Member of the House of Representatives (Sep. 19, 2008) (*available at* http://www.finaid.org/loans/2008 0919treasurylevinforgiveness.pdf) ("[L]oan forgiveness under HEA §§ 455(e) [Income-Contingent Repayment] and 493(c)(7) [Income-Based Repayment] does not satisfy requirements for income exclusion under Code § 108(f).").

[52] *See e.g.*, Diana Jean Schemo, *Private Loans Deepen a Crisis in Student Debt*, N.Y. TIMES (June 10, 2007), http://www.nytimes.com/2007/06/10/us/10loans.html (calling it "virtually impossible to discharge private student loans in bankruptcy"); Michelle Singletary, *Students Trapped in Private Loans, With no Bankruptcy Protection*, WASH. POST (Apr. 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/28/AR2010042804396.html (calling undue hardship "a high hurdle to jump"); Katie Fraser, *Private Student Loans can Pinch*, CHI. SUN-TIMES (Oct. 4, 2010), http://beaconnews.suntimes.com/news/1860184-418/loans-student-private-bankruptcy-debt.html (stating that "by law [private student loans] cannot be discharged in bankruptcy"); Anya Kamenetz, *No Need to Go Begging to Get Out From Underneath Student Loan Debt*, BOS. GLOBE (Jan. 22, 2011), http://articles.boston.com/2011-01-22/

contend that "The cases are so harsh in measuring what an undue hardship is that anybody who is working and maintaining any kind of home life has very little chance of discharging these things in bankruptcy."[53] Such bleak reports have produced a chilling effect that deters debtors from pursuing student loan discharges. These harsh warnings hurt two types of debtors. First, they convince people who already are in bankruptcy not to file an adversary proceeding to seek relief from their student loans. Second, they discourage people whose debt is primarily comprised of student loans from filing for bankruptcy in the first place. After all, why would a person who has a lot of student loan debt file if he believes that none of it will be discharged in bankruptcy.

In each case, the rational debtor weighs the lawyer's fees and court time against the perceived miniscule chance of success. From this simple analysis, most people likely would conclude that the costs far outweigh the expected benefits.

This calculation, however, is based on two incorrect premises. First, the common belief that it is nearly impossible to discharge student loans is wrong. Although the standard is certainly not lenient, it is frequently met. For instance, in my sample, twenty-five percent of debtors received full discharges and an additional fourteen percent received partial discharges.

The second misconception is that lawyers are necessary. Surprisingly, they are not. In fact, in my sample, pro se debtors were actually more likely to receive discharges than their counterparts who were represented by counsel (43% vs. 38%). This is not to say that attorneys add no value in these cases. Instead, it proves that hiring an attorney is not a prerequisite to obtaining relief. Both of these findings will be discussed further in Part III, but first, I present some broader descriptive statistics that illustrate the characteristics of student loan debtors.

2. *Descriptive Statistics*

This section examines the demographic and financial characteristics of the debtors in my sample. The data in the accompanying tables show that student loan debtors are in dismal financial positions. This section also compares discharge seekers in my study to a random sample of 653 non-discharge seekers.[54]

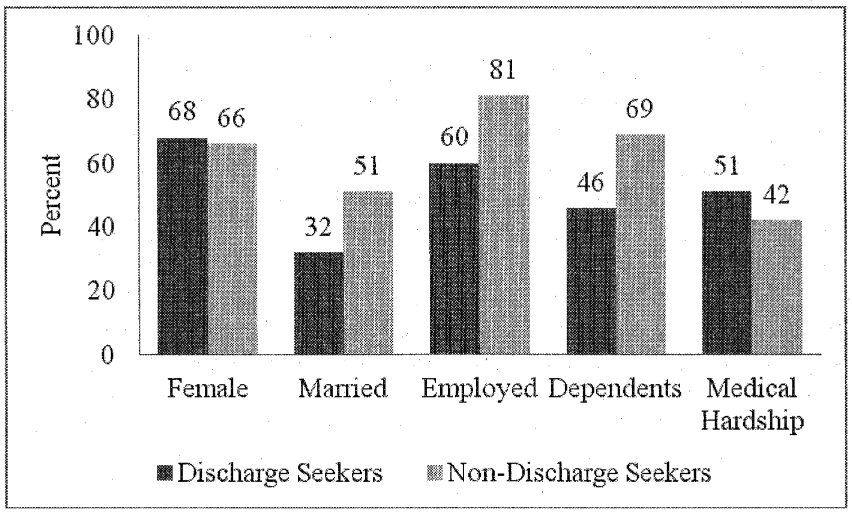
business/29347769_1_income-based-repayment-student-lenders-student-loan ("Both federal and private student loans are all but undischargeable in bankruptcy.").

[53]Jonathan D. Glater, *That Student Loan, So Hard to Shake*, N.Y. TIMES, Aug. 24, 2008, at BU1 (quoting bankruptcy attorney Cathleen Cooper Moran).

[54]For my sample of non-discharge seekers, I used all student loan debtors in the Consumer Bankruptcy Project. Admittedly, some of these debtors actually may have been discharge seekers. However, since the Consumer Bankruptcy Project does not contain identifying information, I could not determine which, if any, debtors to exclude. Fortunately, as I have already shown that non-discharge seekers outnumber

From Figure 2, one can see that the modal characteristics among discharge seekers are as follows: female (68%), unmarried (68%), employed (60%), no dependents (54%), and medical hardship (51%). Of particular note is the disproportionate percentage of discharge seekers who are female (68%). This figure is substantially higher than the percentage of people in bankruptcy who are female (56%); however, it is in line with the percentage of student loan debtors in bankruptcy who are female (66%).[55]

Figure 2: Percentage of Student Loan Debtors with Certain Demographic Characteristics



The fact that substantially more women than men seek educational discharges can likely be attributed to the gender disparities in post-secondary enrollment and student loan debt borrowing. Since 1991, women have outnumbered men on college campuses.[56] At present, women account for fifty-seven percent of college enrollment and earn fifty-seven percent of bachelor's degrees. This figure has remained constant for the past ten years.[57] Turning

discharge seekers by a ratio of more than five hundred to one, we can estimate that only one debtor was incorrectly classified. Given the size of the Consumer Bankruptcy Project sample, this potential misclassification will not skew the data and therefore, should not concern us.

[55]Both these figures are according to data from the CBP.

[56]Mark Mather & Dia Adams, *The Crossover in Female-Male College Enrollment Rates*, POPULATION REFERENCE BUREAU (Feb. 2007), http://www.prb.org/Articles/2007/CrossoverinFemaleMaleCollegeEnrollmentRates.aspx.

[57]*College Gender Gap Appears to be Stabilizing with One Notable Exception, American Council on Education Analysis Finds*, AM. COUNCIL EDUC. (Jan. 26, 2010), http://www.acenet.edu/AM/Template.cfm?Section=Home&CONTENTID=35338&TEMPLATE=/CM/ContentDisplay.cfm.

to graduate school, the balance is similarly tilted, with women constituting approximately sixty percent of the enrollment.[58]

This discrepancy does not entirely account for the data in my sample. Two additional aspects must be considered. First, among lower socioeconomic status families, female students outnumber male students at even higher rates than average, while the ratio among wealthier families is far less skewed.[59] Second, a greater percentage of female students incur student loan debt. At the master's level, forty-seven percent of women have student loans, compared to thirty-eight percent of men.[60] For women and men at the doctoral level, the numbers are thirty-seven percent and twenty-seven percent, respectively.[61]

Substantially more women than men enroll in post-secondary programs. On top of that, proportionally more women than men take out student loans. Given these enrollment and borrowing differences, it is easy to see why more women than men are attempting to discharge their student loans through bankruptcy.

A couple other noteworthy demographic characteristics are the mean age (49) and median age (48.5) of debtors in my sample. These figures show that most filers are well beyond the traditional college age. Because Congress enacted the undue hardship standard to prevent abusive filings by recent college graduates, such a finding is important. At the time Congress passed the undue hardship provision, many politicians feared that young people would borrow substantial sums to pay for college and then discharge their student loans in bankruptcy right after graduation.[62] My data shows that this is not a problem today.

Two more highlights from Figure 2 are the sixty percent employment rate and the fifty-one percent medical hardship rate of discharge seekers. Just by looking at the unemployment and medical statistics, one can see that these debtors are in pretty bad positions, but how do they compare to people who did not attempt to discharge their student loans?

First, discharge seekers are considerably more likely to be unmarried, be

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[58]COUNCIL OF GRADUATE SCHOOLS, GRADUATE ENROLLMENT CONTINUES STRONG GROWTH IN 2009, *available at* http://www.cgsnet.org/portals/0/pdf/N_pr_ED2009.pdf.

[59]Claudia Goldin, Lawrence F. Katz & Ilyana Kuziemko, *The Homecoming of American College Women: The Reversal of the College Gender Gap*, 20 J. ECON. PERSP. 133, 146-48 (2006) (noting that "the female advantage has become greatest (at least in proportional terms) for the children of families with low socioeconomic status").

[60]COUNCIL OF GRADUATE SCHOOLS, DATA SOURCES: GRADUATE STUDENT LOAN DEBT, *available at* http://www.cgsnet.org/portals/0/pdf/DataSources_2009_11.pdf.

[61]COUNCIL OF GRADUATE SCHOOLS, *supra* note 60.

[62]*See* Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783 (2004) (noting that "[t]here was a perception in Congress that an unacceptable number of student debtors were filing for bankruptcy after graduation (and on the eve of lucrative careers) seeking to discharge their federal loans. [M]any in Congress [viewed] such actions [as] 'tantamount to fraud.'").

unemployed, and have a medical hardship. These three characteristics indicate greater levels of adversity for discharge seekers. Of all the variables in the table, dependents is the only one in which non-discharge seekers are worse off (they are more likely to have dependents). On balance, the demographic characteristics seem to show that discharge seekers have a greater degree of hardship. Nonetheless, there is significant overlap between both groups, and this will become even more apparent after we explore the groups' respective financial characteristics.

Figure 3 provides financial information for both discharge seekers and non-discharge seekers. Except for the two variables discussed in the next paragraph, I gathered all of the data for Figure 3 from Schedules A-J and the Statement of Financial Affairs in the associated bankruptcy case.[63] Since most debtors filed an adversary proceeding within six months of their initial voluntary petition, there is little reason to suspect that the debtors' financial status changed appreciably during the intervening time. An additional reason reinforced my decision to gather data from the associated bankruptcy case: for cases that did not go to trial, even the most basic financial data is frequently absent from the adversary proceeding docket.

Figure 3: Financial Characteristics

Characteristic	Discharge Seekers			Non-Discharge Seekers		
	Median	Mean	Std. Dev.	Median	Mean	Std. Dev.
Monthly Income	1,704	1,932	1,242	2,423	2,796	2,346
Monthly Expenses	1,997	2,268	1,440	2,451	2,775	2,299
Disposable Income	-49	-329	864	2	29	1,118
Prior Year Income	21,754	23,850	25,705	25,345	30,132	28,092
Total Assets	13,211	79,969	290,534	39,235	103,107	159,410
Total Liabilities	129,966	214,445	460,796	98,965	149,516	187,131
Educational Debt	47,610	80,746	89,327	9,252	20,538	28,380

I collected two variables (Educational Debt and Amount Discharged) from documents filed in the adversary proceeding. For Educational Debt, I examined the following, in order of preference: (1) judicial opinion, (2) joint statement of facts, and (3) complaint.[64] To find Amount Discharged, I reviewed either the judicial opinion or stipulation for entry of discharge, depending on whether the case went to trial or was settled.

[63]The "associated bankruptcy case" is the Chapter 7 or Chapter 13 case that is connected to the debtor's adversary proceeding. In other words, it is the case inside of which the debtor filed the adversary lawsuit seeking the hardship discharge.

[64]I chose this order because it corresponds to the reliability of the respective documents. First, the judicial opinion is the most reliable because it is issued by an unbiased judge after both parties have had an opportunity to present their sides of the dispute. Next, the joint statement of facts is a stipulation of facts to which both parties agree. Finally, since the complaint is authored by one party (the debtor), it is the most likely to be inaccurate.

Figure 3 shows that the average discharge seeker has a monthly income of $1,932 which equates to an average annual income of just over $23,000. Twenty-seven percent of discharge seekers are living below the poverty line[65] and the average monthly disposable income[66] of discharge seekers is negative $329.

These low incomes are not one-year flukes. A review of the Statements of Financial Affairs shows that, for the two years preceding bankruptcy, discharge seekers averaged annual salaries of $23,850 and $23,973, respectively. To make matters worse, these debtors are highly leveraged. The average discharge seeker has nearly three times the amount of liabilities as assets, and the median debtor fares even worse, with a liabilities-to-assets ratio approaching ten-to-one. By any reasonable metric, these filers are in extreme financial distress.

Now that we have a sense of discharge seekers, we can compare them with non-discharge seekers.[67] In nearly every category, both the mean and median values indicate that discharge seekers have higher levels of financial distress than non-discharge seekers. They make less money, own fewer assets, and have more liabilities, including educational debt.

Non-discharge seekers are in relatively better financial positions. However, this certainly does not mean they are in desirable economic shape. Their disposable income averages just twenty-nine dollars a month, and their liabilities exceed their assets.

The groups are not as distinct as they may seem at first glance. The large standard deviations indicate that there is a high degree of variance within each population and that there is more overlap between the two populations than the means and medians convey by themselves.

Using data from the Consumer Bankruptcy Project, I found that twelve percent of non-discharge seekers have at least as much educational debt as the median discharge seeker. At the time of filing, thirty-one percent of non-discharge seekers had monthly incomes below the median discharge seeker's, and in the year before bankruptcy, forty-four percent of non-discharge seekers earned less than the median discharge seeker earned. Finally, a full thirty-seven percent of non-discharge seekers had disposable incomes below that of the median discharge seeker. These figures show that there is quite a bit of

[65]For each debtor, I calculated the poverty line based on household size. For the forty-eight contiguous states and D.C., the 2007 poverty line was $10,210 plus $3,480 for each additional member of the household. Alaska and Hawaii have slightly modified poverty lines. *See The 2007 HHS Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERVICES, http://aspe.hhs.gov/poverty/07poverty.shtml (last modified Jan. 29, 2010).

[66]I calculated monthly disposable income for each debtor by subtracting monthly expenses (Schedule J, Line 18) from monthly income (Schedule I, Line 16).

[67]I used the 2007 Consumer Bankruptcy Project to determine all Figure 3 characteristics of non-discharge seekers.

similarity between both groups of debtors. Later in the paper, I discuss this comparison in greater detail.[68]

Now that we have seen the financial distress that both discharge seekers and non-discharge seekers experience, the next section will set about determining what factors influence whether a debtor receives a discharge.

B. Who Obtains a Discharge?

Of the 207 debtors in my sample, eighty-one (39%) discharged some portion of their student loans. Their relief came in several forms, the most common being through settlement with their student loan creditors. That happened in fifty-six cases (27%). In twenty cases (10%), judges delivered a trial verdict that granted a discharge. Finally, four cases (2%) terminated by default judgment, and one (0.5%) ended in summary judgment.

This section explores what characteristics made these debtors successful and whether those characteristics were the same ones that courts, through judicial opinions, have identified as important undue hardship determinants. To answer these questions, I first employ several statistical tests to identify which variables warrant further inspection. Then I use an ordered logistic regression[69] to determine whether that significance persists after controlling for other relevant variables.

As discussed earlier, in order to satisfy the undue hardship standard, debtors must prove they (1) have a current inability to repay, (2) have a future inability to repay, and (3) made a good faith effort to repay.[70] The tests in this section are designed to determine whether indicators of these elements are correlated with student loan discharges.

To begin, I employ the Spearman rank correlation[71] to determine the correlation between the percentage of debt discharged and each of the following household financial characteristics: (1) monthly income, (2) monthly expenses, (3) disposable income, (4) poverty ratio,[72] (5) prior year income, and (6) assets

[68] *See infra* Part III.

[69] *See infra* pages 22-24.

[70] This is Pardo and Lacey's restatement of the *Brunner* test which I adopt in this article. *See supra* text accompanying notes 9-14.

[71] Although Pearson's r is the most common correlation coefficient, I cannot determine that statistic from my sample. One of the assumptions underlying Pearson's r is normality. However, since the percent discharges in my sample are overrepresented at the maximum (100%) and minimum (0%) possible values, my data does not satisfy this assumption. For this reason, I chose to use the Spearman rank correlation. This is a nonparametric test and, as such, does not make the distributional assumption of normality. For a more detailed description of the Spearman rank correlation, see generally Douglas G. Altman, Practical Statistics for Medical Research 285-88 (1991).

[72] The poverty ratio is calculated by dividing the debtor's household income by the poverty line established by the U.S. Department of Health and Human Services. The poverty line varies based on the number of depedendents a debtor claims. *See* U.S. Dep't of Health and Hum. Services, *supra* note 65.

minus liabilities. Each of these six factors is closely related to a debtor's current inability to repay outstanding student loans.

Contrary to Pardo and Lacey's findings,[73] my results indicate that several current inability metrics are correlated with higher discharge percentages. More specifically, lower monthly income ($p = .0250$), lower monthly expenses ($p = .0108$), and lower prior year income ($p = .0058$) are all correlated with higher discharge percentages. These findings are displayed in Figure 4.

Figure 4: Percentage of Debt Discharged by Financial Characteristics

Characteristic	Percentage of Debt Discharged		
	Spearman's rho	*p*-value	Observations
Monthly Income	-0.1585	0.0250	200
Monthly Expenses	-0.1802	0.0108	199
Disposable Income	0.0470	0.5095	199
Prior Year Income	-0.1968	0.0058	195
Poverty Ratio	-0.0829	0.2458	198
Assets - Liabilities	0.0875	0.2177	200

Regarding monthly expenses, one's expectation may be that the opposite should be true. Debtors with higher expenses are carrying greater financial burdens and therefore, should be better candidates for discharge. A possible explanation is that judges rely more heavily on a debtor's income than on his expenses to determine whether undue hardship exists. If this is true and income is the more important factor, the high degree of correlation between income and expenses (0.802) may indicate why higher expenses are correlated with lower percentage discharges. Although judges have not generally held that student loan discharge requires "utter hopelessness," they have made it clear that debtors will not receive discharges "merely because repayment of the borrowed funds would require some major personal and financial sacrifices."[74] Likewise, debtors are not entitled to discharges merely because repayment of their student loans would force them to live below a middle class standard.[75] With this in mind, it seems possible that judges believe that debtors with higher expenses are better able to cut their expenses while still remaining well above a situation that would necessitate a discharge.

Although there is substantial overlap between the characteristics that determine one's current inability to repay and those that predict one's future inability to repay, there are some factors that are particularly indicative of future inability. These include whether the debtor (1) claims a medical hard-

[73]*See* Pardo & Lacey, *supra* note 12, at 215-16 (finding that no current inability measures are correlated with higher discharge percentages).

[74]Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889-90 (B.A.P. 9th Cir. 2005).

[75]*See id.* at 889.

ship,[76] (2) is employed,[77] (3) is sixty years or older, (4) has dependents, (5) is married, or (6) has graduated from the school for which the loans were borrowed. These six characteristics are good measures of a debtor's future inability to pay because they are forward-looking with regard to a debtor's earning capacity and expenses. For instance, someone who is sixty years or older is unlikely to have as many working years left as a person in his twenties; caring for dependents is a long-term responsibility; a married person is more likely to live in a dual-income household; and additional education generally increases a person's earning potential.

I used a nonparametric Wilcoxon rank-sum test[78] to determine the association between these six characteristics and the median percentage of debt that was discharged. Figure 5 displays the results and shows that the first four of these variables are statistically significant. Debtors with medical hardships received higher percentage discharges (44% vs. 22%, $p = .0002$). Likewise, unemployed debtors (46% vs. 25%, $p = .0005$) and those over age sixty (66% vs. 32%, $p = .0063$) discharged greater percentages of student loan debt.

Interestingly, debtors without dependents discharged a higher percentage of student loan debt than debtors with dependents did (47% vs. 24%, $p = .0116$). To determine whether another factor was driving the dependents' coefficient to point in the "wrong" direction, I examined the correlation between dependents and other variables. Primarily, I wanted to know if there was a high degree of correlation between being under the age of sixty and having dependents or between being married and having dependents. Since both of these categories (being younger than sixty and being married) were correlated with lower percent discharges of student loans, a high degree of correlation between dependents and either of these two attributes would suggest that they might be causing this unexpected outcome. Neither relationship provided support for that hypothesis. The correlation between being under the age of sixty and having dependents was 0.27, and the correlation between being married and having dependents was 0.35.

[76]For cases classifying medical hardship as a "future inability" characteristic, see e.g., Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385-86 (6th Cir. 2005); Hafner v. Sallie Mae Servicing Corp. (*In re* Harrer), 303 B.R. 351, 356 (Bankr. S.D. Ohio 2003); Thoms v. Educ. Credit Mgmt. Corp. (*In re* Thoms), 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001). At least one court has held that when a debtor claims that a medical condition is causing undue hardship, the court should rely heavily on the debtor's word. Corroborating expert testimony is not necessary. *See In re* Mosley, 494 F.3d 1320, 1325 (11th Cir. 2007).

[77]Employment is arguably categorized as both a current inability and a future inability factor.

[78]Because the percent discharges in my sample are not normally distributed, my data does not satisfy the assumptions necessary to use a t-test. Therefore, I employ the nonparametric Wilcoxon rank-sum test. For a more detailed explanation of the Wilcoxon rank-sum test, see generally MYLES HOLLANDER & DOUGLAS A. WOLFE, NONPARAMETRIC STATISTICAL METHODS (1973).

As it stands, I do not have a theoretical reason for why debtors without dependents manage to discharge a greater percentage of student loans. Fortunately, we should not be too worried since, after I control for other factors in later regressions, the dependents variable loses its statistical significance.

The table also contains several factors that, although not directly related to a debtor's future inability to repay, may nonetheless be expected to have some effect on the amount of relief obtained. These are whether (1) the case ended in settlement or at trial, (2) the debtor's disposable income was less than zero, (3) the debtor was represented by an attorney, (4) the debtor was male, (5) the debtor cosigned the student loan for another person, and (6) the lead case was a Chapter 7 or Chapter 13 filing. I included these variables for the following reasons: first, whereas a settlement generally falls in the middle ground, a trial verdict is more likely to be an all-or-nothing outcome; second, a debtor with negative disposable income has insufficient money to pay off his lenders; third, attorneys are generally thought to increase their clients' likelihood of success; fourth, given the large disparity in filing rates between men and women, determining if there is gender bias in outcomes would show whether outcome discrimination is a potential causal factor; fifth, judges may be more lenient when a person cannot pay debts incurred for the benefit of another than when that person cannot pay debts incurred for his own benefit; and finally, since someone who files Chapter 13 intends to confirm a plan and repay a percentage of his debts, judges may be less willing to discharge student loans outright.

Figure 5: Percentage of Debt Discharged by Case Characteristics (Wilcoxon Rank Sum)

Groups	Observations	Median	Mean	z-statistic
Medical Hardship	104	11	43.69	3.734***
No Medical Hardship	96	0	21.85	(0.0002)
Employed	118	0	24.75	-3.478***
Unemployed	81	14	45.96	(0.0005)
Age = 60 years	18	100	65.95	2.730**
Age < 60 years	51	0	32.12	(0.0063)
Dependents	89	0	24.42	-2.524*
No Dependents	109	0	47.17	(0.0116)
Trial	39	61.64	48.32	-2.133*
Settlement	63	87.67	65.92	(0.0329)
Married	64	0	25.81	-1.874
Single	135	0	36.23	(0.0609)
Disposable Income > 0	70	0	29.30	-0.907
Disposable Income = 0	129	0	35.43	(0.3644)
Graduate from School	59	0	27.64	-0.750
Not Graduate	32	0	34.03	(0.4533)
Male	52	0	33.98	0.259
Female	132	0	32.64	(0.7956)
Attorney	162	0	32.70	-0.258
Pro Se	41	0	34.63	(0.7964)
Last Loan = 7 Years	59	0	36.71	0.186
Last Loan < 7 Years	93	0	34.60	(0.8524)
Loan for Self	170	0	32.61	-0.179
Loan for Other	20	0	34.65	(0.8579)
Chapter 7	190	0	32.80	-0.058
Chapter 13	15	0	36.60	(0.9537)

* $p < .05$; ** $p < .01$; *** $p < .001$

Of these six measures, the only significant variable was whether the case ended in settlement or by trial verdict. Those debtors who settled discharged a higher percentage of debt than those who rolled the dice on a judge's decision (88% vs. 62%, $p = .0329$).[79]

The final prong of the *Brunner* test requires the debtor to have made a good faith effort to repay the loan. Pardo and Lacey have recommended two variables to measure this requirement: whether the debtor (1) is employed or (2) has sought administrative relief before turning to the bankruptcy courts

[79]This does not imply that the trial debtors should have pushed for a settlement. Since the Wilcoxon rank-sum test does not control for other factors, there may be additional differences between the two groups that account for the higher success of settlements.

for assistance.[80] Pardo and Lacey argue that, if a debtor is employed, it shows that he is making an effort to repay the loans. However, since so many outside factors govern employment, it is not a reliable measure of good faith repayment. For example, the variable does not indicate whether an unemployed debtor is actively looking for work, and such information is generally not found within the bankruptcy filings, although it may come out at trial. Additionally, the good faith effort prong requires courts to look at the debtor's past actions. Current employment status is irrelevant as to whether the debtor made a good faith effort to repay student loans in the past. Finally, given employment's close association with financial well-being, employment is more indicative of a debtor's current and future inability to repay than of a debtor's good faith effort to repay.

The second variable, which deals with administrative relief, is a better measurement of good faith effort to repay. By seeking this type of non-judicial relief, the debtor provides evidence that he has attempted to work with his creditors to create a manageable repayment plan. Unfortunately, very few adversary proceedings contain enough information to code whether the debtor sought administrative relief.

Because of these shortcomings, I did not use either of Pardo and Lacey's suggested variables. Instead, I created a binary variable that takes a value of one if the debtor last borrowed student loans at least seven years before the filing date of the adversary proceeding and a value of zero otherwise. The theory supporting this variable choice comes from the belief that a debtor who shoulders student loans for a number of years has made more of a good faith effort to repay than the debtor who files for bankruptcy shortly after borrowing student loans. I chose seven years as the cutpoint because, until 1998, Congress allowed all people to discharge student loans through the regular bankruptcy process, provided the loans were at least seven years old.[81]

There was no statistical difference in the percentage of debt discharged between debtors whose loans were at least seven years old and those whose loans were younger than seven years (37% vs. 35%, $p = .8524$). Using different years as break-points produced similarly high p-values.

After seeing what variables were statistically significant in isolation, I set out to determine what variables remained statistically significant when other

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[80] *See* Pardo & Lacey, *supra* note 12, at 218.

[81] Before the 1998 amendments, the undue hardship standard applied only to debtors whose loans did not meet the seven-year minimum. *Compare* P.L. 101-647; 104 Stat. 4865 (1990) (Student loans are dischargeable if they "first became due more than 7 years . . . before the date of the filing of the petition."), *with* Higher Education Amendments of 1998; P.L. 105-244 (1998) (eliminating the seven year option and making undue hardship the only basis for discharging student loans).

factors are controlled for. Because I am analyzing what characteristics are predictive of obtaining a discharge, I opted to run ordered logistic regressions.

An ordered logistic regression is similar to a binary logistic regression. The primary difference is that, instead of requiring a dichotomous dependent variable, the regression employs an ordinal dependent variable. This allows me to divide the debtors into three groups: those who received no discharge (122), a partial discharge (29), and a full discharge (51).

Only three variables remained statistically significant across a wide variety of models (i.e., were robust to alternative specifications). These were (1) whether the debtor has a medical hardship, (2) whether the debtor is employed, and (3) the debtor's income the year before filing bankruptcy. All coefficients pointed in the expected directions. Medical hardship is positively correlated with receipt of a discharge. Being employed and having a higher income in the year preceding bankruptcy are negatively correlated with receipt of a discharge.

Figure 6 shows the relative frequency with which debtors who have these characteristics fall into the three discharge categories. I also include whether the debtor is represented by an attorney because the lack of a significant difference is theoretically interesting.

As seen in Figure 6, medical hardship and employment status appear to be correlated with discharge outcome. Whereas seventy-three percent of people who did not have a medical hardship failed to receive any type of discharge, the same can be said about only forty-eight percent of debtors who had a medical hardship. Similarly, forty percent of unemployed debtors received a full discharge, but only sixteen percent of debtors with a job received a full discharge.

Whether one hires an attorney appears to have little correlation with discharge outcome. A comparison between the groups reveals that the relative frequencies with which each outcome is reached are quite similar.

Figure 6: Discharge Frequencies, by Regression Variables

Groups	Observations	No Discharge	Partial Discharge	Full Discharge
Medical Hardship	104	48%	17%	35%
No Medical Hardship	98	73%	11%	15%
Employed	120	68%	16%	16%
Unemployed	81	48%	12%	40%
Attorney	163	61%	13%	25%
Pro Se	42	57%	19%	24%
Prior Year Income	197	$28,272	$20,072	$16,394

Due to its non-categorical nature, for the variable Prior Year Income, relative frequencies are not listed. Instead, the mean income for debtors who fall in each of the discharge outcomes is displayed. The table shows that there is a clear and substantial dropoff in income as one proceeds from no discharge ($28,272) to partial discharge ($20,072) and, finally, to full discharge ($16,394).

With these descriptive statistics in mind, I now turn to the ordered logistic regressions in Figure 7. Model 1 reaffirms that, when taken alone, medical hardship is a strong predictor of whether a debtor will receive a discharge ($p = .0002$). To see whether certain medical conditions are more predictive of higher discharges than other medical problems are, I subdivided medical hardship into three categories[82]: (1) physical disability,[83] (2) mental illness,[84] and (3) chronic disease.[85] As shown in model 2, all three variables are statistically significant.

To determine whether a medical problem's severity had any influence, I categorized the medical hardships by severe and not severe. I classified as severe those debtors who claimed to have terminal illnesses or who were enrolled in the Social Security Total and Permanent Disability program.[86] I placed debtors who did not meet either of these requirements into the not severe group.[87] Surprisingly, there was not a statistically significant difference in outcomes between the two groups. Putting the severity and type of illness findings together, it appears that the mere existence of a medical condition may be the driving factor. Alternatively, judges might be using information not available on PACER (such as the debtor's testimony or physical appearance) to classify severity differently than I did.

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[82]Only seven debtors fell into more than one category, and none fell into all three.

[83]Forty debtors had a physical disability. Examples from my dataset include paraplegia, a crushed sciatic nerve, and physical injuries during the war in Iraq.

[84]Twenty-eight debtors fell into this category. The most common mental illness was bi-polar disorder, which occurred eleven times. Other examples are clinical depression and post-traumatic stress disorder.

[85]Forty debtors were in this grouping. Some chronic diseases from my sample include AIDS, cancer, and transverse myelitis.

[86]Some examples from this group include terminal cancer, severe brain damage from an injury, and paraplegia.

[87]Debtors in this category had osteoarthritis, hypertension, emphysema, and other similar conditions.

Figure 7: Ordered Logistic Regression Models of Case Characteristics on Student Loan Discharge

	(1)	(2)	(3)	(4)	(5)
Medical Hardship	1.090***			0.822*	0.853**
	(0.294)			(0.324)	(0.329)
Employed			-0.973***	-0.652*	-0.631*
			(0.288)	(0.321)	(0.322)
Prior Year Income (thousands)				-0.017*	-0.017*
				(0.007)	(0.007)
Attorney					-0.248
					(0.385)
Physical Disability		1.083**			
		(0.360)			
Mental Illness		1.025*			
		(0.399)			
Chronic Disease		0.863*			
		(0.361)			
Intercept 1	1.016	0.984	-0.164	0.077	-0.093
	(0.227)	(0.216)	(0.220)	(0.360)	(0.447)
Intercept 2	1.722	1.694	0.536	0.798	0.630
	(0.248)	(0.239)	(0.224)	(0.365)	(0.449)
Observations	202	202	201	193	193
AIC	367.589	370.467	369.486	343.983	345.571

* $p < .05$; ** $p < .01$; *** $p < .001$

The dependent variable "Student Loan Discharge" takes a value of 0 if the debtor received no discharge, a value of 1 if the debtor received a partial discharge, and a value of 2 if the debtor received a full discharge. The parentheses contain standard errors.

Model 3 shows that unemployed debtors are significantly more likely to receive discharges ($p = .0007$). Model 4 builds upon previous models by combining medical hardship with employment status and prior year income. Each of these variables is statistically significant. Debtors are more likely to receive student loan discharges if they have a medical hardship ($p = .0112$), are unemployed ($p = .0422$), or have a lower prior year income ($p = .0152$). As seen by its AIC score, Model 4 is also the best model.

Before drawing any additional conclusions, I must first test whether the regression results suffer from multicollinearity. A basic assumption of logistic regression is that the independent variables are not highly correlated. If this assumption is not met, the coefficients for the individual predictors will be less reliable and the error terms will increase. This makes it hard to accurately assess the importance of each independent variable in predicting the outcome. Because several of the variables in my analysis (especially medical hardship, employed, and prior year income) seem like they could be highly correlated, checking for multicollinearity is especially important. To test for this problem, I calculated the tolerance and variance inflation factor (VIF) for each of the independent variables. Figure 8 displays the results.

The findings should alleviate any concern that the regression models suffer from multicollinearity. If the variables were completely uncorrelated, tolerance and VIF would equal one. As such, values close to one indicate that multicollinearity is not a problem. The square root of VIF shows the small effect that correlation among the independent variables had on the size of their standard errors. Medical Hardship and Employed's standard errors are ten percent larger than if the independent variables had been completely uncorrelated, and the standard errors for Prior Year Income and Attorney are a mere one percent larger. Both of these values are quite low and indicate that correlation between the independent variables is not adversely affecting the estimation.

Figure 8: Tolerance and Variance Inflation Factor of Regression Variables

Variable	Tolerance	VIF	Square Root of VIF
Medical Hardship	0.82	1.22	1.10
Employed	0.82	1.22	1.10
Prior Year Income	0.99	1.01	1.01
Attorney	0.98	1.02	1.01

Now that the issue of multicollinearity has been evaluated, it is possible to draw some firmer conclusions regarding the ordered logistic regressions. Notably, the models suggest that people who meet the first two prongs of the *Brunner* test receive discharges at higher rates. The prior year income variable is indicative of one's current inability to repay, the medical hardship variable is indicative of one's future inability to repay, and the employment variable speaks to both the current and future inability prongs. The variable I used (years since debtors borrowed their student loans) as a proxy for the third part of the *Brunner* test was not statistically significant. This does not mean that courts do not take into consideration whether a debtor made a good faith effort to repay his student loans. As mentioned before, judges may look at other factors such as whether a debtor has pursued administrative remedies or whether a debtor is actively seeking employment. Unfortunately, the data to code these variables is not available on most bankruptcy dockets.

Model 5 in Figure 7 shows that even after I controlled for other variables, there was no statistical difference ($p = .5195$) in outcome between debtors with attorneys and those without attorneys. This is an encouraging finding for the 99.9 percent of debtors who do not attempt to discharge their student loans. If the cost of hiring an attorney is deterring them from pursuing a discharge, they should consider filing pro se. Debtors who took that path were just as successful as debtors who had the aid of an attorney.

As mentioned above, the regressions show that the variables Medical Hardship, Employed, and Prior Year Income are associated with receipt of a discharge. However, the logistic regression table does not provide a quick way to determine just how predictive these variables are. The predicted probabilities presented in Figure 9 serve this role.

Figure 9: Predicted Probability of Receiving a Student Loan Discharge, by Debtor Characteristics

	No Discharge		Partial Discharge		Full Discharge	
	Employed					
Medical Hardship	Yes	No	Yes	No	Yes	No
Yes	52	36	17	18	31	46
No	71	56	12	16	17	28

The estimates are for debtors whose income was at the poverty line ($10,210) the year before they filed bankruptcy.

The table shows that employment and medical status have substantial predictive power. At one extreme, a debtor who is employed and lacks a medical hardship has a seventeen percent chance of receiving a full discharge but a seventy-one percent chance of getting no discharge. Reversing those characteristics so the debtor is unemployed and has a medical hardship drastically changes the predicted probabilities. Such a debtor is three times as likely to get a full discharge (46%) and would only come away without any type of discharge on thirty-six percent of the occasions.

These variables appear to be less important in determining when a partial discharge will be granted. Given the broad range of possible outcomes grouped in the partial discharge category, this is not particularly surprising. Indeed, debtors in my sample represent this wide spectrum, having had their loans reduced from anywhere between sixteen percent and ninety-seven percent of their total educational debt. Nonetheless, Figure 9 shows that two characteristics of a debtor (employment and medical status) have a substantial effect on the predicted outcome of student loan discharge cases.

III. IMPLICATIONS

From academics and judges to consumer advocates and journalists, much of the bankruptcy community has mounted a two-pronged attack against the undue hardship standard, arguing that it is too burdensome and applied inconsistently.[88] This paper has provided empirical evidence against both of these criticisms. Nonetheless, an important question remains: why do so few people in bankruptcy attempt to discharge their student loans? A couple reasons likely account for this phenomenon. First, the view that student loan discharges are nearly impossible to obtain may be a self-fulfilling prophecy. As mentioned earlier, journalists and academics have long asserted that it is nearly impossible to meet the undue hardship standard. If debtors take these comments to heart and believe that their chances of success are trivial, they will be less likely to attempt to discharge their educational debt. Judges grant so few discharges simply because they hear so few student loan cases. Unfortunately, with judges granting so few discharges, commentators feel even more justified in arguing that the undue hardship requirement is too harsh. Thus, the cycle continues. The data dispel the myth that it is nearly impossible to discharge educational debt. Thirty-nine percent of debtors who filed an adversary proceeding received a full or partial discharge.

A second reason that people may choose not to pursue discharges is that they do not have money to pay an attorney. Because the adversary proceeding is essentially a trial, debtors may believe that they need an attorney in order to win. Quite reasonably, they do not think they will be able to represent themselves against a large company such as Sallie Mae or Wells Fargo. My study, however, shows that a debtor can be successful without an attorney. In fact, after controlling for other factors, I found that there was no statistical difference in outcome between *pro se* debtors and debtors represented by an attorney.[89]

Whatever the reason, the largest flaw in the system is not the undue hardship requirement itself. The problem is that debtors are not informed about the actual workings of the discharge process. Although most academics would welcome the end of the undue hardship requirement, they should step back and consider whether the standard's existence is truly burdening many debtors. The answer seems to be "no." A debtor cannot obtain a discharge if he never asks for one, and 99.9 percent of student loan debtors in bankruptcy fail to ask for one. Instead of criticizing the undue hardship requirement, scholars, policymakers, and consumer advocates could help many more people by informing them both that courts grant a large percentage of student loan discharge requests and that many debtors are successful without the help of a lawyer.

To produce a conservative estimate of just how many people such an

[88]*See supra* text accompanying notes 19 and 20.

[89]This, of course, is only a correlational, not a casual, finding. Nonetheless, such a finding provides reason for debtors who cannot afford an attorney to be more optimistic about their prospects for obtaining a discharge.

informational campaign could help, I calculated the number of non-discharge seekers who (1) have a medical hardship, (2) are unemployed, and (3) earned less income in the year before filing for bankruptcy than the median discharge seeker earned. I chose these three measures because, as discussed above, they were the variables that produced the best model.

Relying upon data from the Consumer Bankrupty Project, I determined that 7.2 percent of non-discharge seekers met all three of these requirements and 21.9 percent met two. In 2007, there were 238,446 student loan debtors who filed for bankruptcy. Knowing this allowed me to calculate that slightly more than 17,000 (7.2%) student loan debtors were worse off than the median discharge seeker in my sample on the three measures most predictive of receiving a discharge and another 52,000 (21.9%) were worse off in two of the three measures. Given that thirty-nine percent of the debtors in my sample received a discharge, these 69,000 debtors would have been good candidates to obtain relief. Nonetheless, less than three hundred actually attempted to discharge their student loans. Consider that again. There were 69,000 student loan debtors in bankruptcy who would have had a good chance to discharge their student loans, but less than three hundred even attempted to do so.

This dearth of petitioners speaks to another aspect of the system: student loan creditors get paid. After paying loan collection agencies, the U.S. Department of Education recovers approximately eighty-five percent of student loans in default based on present value.[90] Because most student loans are guaranteed by the federal government, Congress's undue hardship requirement saves American taxpayers more than four billion dollars a year.[91] If student loans were placed on the same level as normal debts, non-discharge seekers would have automatically had their educational loans wiped out.

Educational loans that are backed by the federal government should not be as easily dischargeable as regular debts.[92] At the same time, the process should not appear so daunting that it dissuades all but a handful of debtors from pursuing a discharge. If more debtors want discharges, they should file adversary proceedings and prove undue hardship. This will allow the courts

[90]*See* Melissa Korn, *Government Sees High Returns On Defaulted Student Loans*, WALL ST. J. (Jan. 4, 2011), http://online.wsj.com/article/SB10001424052748704723104576061953842079760.html. Interestingly, the federal government may actually profit from debtors who default on their student loans. *Id.* ("[T]he government stands to earn $2,010.44 more in interest from a $10,000 loan that defaulted than if it had been paid in full over a 20-year term, and $6,522.00 more than if it had been paid back in 10 years.").

[91]I arrived at this number by multiplying the total number of non-discharge seekers (238,141) by the average educational debt of non-discharge seekers ($20,120).

[92]It is important to note that although private student loans are not federally guaranteed, they are still subject to the undue hardship discharge requirement. Since taxpayers are not footing the bill for private loan defaults, it makes little sense to grant them special status. Debtors should be able to discharge private student loans via normal bankruptcy procedures.

to sort out the debtors who have no ability to repay their loans from those debtors who can repay at least a portion. At present, it is unwise to eliminate a provision that saves billions of dollars. My point, however, is not meant to diminish the burdens carried by many debtors. On the contrary, each year, tens of thousands more non-discharge seekers should be attempting to discharge their student loans.

CONCLUSION

For years, commentators have derided the undue hardship requirement as too burdensome and attacked courts for applying the standard in an inconsistent manner. The real problem, it turns out, is that debtors simply are not pursuing student loan discharges. So few discharges are granted, not because judges set the bar too high, but rather, because so few people request relief. This study showed that only 0.1 percent of student loan debtors in bankruptcy file an adversary proceeding in an attempt to discharge their educational debts. This statistic is surprising for three main reasons.

First, many debtors who do not try to discharge their loans are in dire financial positions. Second, courts grant discharges to nearly forty percent of discharge seekers. Third, many debtors are successful without the aid of an attorney.

This study also showed that courts are not granting relief in an indiscriminate manner. People who received discharges differed from people who were denied discharges in three respects: successful debtors (1) were more likely to have a medical hardship, (2) were less likely to be employed, and (3) had lower annual incomes the year before they filed bankruptcy.

Rather than condemn the undue hardship requirement, members of the bankruptcy community should encourage debtors with legitimate need to file adversary proceedings even if they cannot hire an attorney. Courts are willing to grant discharges. The problem is that few people are asking for them.

* * *

Student Loan Bankruptcy and the Meaning of Educational Benefit

Jason Iuliano*

Unlike any other consumer debt, student loans are not dischargeable through the normal bankruptcy process. Instead, for any student loan that satisfies one of three statutory criteria, borrowers may only obtain a discharge if they prove that repayment would impose an "undue hardship." This Article argues that courts have misinterpreted the scope of these statutory criteria. Specifically, by adopting a reading of the term "educational benefit" that conflicts with the statutory text, the legislative history, and the policy rationales underlying the Bankruptcy Code, courts have misclassified billions of dollars of student loan debt and prevented many borrowers from obtaining the financial relief to which they are entitled.

TABLE OF CONTENTS

Introduction

America is barreling toward a student loan crisis. From politicians[1]

* Research Fellow, University of Pennsylvania Law School. Thanks to Kara Bruce, Jonah Gelbach, Dalié Jiménez, Ben Johnson, Madison Kilbride, Leslie Levin, Adam Levitin, Lynn LoPucki, Lee Otis, Jenn Weinberg, and Alan White for helpful comments and discussions relating to this Article. And thanks to Judge Elizabeth Brown, Judge Michael Kaplan, Kerstin Cass, Rebecca Earl, and Travis Graga for valuable editorial work on the piece.

[1] *See, e.g.*, Press Release, Dick Durbin United States Senator Illinois, As Student Loan Debt Surpasses $1 Trillion, Senators Introduce Legislation To Address Crisis (Jan. 23, 2013), *available at* https://www.durbin.senate.gov/newsroom/press-releases/as-student-loan-debt-surpasses-1-trillion-senators-introduce-legislation-to-address-crisis (asserting that "one of the biggest threats to millions of working families [is] the growing student

and journalists,[2] to scholars[3] and judges,[4] and even to celebrities,[5] it seems almost everyone is in agreement that educational debt is out of control.[6]

The widespread concern over this issue is easy to understand. At present, Americans owe more than 1.5 trillion dollars in student loan debt[7]—an amount that has tripled in the last decade and now exceeds both automotive and credit card debt.[8] Despite the troubling

loan debt crisis"); Bernie Sanders (@BernieSanders), TWITTER (Dec. 28, 2016, 6:47 a.m.), https://twitter.com/berniesanders/status/814120585227882496 ("One of the most revolting aspects of the student loan crisis is that the government makes billions in profits off of student loans.").

[2] *See, e.g.*, Kevin Carey, *Student Debt Is Worse Than You Think*, N.Y. TIMES, Oct. 7, 2015, https://www.nytimes.com/2015/10/08/upshot/student-debt-is-worse-than-you-think.html (discussing data from the Department of Education that suggests "that the system is failing and that, at some colleges, the saddling of students with loans they cannot afford to pay down is far more dire than anyone knew"); Editorial Board, *Four Years on Campus Might Be One Too Many*, BLOOMBERG BUSINESSWEEK, Nov. 17, 2017 (proposing that colleges reduce the time it takes to earn a bachelor's degree by one year in order to rein in the "student-loan crisis").

[3] *See, e.g.*, Adam Levitin, *Is There a Student Loan Debt Crisis?*, CREDIT SLIPS, June 23, 2015, http://www.creditslips.org/creditslips/2015/06/is-there-a-student-loan-debt-crisis.html (hesitating "to call student loan debt a crisis, [but observing that] what is clear is that if current trends continue it will become one"); Michael Stratford, *Income-Based Loans Made Simple*, INSIDE HIGHER ED, Oct. 22, 2013, https://www.insidehighered.com/news/2013/10/22/new-report-calls-income-based-repayment-system-operates-payroll-taxes (quoting Susan Dynarski) ("We have a repayment crisis because student loans are due when borrowers have the least capacity to pay.").

[4] *See, e.g.*, Suesz v. Med-1 Solutions, LLC, 757 F.3d 636, 661 n.3 (7th Cir. 2014) (referring to student debt as "the [second] largest bit of baggage in our nation's consumer inventory"); Cushing v. Student Loan Mkt. Assoc., No. 16-595, 2016 WL 5390644, at *2 (E.D. Pa. Sept. 27, 2016) (observing that the "student debt crisis [could have] potentially devastating impacts . . . . [and is] a situation that calls out for legislative relief").

[5] *See, e.g.*, Chloe Melas, *Nicki Minaj Pays Off Thousands in Fans' Student Loans, tuition*, CNN, May 15, 2017, http://www.cnn.com/2017/05/15/celebrities/nicki-minaj-pays-students/index.html (discussing how Nicki Minaj paid off student loans for at least eight of her fans); Mark Cuban, *The Coming Meltdown in College Education & Why The Economy Won't Get Better Any Time Soon*, BLOG MAVERICK, May 13, 2012 (comparing the student loan market to the housing bubble).

[6] Some of the most prominent financial institutions have expressed similar views. *See, e.g.*, Chelsey Dulaney, *Student Loan Debt: the Bubble Goldman Thinks You Should Buy*, WALL ST. J., Dec. 5, 2017, https://blogs.wsj.com/moneybeat/2017/12/05/student-loan-debt-the-bubble-goldman-thinks-you-should-buy (noting that Goldman Sachs has described the student loan market as a "bubble").

[7] *See* Board of Governors of the Federal Reserve, *Consumer Credit – G.19*, June 7, 2018, https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html; *see also Current Student Loan Debt in the United States*, COLLEGE DEBT, http://collegedebt.com (keeping a running tally of the total outstanding student loan debt).

[8] Total U.S. auto loan debt is around $1.1 trillion. Michael Corkery and Stacy Cowley, "Household Debt Makes a Comeback in the U.S.," The N.Y. Times, last modified May 17, 2017, https://www.nytimes.com/2017/05/17/business/dealbook/household-debt-united-states.html. Total U.S. credit card debt slightly exceeds $1 trillion. "Consumer

increase, there is an even more pressing issue: the low repayment rate. Only sixty percent of student loans are in active repayment,[9] and a full eleven percent are in default.[10] All told, these bleak statistics make it impossible to deny that educational debt is a significant problem in the United States.[11] Disagreement arises, however, over the potential remedies.

If student loans were like any other consumer debt, a first-pass solution to the problem would be obvious. Individuals in need of relief could simply file for bankruptcy. Student loans, however, are not like any other consumer debts. Instead, they are subject to a number of restrictions that prevent courts from granting discharges through the normal bankruptcy process. Specifically, if a student loan satisfies one of three statutory criteria, a borrower can only discharge the debt through a showing of "undue hardship."

In reviewing how bankruptcy courts have implemented this statutory scheme, lawyers and scholars alike have advanced two propositions: (1) that the criteria for exemption are so broad as to encompass all educational debts[12] and (2) that virtually no one is able to prove undue hardship.[13] My research challenges this prevailing

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Credit–G.19," Board of Governors of the Federal Reserve System, accessed Dec. 26, 2017, https://www.federalreserve.gov/releases/g19/hist/cc_hist_sa_levels.html.

[9] Although a substantial portion of loans not in repayment are in deferment or forbearance, it is important to keep in mind that such loans generally continue to accrue interest and ultimately yield significantly heavier debt burdens.

[10] *See* Student Loan Hero, *A Look at the Shocking Student Loan Debt Statistics for 2018*, https://studentloanhero.com/student-loan-debt-statistics.

[11] *See, e.g.*, Rana Foroohar, *The US College Debt Bubble is Becoming Dangerous*, FINANCIAL TIMES, https://www.ft.com/content/a272ee4c-1b83-11e7-bcac-6d03d067f81f (quoting N.Y. Federal Reserve president Bill Dudley as describing educational debt as a "headwind to economic activity").

[12] *See* Steve Rhode, *Here is Why Your Private Student Loan May Able to Be Eliminated in Bankruptcy*, Dec. 29, 2016, https://getoutofdebt.org/100708/private-student-loan-may-able-eliminated-bankruptcy (lamenting "the vast number of people who continue to believe that student loans are not dischargeable in bankruptcy, yet many are. Even large swaths of bankruptcy attorneys continue to believe this urban myth . . . [A] blanket belief that student loans are not dischargeable is just not a true fact."); Michael J. Tremblay, *I Thought All Student Loans could not be Discharged in Bankruptcy*, http://attorneytremblay.com/category/bankruptcy-2 (noting that "[t]here is a common misunderstanding that all student loans are not dischargeable in bankruptcy").

[13] As one consumer bankruptcy attorney wrote:

> Student loans are not dischargeable in bankruptcy under almost any circumstances. There is such a thing as a hardship discharge of student loan debt, but to get one of those you need to be over the age of eighty, have no hearing, and have a serious mental illness that prevents you from ever being able to earn a dime or receive a social security payment, and not have any family that can assist you.

David R. Black, *Successfully Guiding a Client through the Chapter 13 Filing Process*, ASPATORE, view of the student loan bankruptcy system.

In a previous article, I refuted the second claim by showing that many debtors are able to satisfy the undue hardship standard.[14] That study gathered a nationwide sample of student loan bankruptcy filings and found that approximately forty percent of those who seek to discharge their student loans through bankruptcy are successful.[15] The central problem, that piece concluded, is that so few student loan debtors in bankruptcy take the necessary steps to request an undue hardship determination.[16] Many more would be successful if they tried.

This Article shifts the focus to the first claim—namely, that the student loan discharge exceptions encompass all educational debts. Upon reviewing the cases, I find that this statement does, in fact, capture the reading advanced by a majority of bankruptcy courts. That, however, is not the full story. The textual language, the provision's legislative history, and the policy rationales underlying the Bankruptcy Code all point towards an alternative interpretation of the statute.

The primary source of the problem is the misreading of one short phrase: "educational benefit." Whereas all factors indicate that this phrase should be understood in a narrow, semi-technical sense, a majority of courts have read it expansively to mean any loan that an

Jan. 2014, 2014 WL 10512. Although seemingly hyperbolic, this attorney's view is representative of how lawyers and scholars conceive of the undue hardship standard. *See, e.g.*, Jonathan M. Layman, *Forgiven but not Forgotten: Taxation of Forgiven Student Loans under the Income-Based-Repayment Plan*, 39 CAP. U. L. REV. 131, 136 (2011) (claiming that "federally backed student loans cannot be discharged in bankruptcy except in some rare cases of extreme financial hardship"); Aaron N. Taylora & Daniel J. Sheffner, *Oh, What a Relief it (Sometimes) is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 297 (2016) ("Conventional wisdom dictates that it is all-but-impossible to discharge student loans in bankruptcy.").

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

[15] *See id.* at 523 (concluding that "[t]he data dispel the myth that it is nearly impossible to discharge educational debt. Thirty-nine percent of debtors who filed an adversary proceeding received a full or partial discharge.").

[16] *See id.* (finding that "99.9 percent of student loan debtors in bankruptcy fail to ask for" a student loan discharge). Ultimately, I concluded that "[c]ourts are willing to grant discharges. The problem is that few people are asking for them." *Id.* at 525. To put numbers on the magnitude of the shortfall, consider the following: Each year, approximately two hundred fifty thousand people with student loan debt file for bankruptcy. Of those individuals, only about five hundred file an adversary proceeding—a process that is necessary to request a student loan discharge from the court. This places the filing rate around 0.2%. In other words, more than ninety-nine percent of individuals go through the bankruptcy process without even trying to discharge their student loans. Based on my estimates, tens of thousands of debtors each year could prove undue hardship if they only took the necessary legal steps. *See id.* at 523–24.

individual uses for educational purposes. By adopting this broad reading, courts have prevented honest debtors from utilizing the protections of bankruptcy. All manner of student loans that should have been discharged—such as loans for unaccredited schools, loans for tutoring services, and loans that exceed the cost of attendance for college—have been swept up in this interpretation.

Although this Article's argument, if accepted, would lead to the discharge of many types of educational debts, it is important to note that it would leave untouched several of the largest categories of student debt—such as educational loans from the government, educational loans from non-profit organizations, and qualified education loans from private lenders. Despite not altering the status of these debts, my proposed reading of educational benefit has a broad scope and would lead to the reclassification of billions of dollars of student loan debt.

This Article proceeds in two parts. Part I lays out the three student loan exceptions contained in the Bankruptcy Code and discusses how they have been interpreted by the courts. Part II argues that the broad reading of "educational benefit" is incorrect and presents an alternative, narrower reading that is supported by the statutory text, the legislative history, and the Bankruptcy Code's policy rationales. Ultimately, if courts adopt the narrow reading of "educational benefit," they will not only be exhibiting fidelity to the text and congressional intent but will also be closing a significant access-to-justice gap.

I. The Exceptions to Student Loan Discharge

The current iteration of the law governing student loan discharges was enacted as part of the 2005 Bankruptcy Abuse and Consumer Protection Act. The relevant statutory language reads as follows:

> (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

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(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.[17]

There is a lot to parse in this excerpt. For current purposes, however, the most important point is that not all student loans are excepted from discharge. The exemption applies only to three categories of educational debt[18]: (1) government and nonprofit-backed loans and educational benefit overpayments, (2) obligations to repay funds received as an educational benefit, scholarship, or stipend, and (3) qualified education loans.[19] Unless an educational debt falls within one of these classifications, it is dischargeable through the normal bankruptcy process.[20]

I discuss the scope of these exceptions later in this Part, but for now it is worth mentioning two procedural features that bear on the determination of whether a student loan is excepted from discharge. First, at the initial stage, the creditor has the burden of proving both the existence of the debt and that the debt meets one of the statutory exceptions to discharge.[21] Courts uniformly agree that "the initial burden is on the lender to establish the existence of the debt and to demonstrate that the debt is included in one of the . . . categories enumerated in § 523(a)(8)."[22] Not until the creditor has satisfied these burdens does the burden of proving undue hardship fall upon the debtor.[23] Too often, however, debtors simply

[17] 11 U.S.C. § 523(a)(8) (2012).

[18] *See In re* Corbin, 506 B.R. 287, 291 (Bankr. W.D. Wash. 2014) (noting that "the creditor bears the initial burden of proving the debt exists and that the debt is of the type excepted from discharge under the discharge exception for student loan debt").

[19] Some courts have identified four exempt categories. In these cases, the court merely chose to break the first provision into two separate categories.

[20] *See In re* Corbin, 506 B.R. 287, 291 (Bankr. W.D. Wash. 2014) (noting that "the creditor bears the initial burden of proving the debt exists and that the debt is of the type excepted from discharge under the discharge exception for student loan debt").

[21] *See In re* Roth, 490 B.R. 908, 916–17 (B.A.P. 9th Cir. 2013) ("the lender has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters . . . ").

[22] *In re* Creeger, 2016 WL 3049972, at *5 (Bankr. N.D. Ohio May 20, 2016); *see also In re* Rumer, 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012).

[23] *In re* Renshaw, 222 F.3d 82, 86 (2d Cir. 2000) (citing Grogan v. Garner, 498 U.S. 279, 287, 291 (1991)) (holding that the Bankruptcy Code requires "the creditor to prove

concede that their student loan debt is nondischargeable absent a showing of undue hardship.[24] This action relieves creditors of a significant burden and, in doing so, exempts many loans from discharge that otherwise would be entitled to discharge.

The second issue worth highlighting with respect to the interpretation of this statute is that the exceptions to discharge must be construed narrowly.[25] Courts have repeatedly held that such a construction of the statute is necessary "in order to preserve the Bankruptcy Act's purpose of giving debtors a fresh start."[26] If judges were to read the exceptions broadly, they would "frustrate this fundamental policy."[27] Therefore, to avoid this problem, "[t]he reasons for denying a discharge . . . must be real and substantial, not merely technical and conjectural."[28] In the remainder of this Part, I explore the manner in which courts have interpreted these three provisions.

A. Federal and Nonprofit Loans

Section 523(a)(8)(A)(i) excepts from discharge any "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."[29] As you can see, there are two different discharge exceptions in this provision: "loans" that are backed by the government or nonprofit institutions and "educational benefit overpayments" that are backed by the government or nonprofit institutions.[30]

With regard to the former, courts have held that "[t]his language applies to all situations of student loans funded by the government or nonprofit institutions,"[31] and that "for there to have

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by a preponderance of the evidence that its claim is one that is not dischargeable").

[24] United States v. Wood, 925 F.2d 1580, 1583 (7th Cir. 1991) (noting that the "burden of challenging th[e] presumption [of nondischargeability] falls on the debtor.")

[25] *See In re* Bullock, 670 F.3d 1160, 1164 (11th Cir. 2012) (noting that "exceptions to discharge . . . must be construed narrowly" (citing *In re* Mitchell, 633 F.3d 1319, 1327 (11th Cir. 2011))), *vacated and remanded by* Bullock v. BankChampaign, 569 U.S. 267 (2013).

[26] *In re* Jackson, 184 F.3d 1046, 1051 (9th Cir. 1999) (citations omitted).

[27] *In re* Stone, 91 B.R. 589, 591 (D. Utah 1988).

[28] *In re* Miller, 39 F.3d 301, 304 (11th Cir. 1994) (internal quotations omitted); *see In re* Corbin, 506 B.R. 287, 291 (Bankr. W.D. Wash. 2014) (noting that "[c]ourts construe exceptions to discharge strictly against a creditor and liberally in favor of the debtor").

[29] 11 U.S.C. § 523(a)(8)(A)(i) (2012).

[30] *See, e.g.*, *In re* Johnson, 222 B.R. 783, 786 (Bankr. E.D. Va. 1998) (labeling these as two separate categories).

[31] *In re* Rezendes, 324 B.R. 689, 692 (Bankr. N.D. Ind. 2004).

been a loan 'there must be (i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services, to another, and (iii) the other party agrees to pay for the sum or items transferred at a later date.' "[32] This is a straightforward exception that is designed to protect American taxpayers and nonprofit organizations from bearing the burden of widespread student loan defaults.

With regard to the second exception, courts have concluded that the phrase "educational benefit overpayments" applies to benefit payments that an individual receives for schooling but subsequently uses for alternative purposes.[33] For one example, consider the Servicemen's Readjustment Act of 1944 (colloquially known as the G.I. Bill). This Act provides educational assistance to veterans. Any individuals who participate in this program must use the funds for approved educational purposes, and any funds not used in such a manner must be paid back to the government. By excepting "educational benefit overpayments" from discharge, the Bankruptcy Code ensures that individuals who exploit programs—such as the one in the G.I. Bill—by using the money for unauthorized purposes cannot discharge their debt obligations in bankruptcy.

B. Educational Benefits

Section 523(a)(8)(A)(ii) excepts from discharge "an obligation to repay funds received as an educational benefit, scholarship, or stipend."[34] Most courts to consider the issue have interpreted the clause to include any loans that facilitated a debtor's education.[35] Specifically, they read "obligation to repay funds received" as synonymous with "loan" and "educational benefit" as synonymous with "advancing an individual's education."[36]

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[32] *In re* Tucker, 560 B.R. 206, 208 (Bankr. W.D.N.Y. 2016) (quoting *In re* Renshaw, 222 F.3d 82, 88 (2d Cir. 2000)).

[33] *See, e.g.*, *In re* Moore, 407 B.R. 855, 859 (Bankr. E.D. Va. 2009) (describing "educational benefit overpayment" as "an overpayment from a program like the G.I. Bill, where students receive payments even though they are not attending school").

[34] 11 U.S.C. § 523(a)(8)(A)(ii) (2012).

[35] *See, e.g.*, *In re* Corbin, 506 B.R. 287, 296 (Bankr. W.D. Wash. 2014) (observing that "a majority of courts have held that a loan qualifies as an 'educational benefit' if the stated purpose for the loan is to fund educational expenses." (citing *In re* Maas, 497 B.R. 863, 869–870 (Bankr. W.D. Mich. 2013))).

[36] *See, e.g.*, *In re* Rumer, 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012) (writing that "loans received as an educational benefit, scholarship, or stipend" are excepted from discharge); *In re* Beesley, Adv. No. 12-2444-CMB, 2013 WL 5134404, at *4 (Bankr. W.D. Pa. Sept. 13, 2013) (noting that "courts . . . have interpreted 'funds received as an educational benefit' to include loans").

By interpreting the clause in this broad manner, courts have swept every loan that is used for any educational purpose within the ambit of the statute. *In re Belforte* presents an illustrative example.[37] In this case, the debtor (Patricia Belforte) took out a general, unsecured loan in the amount of ten thousand dollars from her credit union (Liberty Bay).[38] A number of years later, Patricia submitted a handwritten letter requesting that the credit union "rewrite [her] personal loan to $14,000 . . . for tuition [and] books for [her] children's schools."[39] Liberty Bay agreed and advanced the funds.

Several years passed, and Patricia filed for bankruptcy, seeking to discharge the loan she had obtained from Liberty Bay. The credit union attempted to block the discharge by arguing that the debt was "an obligation to repay funds received as an educational benefit" and, as such, could not be discharged absent a showing of undue hardship.[40] Liberty Bay's primary argument was that Patricia's handwritten note requesting the personal loan increase to pay for her children's tuition and books proved that the loan's purpose was to confer an "educational benefit."[41]

Liberty Bay's position is odd for a number of reasons. First, and most notably, Patricia received no educational benefit from the loan. To the extent any educational benefit was conferred, it was solely upon her children. Second, despite having an educational loan program, the credit union opted to advance the funds under Patricia's existing unsecured personal line of credit. And third, Liberty Bay evinced a conspicuous lack of oversight with regard to the loan. The company made no inquiries into where Patricia's children were enrolled, much less whether such schools were accredited.

Given the credit union's lack of interest in collecting this information before approving the loan, it is hard to believe that the company only lent the money to Patricia because it thought the loan was a nondischargeable educational debt. The only way to maintain this position was for the credit union to argue that the statute exempts from discharge any loan that a debtor professes to use for any educational purpose whatsoever. Unsurprisingly, after engaging in a bit of post hoc legal maneuvering, the credit union set forth that exact argument.[42] What is surprising, however, is that the court

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37 *In re* Belforte, Adv. No. 11-1008, 2012 WL 4620987 (Bankr. D. Mass. Oct. 1, 2012).

38 *See id.* at *2.

39 *Id.*

40 *Id.* at *3–4.

41 *Id.* at *3.

42 *Id.* at *3 ("Liberty Bay asserts that the funds were received as an educational benefit because the Debtor asked for money for her children's education, and that the actual use

granted summary judgment in favor of the credit union.[43]

Finding the outcome so obvious as to be unworthy of a full trial, the judge held that the debtor's handwritten note stating that the funds would be used for "tuition [and] books" was sufficient to transform this personal loan into "an obligation to repay funds received as an educational benefit."[44] The court did not go so far as to explicitly hold that any loan that a debtor professes to use for "educational purposes"—no matter how indirect or unlikely the educational benefit—qualifies as a nondischargeable student loan, but that is the clear implication of the opinion.[45]

Although this outcome is striking, the *Belforte* court is far from alone in adopting such an expansive reading of the statute. As one bankruptcy judge observed, "[t]he Code does not define the term 'educational benefit,' but a majority of courts have held that a loan qualifies as an 'educational benefit' if the stated purpose for the loan is to fund educational expenses."[46] Relying on this broad understanding of the statute, courts have ruled that funds borrowed to pay for everything from tutoring services[47] to bar review courses[48] to vocational schools that committed fraud[49] count as an "educational benefit" and are, therefore, nondischargeable. These decisions are not only problematic at the policy level, they are wrong as a matter of law. In Part II, I develop a critique of the prevailing bankruptcy court decisions on the subject. For now, though, I turn to the Bankruptcy Code's third and final student loan discharge exception.

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of the funds does not affect the analysis.").

[43] *See id.* at *9.

[44] *Id.* at *8.

[45] *Id.* at *6 (holding that "§523(a)(8)(A)(i) must be read as encompassing a broad[] range of educational benefit obligations, such as those in the instant case").

[46] *In re* Corbin, 506 B.R. 287, 296 (Bankr. W.D. Wash. 2014) (citing *In re* Maas, 497 B.R. 863, 869–870 (Bankr. W.D. Mich. 2013)).

[47] *See In re* Roy, Adv. No. 09-1406, 2010 WL 1523996 *1 (Bankr. D.N.J. April 15, 2010) (hold that loans for tutoring services for a debtor's child conferred an "educational benefit" and were, therefore, nondischargeable absent a showing of undue hardship).

[48] *See In re* Vuini, Adv. No. 6:11-ap-00227-KSJ, 2012 WL 5554406 (Bankr. M.D. Fla. Nov. 14, 2012) (holding that the more than fourteen thousand dollars the debtor borrowed to pay for a bar exam review course is a nondischargeable student loan); *In re* Skipworth, Adv. No. 09-80149-JAC-7, 2010 WL 1417964 *2 (Bankr. N.D. Ala. April 1, 2010) (finding that the "debtor's obligation to Citibank is clearly 'an obligation to repay funds received as an educational benefit' for purposes of § 523(a)(8)(A)(ii) in that Citibank loaned funds to the debtor to assist the debtor with his educational expenses i.e. the debtor's bar review course").

[49] *See In re* Kidd, 458 B.R. 612, 620–21 (Bankr. N.D. Ga. 2011) (finding the loan nondischargeable even though the school closed before the debtor received her education).

C. Qualified Education Loans

This final provision exempts "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."[50] As anyone familiar with the Tax Code might suspect, fully understanding the scope of this exception requires going on a definitional scavenger hunt. Indeed, the Tax Code's definition of "qualified education loan"[51] relies upon another defined term ("qualified higher education expenses"[52]), the definition of which, in turn, references two other defined terms ("cost of attendance"[53] and

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[50] 11 U.S.C. § 523(a)(8)(B) (2012).

[51] *See* 26 U.S.C. § 221(d)(1). This section defines "qualified education loan" as follows:

> 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..

[52] *See* 26 U.S.C. § 221(d)(2). This section defines "qualified higher education expenses" as follows:

> the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087ll, as in effect on the day before the date of the enactment of the Taxpayer Relief Act of 1997) at an eligible educational institution, reduced by the sum of—
>
> (A) the amount excluded from gross income under section 127, 135, 529, or 530 by reason of such expenses, and
>
> (B) the amount of any scholarship, allowance, or payment described in section 25A(g)(2).
>
> For purposes of the preceding sentence, the term "eligible educational institution" has the same meaning given such term by section 25A(f)(2), except that such term shall also include an institution conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training.

[53] *See* 20 U.S.C. § 1087ll. This section defines "cost of attendance" as follows:

> (1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;
>
> (2) an allowance for books, supplies, transportation, and miscellaneous personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer, for a student

"eligible educational institution"[54]) which, yet again, reference other defined terms.

To further complicate matters, the definitions for many of these terms are rather lengthy. Therefore, to avoid reproducing entire pages of the Tax Code and, in light of my more modest goal of providing a broad outline of this exception, I focus only on the general scope of the provision. Condensed down to its most basic form, § 523(a)(8)(B) exempts from discharge any loans that are provided for the purpose of paying approved costs of attending an accredited educational institution.

There are four key points to keep in mind with this definition. First, because government-backed loans and nonprofit-backed loans are already exempt from discharge under § 523(a)(8)(A)(i), this section of the statute only alters the treatment of private student loans that meet certain criteria. Second, the provision requires there to be a lender-borrower relationship. If there is not a contract in which one party advances funds to another in exchange for a promise of future repayment, then the debt does not qualify.[55]

Third, the loans only become nondischargeable if the debtor borrows them to attend an educational institution that is accredited under Title IV of the Higher Education Act of 1965.[56] Although accreditation is by no means a high hurdle, this requirement does ensure that students are not prevented from discharging educational debts they accrued to attend some of the worst-performing for-profit institutions. Finally, private loans are only exempt from discharge up to the cost of attendance. This criterion means that, if a school calculates its cost of attendance to be fifty thousand dollars, then any borrowing in excess of that amount is dischargeable even absent a showing of undue hardship. A creditor who lends sixty thousand dollars to the student, for example, will only be able to maintain that

attending the institution on at least a halftime basis, as determined by the institution;
(3) an allowance (as determined by the institution) for room and board costs incurred by the student).

[54] *See* 26 U.S.C. § 25A(f)(2) (defining "eligible educational institution" as "an institution—(A) which is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), as in effect on the date of the enactment of this section, and (B) which is eligible to participate in a program under title IV of such Act").

[55] *See In re* Oliver, 499 B.R. 617, 625 (Bankr. S.D. Ind. 2013) (holding that, because the debt obligation did not "give rise to a lender/borrower relationship between [the university] and Debtor," the debt was not exempt from discharge under §523(a)(8)(B)).

[56] *See, e.g.*, *In re* Decena, 549 B.R. 11, 14 (Bankr. E.D.N.Y. 2016) (finding that the debtor's loans were not qualified education loans because the foreign medical school—which was unlicensed and unaccredited—was not an eligible educational institution), *rev'd in part and vacated in part*, 562 B.R. 202 (E.D.N.Y. 2016).

the first fifty thousand dollars is exempt from discharge. Although parsing the Tax Code to uncover which debts are qualified education loans can be time consuming, the actual determinations are not particularly contentious.

II. The Meaning of Educational Benefit

It is a truism to state that there are as many methods of statutory interpretation as there are judges and legal scholars.[57] Despite the vast number of approaches, there are, nonetheless, underlying similarities. In particular, when seeking to discern the meaning of a statute, all judges evaluate the text, the legislative history, and the policy implications.

In making this claim, I do not mean that judges weigh these factors equally or even that they acknowledge these factors in most cases. Instead, I am defending two far more modest points: first, that these three factors guide statutory interpretation and second, that—at least in extreme circumstances—every judge is willing to consider each of these factors.[58] It is, for example, apparent that even the most ardent textualist will look to the legislative history if that is necessary to avoid an absurd result. Likewise, even the most dedicated intentionalist or purposivist will give weight to the textual language if the meaning is clear and permits only one interpretation.

Accordingly, the dispute among the different interpretive camps is not over which factors merit examination but rather over the relative weight that the various factors should have in the final determination. For textualists, the statutory text is primary.[59] For

[57] *See, e.g.*, Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 586 (1994) ("There are many approaches to statutory interpretation precisely because judges so often must decide how to apply ambiguous statutory provisions to specific cases.").

[58] *See, e.g.*, HENRY J. FRIENDLY, BENCHMARKS 200 (1967) ("Indeed the same judges—even very great ones—give different emphasis at different times to the two souls that dwell within their breasts. Thus Holmes, whom Frankfurter quoted as saying of legislators, 'I don't care what their intention was. I only want to know what the words mean,' wrote also that 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down,' and even that 'the meaning of a sentence is to be felt rather than to be proved.'"). Whether all judges will admit to considering each of these factors is a different matter. *See* TOBIAS A. DORSEY, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE 75–76 (2006) ("Courts consider everything they can, including policy," but "[w]hether they admit in writing to doing so is another matter.").

[59] For a defense of textualism, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–48 (1997). *See also* ANTONIN

intentionalists, legislative intent is worthy of greater deference,[60] and for pragmatists, policy considerations are most important.[61] It is when these factors—text, legislative intent, and policy consequences—point toward different legal meanings that conflicts arise.[62]

Fortunately, the present case is not one of these situations. All three factors mandate the same conclusion—namely, a narrow reading of the term "educational benefit." The broad reading of the term that dominates judicial discourse today was borne not out of a differing interpretive methodology but rather out of a fundamental misreading of the text, legislative history, and policy rationales underlying the statute.

A. Text

For any issue of statutory interpretation, the starting point is the text of the statute itself.[63] If the language is clear and

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SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS ("[Textualists] look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences.").

[60] For a defense of intentionalism, see generally KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 1–16 (1999). Purposivism is a related—though distinct—theory that places great weight on the purpose of the statute. For a defense of this theory and a discussion of its use in statutory interpretation, see generally STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85–101 (2005).

[61] For a defense of pragmatism, see generally RICHARD A. POSNER, HOW JUDGES THINK 93–124 (2010). For another theory that falls under the same umbrella, see generally WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 9–106 (1994) (defending an account he refers to as "critical pragmatism").

[62] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) ("[S]tatutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control. These three perspectives relate to (1) the statutory text, which is the formal focus of interpretation and a constraint on the range of interpretive options available (textual perspective); (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective); and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time (evolutive perspective).").

[63] *See* Ross v. Blake, 136 S. Ct. 1850, 1856 (2016) ("Statutory interpretation, as we always say, begins with the text." (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010))). As Justice Frankfurter's "three-fold imperative to law students" goes, "(1) Read the statute; (2) read the statute; (3) read the statute!" HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (quoting Justice Frankfurter).

unambiguous, the inquiry ends there.[64] This approach—known as the "plain meaning rule"—is a hallmark of judicial interpretation and is a fundamental principle for resolving cases in which the meaning of a text is in dispute.[65] With that in mind, I begin my analysis with the statutory text.

This choice, of course, requires defining the scope of the inquiry. Should the investigation be limited to the dictionary definition of the particular terms in dispute? Or is how Congress uses the same language in other sections of the statute relevant? Or perhaps understanding the text requires determining the overall purpose of the statute? In grappling with these questions, the Supreme Court has emphasized that

> [s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[66]

Before looking at the entire statute, however, it makes sense to first review the provision in dispute. Only then is it possible to evaluate how the potential interpretations would fit into the broader structure. The relevant provision reads as follows:

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[64] *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (noting that "[i]f the statutory language is plain, we must enforce it according to its terms."); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). In recent years, the Supreme Court has relied in even greater part on the statutory text. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 124–27 (arguing that "except in cases of absurdity, the Court no longer claims the authority to deviate from the clear import of the text").

[65] The plain meaning rule applies in any area of law where the meaning of a text is in dispute. *See, e.g.*, NLRB. v. Enterprise Leasing Co. Se., LLC, 722 F.3d 609, 664 (Duncan, J., concurring) ("The first rule of constitutional interpretation is, of course, to apply the plain meaning of the text." (citing McPherson v. Blacker, 146 U.S. 1 (1892))); Evans v. Stephens, 387 F.3d 1220, 1229 (11th Cir. 2004) ("The first rule of constitutional interpretation is to look to the plain meaning of the Constitution's text." (citing Solorio v. United States, 483 U.S. 435, 447 (1987))); 5 Margaret N. Kniffin, CORBIN ON CONTRACTS § 24.7, at 33 (Joseph M. Perillo ed. 1998) ("[I]f a 'clear, unambiguous' meaning is discernible in the language of the contract, no extrinsic evidence of surrounding circumstances may be admitted to challenge this interpretation.").

[66] United Savings Ass'n v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 371 (1988) (citations omitted).

> 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 . . . (ii) an obligation to repay funds received as an educational benefit . . . .[67]

The language up until the second ellipsis is straightforward. It states that, absent undue hardship, a bankruptcy discharge does not eliminate the debtor's need to repay certain debts. Courts have read the statutory language in this way, and it seems undeniable that this interpretation is correct. Following that point, however, the standard interpretation falters.

The statute sets forth a number of nondischargeable educational debts and lists among them "an obligation to repay funds received as an educational benefit . . . ."[68] Notably, "educational benefit" is not defined anywhere in the Bankruptcy Code, so determining its meaning requires other interpretive tools.[69] One common tool is to look at the ordinary, everyday meaning of the term. Upon first pass, most people would likely understand the statutory language to include any debt that an individual incurs for the intended purpose of advancing her education. In this reading, "benefit" is taken to be equivalent to "an advantage or profit gained from something."[70] The majority of courts have adopted this interpretation, which I will refer to as the "Broad Reading."

There is something to be said for the Broad Reading. Not only is it consistent with one common usage of the words, but also it reflects the primary dictionary definition of the term "benefit."[71] As *The American Heritage Dictionary* states, the principal meaning of benefit is "[s]omething that promotes or enhances well-being; an advantage."[72] Likewise, the *Merriam-Webster Dictionary* lists the primary definition as "something that produces good or helpful results or

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[67] 11 U.S.C. § 523(a)(8) (2012).

[68] 11 U.S.C. § 523(a)(8).

[69] *See In re* Vasa, Adv. No. 14-4008, 2014 WL 6607512 *3 (Bankr. S.D. Nov. 19, 2014) ("The term 'educational benefit' is not defined in § 523(a)(8)(A)(ii) or in any other provision of the bankruptcy code.").

[70] *Benefit*, OXFORD ENGLISH DICTIONARY, https://en.oxforddictionaries.com/definition/benefit.

[71] *See id.*

[72] *Benefit*, THE AMERICAN HERITAGE DICTIONARY, https://ahdictionary.com/word/search.html?q=benefit.

effects or that promotes well-being."[73]

Although the dictionary definitions are in line with the Broad Reading, that alone is not sufficient to reveal the plain meaning and conclude the inquiry. As any speaker of English knows, words have multiple meanings and, often, the most sensible reading of a word in a particular context is not its most common reading.

With that in mind, I turn to the secondary meaning of "benefit." According to the dictionary, "benefit" can also mean "a payment or gift made by an employer, the state, or an insurance company."[74] This phrasing may sound a bit unusual, but it captures a common way in which "benefit" is used. Consider, for instance, the terms "unemployment benefits," "insurance benefits," "social security benefits," "retirement benefits," and "welfare benefits." The core feature behind these types of benefits is not that they promote an individual's well-being (although they do) but rather that they provide monetary assistance that the beneficiary is entitled to receive.[75] The payment may come from the state, an employer, or an insurance company, but in each instance, the payer is distributing guaranteed benefits.[76]

Although most Americans are more familiar with the aforementioned types of benefits, such distributions also occur in the educational context and are, in those circumstances, referred to as "educational benefits." To be more precise, the term denotes conditional educational grants—i.e., educational funds that a student receives in exchange for agreeing to perform services in the future.

A salient example of this type of educational benefit is the Reserve Officer Training Corps program. This program covers the cost of college for students who meet certain qualifications and agree to serve in the military for a given number of years (generally four to ten) following graduation.[77] Another example is the federally funded National Health Service Corps scholarship, a program which pays the

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[73] *Benefit*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/benefit.

[74] *Benefit*, DICTIONARY.COM, http://www.dictionary.com/browse/benefit?s=t.

[75] *See* OXFORD ENGLISH DICTIONARY, *supra* note 70 ("A payment made by the state or an insurance scheme to someone entitled to receive it.").

[76] *See* MERRIAM-WEBSTER DICTIONARY, *supra* note 73 (offering one definition of "benefit" as "financial help in time of sickness, old age, or unemployment . . . a payment or service provided for under an annuity, pension plan, or insurance policy . . . a service (such as health insurance) or right (as to take vacation time) provided by an employer in addition to wages or salary").

[77] Scholarship America, *Get Money for College Through ROTC Programs*, U.S. NEWS & WORLD REPORT (July 25, 2013), https://www.usnews.com/education/blogs/the-scholarship-coach/2013/07/25/get-money-for-college-through-rotc-programs.

tuition for medical school students who agree to spend a fixed period of time working in underserved areas following graduation.[78] Notably, these programs are not loaning money but rather are offering conditional educational grants. They are, in other words, providing educational benefits under the second dictionary definition of the term. I refer to this interpretation of the provision as the Narrow Reading.

Thus far, it seems that the analysis yields two plausible readings of the term "educational benefit." The Broad Reading encompasses any funds that are used to provide an educational advantage, while the Narrow Reading is limited to conditional educational grants. Given the existence of competing interpretations, some method for selecting between these possibilities is necessary. Fortunately, textualists have a strategy for resolving statutory ambiguities such as this. They pull back the lens to see whether the surrounding clauses or the broader statute provide any clues as to the appropriate meaning.

The initial step in this process is to look at the words that surround "educational benefit." Specifically, the statute excepts from discharge "an obligation to repay funds received as an educational benefit, scholarship, or stipend." The phrase "obligation to repay funds received" stands out as notable. This word choice, in particular, is extremely unusual—a characteristic that suggests the phrase has a specialized or nuanced meaning.

Despite this indication, a majority of courts have declined to comment on the odd nature of the phrase, instead opting to read "obligation to repay funds received" out of the statute and to insert the word "loan" in its place.[79] In doing so, these courts have endorsed the Broad Reading of "educational benefit" and thereby shifted the inquiry away from the question of whether a debt is an educational benefit and to the question of whether a debt is a loan that conferred an educational benefit. Although similar sounding, there is a stark difference in these two categories, as the definitional examination above highlights.

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[78] National Health Service Corps, *Scholarship Program Overview*, https://nhsc.hrsa.gov/scholarships/overview/index.html.

[79] *See, e.g.*, *In re* Beesley, Adv. No. 12-244-CMB, 2013 WL 5134404, *4 (Bankr. W.D. Pa. Sept. 13, 2013) (holding that loans could be "funds received as an educational benefit"); *In re* Belforte, Adv. No. 11-1008, 2012 WL 4620987, at *8 (Bankr. D. Mass. Oct. 1, 2012) (holding that "under the plain language of 11 U.S.C. § 523(a)(8)(ii), the August 2007 Agreement is a loan for an educational benefit"); *see also In re* Rust, 510 B.R. 562, 567 (Bankr. E.D. Ky. 2014) (noting that "a majority of courts determine whether a loan qualifies as an 'educational benefit' by focusing on the stated purpose for the loan when it was obtained").

Strikingly, many courts that have taken this approach have failed to acknowledge their substitution,[80] instead simply assuming the change to be so unobjectionable as to be unworthy of mention.[81] As one Pennsylvania bankruptcy court declared without explanation, "Section 523(a)(8) protects . . . from discharge . . . *loans* received as an educational benefit, scholarship, or stipend."[82]

A substitution of this sort conflicts with a basic principle of statutory interpretation: Where Congress has shown that it knows how to use a term, the absence of that term in the same or a related section of a statute should be taken as meaningful and deliberate.[83] As the Supreme Court has held in numerous cases, "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[84] Accordingly, when a term is ambiguous, courts should disfavor a reading that is clearly and directly captured by a different term that Congress has already proven it knows how to use.[85]

The key question, then, is as follows: If Congress meant "loan," why did it not simply say "loan" rather than enact the clunky circumlocution "obligation to repay funds received?" After all, Congress used the word "loan" three times in section 523(a), so this is not an instance of ignorance. To the contrary, the evidence suggests that Congress' choice to forego the term "loan" in this portion of the statute represents a considered decision. Therefore, if

[80] *See In re* Christoff, 527 B.R. 624, 635 (9th Cir. B.A.P. 2015) (observing that "those bankruptcy cases [in the majority], perhaps inadvertently, imprecisely quote the provisions of the discharge exception statute as applying to 'loans received,' as opposed to the 'obligation to repay funds received'").

[81] *See e.g.*, *In re* Campbell, 547 B.R. 49, 54 (Bankr. E.D.N.Y. 2016) (noting that "[s]ome courts have decided without explanation, or assumed, that 'educational benefit,' as used in § 523(a)(8)(A)(ii), encompasses any loan which relates in some way to education").

[82] *In re* Rumer, 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012) (emphasis added).

[83] *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 173 (2001) (observing that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotations omitted); Keene Corp. v. United States, 508 U.S. 200, 208 (1993).

[84] Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Rusello v. United States, 464 U.S. 16, 23 (1983)); *see* Bailey v. United States, 516 U.S. 137, 146 (1995) (concluding that the term "used" does not encompass intended uses of a firearm because Congress had used the phrase "intended to be used" in a parallel provision of the statute and, therefore, the absence of the words "intended to be" should be understood as meaningful and intentional).

[85] *See Keene Corp.*, 508 U.S. at 208 (contrasting Congress' use of "jurisdiction to render judgment" with "jurisdiction" and emphasizing the Court's "duty to refrain from reading a phrase into the statute when Congress has left it out").

we are to take the Supreme Court's interpretative principle seriously, there is no option but to conclude that "obligation to repay funds received" refers to something other than a loan. Recently, a small number of courts have endorsed precisely this argument.[86]

The case of *In re Christoff* is the most prominent.[87] Focusing on Congress' word choice, the Ninth Circuit Bankruptcy Appellate Panel emphasized that § 523(a)(8)(A)(ii)

> excepts from discharge only those debts that arise from 'an obligation to repay funds received as an educational benefit,' and must therefore be read as a separate exception to discharge as compared to that provided in § 523(a)(8)(A)(i) for a debt for an 'educational overpayment or loan' made by a governmental unit or nonprofit institution or, in § 523(a)(8)(B), for a 'qualified education loan.'[88]

The court went on to explain:

> [The appellant's] arguments conflating "loan" as used in § 523(a)(8)(A)(i) and (a)(8)(B) . . . with "an obligation to repay funds received" as provided in § 523(a)(8)(A)(ii) are unconvincing. According to [the appellant], "[t]here is no reason why the word 'funds' should not be interpreted in the same light that 'loans' has been interpreted in prior cases in the Ninth Circuit . . . " In effect, [the appellant] argues that we should read § 523(a)(8)(A)(ii) to say "loans received" as opposed to "funds received." But this we must not do . . . . Instead, we must presume that, in organizing the provisions of § 523(a)(8) as it did in BAPCPA, Congress intended each subsection to have a distinct function and to target different kinds of debts.[89]

Based on its analysis, the Bankruptcy Appellate Panel rejected the argument that "educational benefit" refers to all debts incurred to advance one's education.[90] Adopting the Narrow Reading, the court

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[86] *See, e.g.*, *In re* Essangui, 573 B.R. 614, 625 (Bankr. D. Md. 2017) ("the Court is not persuaded by the Defendant's argument that an 'obligation to repay funds' is equivalent to a loan").

[87] *See In re* Christoff, 527 B.R. 624 (9th Cir. B.A.P. 2015).

[88] *Id.* at 634.

[89] *Id.*

[90] *See id.* ; *see also In re* Kashikar, 567 B.R. 160, 167 (9th Cir. B.A.P. 2017) (holding that "a 'loan' is not an 'educational benefit' within § 523(a)(8)(A)(ii)").

concluded that the phrase only excepts conditional educational grants from discharge.[91]

Although significant, the construction "obligation to repay funds received" is not the only textualist consideration that favors the Narrow Reading of "educational benefit." Congress' decision to use the word "as" in the phrase "funds received as an educational benefit" is also telling. It suggests that the exemption applies to a defined type of fund (i.e., an "educational benefit") and not to all funds that are used for a broad purpose (i.e., to confer an "educational benefit"). If the latter interpretation were correct, the statute would have exempted from discharge "funds received *for* an educational benefit" rather than "funds received *as* an educational benefit."

This reading is further bolstered by what comes after "educational benefit" in the list of exemptions—namely, scholarships and stipends. The fact that these terms are grouped with "educational benefit" suggests that all three categories have similar features and should be interpreted in relation to each other. As the Supreme Court has written, "a word is known by the company it keeps."[92]

This interpretative principle derives from the canon of *noscitur a sociis*, a fundamental rule of statutory construction holding "that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it."[93] In practice, the Supreme Court invokes this doctrine "where a word is capable of many meanings in order to avoid the giving of unintended breadth to

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[91] *In re Christoff*, 527 B.R. at 634 n.9 ("§ 523(a)(8)(A)(ii) is not a 'catch-all' provision designed to include every type of credit transaction that bestows an educational benefit on a debtor. Instead, this subsection includes a condition, distinct from those in the other subsections of § 523(a)(8), that must be fulfilled . . . .[T]his unique requirement, that 'funds [be] received' by the debtor, mandates that cash be advanced to or on behalf of the debtor. In light of the many programs available to students which provide cash benefits to students, like veteran's educational benefits, stipends for teaching assignments, and cash scholarships, it is not absurd to assume that Congress intended the scope of § 523(a)(8)(A)(ii) to target obligations other than those arising from traditional student loans."); *see also In re* Decena, 549 B.R. 11, 19 (Bankr. E.D.N.Y. 2016) ("Because loans are specifically mentioned in subsection 523(a)(8)(A)(i) and are not mentioned in subsection 523(a)(8)(A)(ii), and because 'educational benefit' refers to funds not required to be repaid, the Court finds that Congress intended subsection 523(a)(8)(A)(ii) to refer to educational debts other than loans.")), *rev'd in part and vacated in part*, 562 B.R. 202 (E.D.N.Y. 2016).

[92] McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016) (internal quotations omitted).

[93] N*oscitur a sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (translating the Latin as "it is known by its associates"); *see* Maracich v. Spears, 133 S. Ct. 2191, 2201 (2016) (noting that "the canon of *noscitur a sociis* 'counsels that a word is given more precise content by the neighboring words with which it is associated'" (quoting United States v. Williams, 553 U.S. 285, 294 (2008))).

the Acts of Congress."[94]

The case of *Gustafson v. Alloyd Co.* provides an excellent illustration of how the Court applies the canon of *noscitur a sociis*.[95] Central to this case was the meaning of the word "communication."[96] Rejecting the appellee's argument that "communication" should be read to refer to any written transmission of information, the Court emphasized that "communication" appears in a list of words and must, therefore, be read in conjunction with those surrounding words.[97] Observing that the accompanying terms of "prospectus, notice, circular, advertisement, [and] letter" refer to "documents of wide dissemination," the Court held that "communication" must, likewise, refer only to public transmissions of information and cannot be read to include private writings between two—or a small number of—parties.[98] In support of its decision, the Court wrote, "we rely upon [the canon of *noscitur a sociis*] to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words."[99]

The parallels between the statute in *Gustafson* and the student loan statute are too strong to ignore. In both, there is a disputed term that is capable of two meanings.[100] One of these meanings is extremely broad; the other is narrow. And there are two accompanying terms in the list that point to a narrow reading of the disputed term.[101] These similarities suggest that the student loan provision is an ideal candidate for the canon of *noscitur a sociis*.

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[94] *McDonnell*, 136 S. Ct. at 2368 (internal quotations omitted).

[95] Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 573–76 (1995). For other examples of how the Supreme Court has employed the canon of *noscitur a sociis*, see McDonnell v. United States, 136 S. Ct. 2355, 2368–69 (2016) (adopting a narrow definition for the terms "question" and "matter" because such a reading is "similar in nature" to the other words that complete the statutory list) and Jarecki v. G. D. Searle & Co., 367 U.S. 303, 306 (1961) (Interpreting "discovery" in a "precise and narrow" manner on the ground that such a reading is required by the doctrine of *noscitur a sociis*).

[96] *Gustafson*, 513 U.S. at 573–76.

[97] *See id.* at 574 ("The word 'communication,' however, on which Alloyd's entire argument rests, is but one word in a list, a word Alloyd reads altogether out of context.").

[98] *Id.* at 575.

[99] *Id.*; *see* Yates v. United States, 135 S. Ct. 1074, 1087 (2015) (internal quotation marks omitted) ("[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.").

[100] *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016) ("To choose between . . . competing definitions, we look to the context in which the words appear [as required by] the familiar interpretive canon *noscitur a sociis* . . . .").

[101] *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (noting that "words grouped in a list should be given related meaning").

As one bankruptcy court that relied on this principle wrote, what "educational benefits," "scholarships," and "stipends" have in common is that "[u]nlike loans, [they] are conditional educational grants, which are not generally required to be repaid."[102] Viewed from this perspective, Congress' decision to group these terms together and preface them with the phrase "obligation to repay funds received" makes complete sense. The subsection was designed to except from discharge grants of money that are tied to service obligations—a category wholly distinct from loans.[103] In other words, the canon of *noscitur a sociis* provides further support for the Narrow Reading.[104]

Another core interpretive principle that bears on this case is the canon against surplusage.[105] As its name suggests, this canon holds that courts must "give effect, if possible, to every clause and word of a statute."[106] This mandate creates a strong presumption against reading statutory terms or phrases in a manner that duplicates

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[102] *In re* Decena, 549 B.R. 11, 19 (Bankr. E.D.N.Y. 2016)), *rev'd in part and vacated in part*, 562 B.R. 202 (E.D.N.Y. 2016); *see In re* Campbell, 547 B.R. 49, 55 (Bankr. E.D.N.Y. 2016) ("[T]he canon of statutory construction known as *noscitur a sociis* instructs that when a statute contains a list, each word in that list presumptively has a similar meaning. To the extent that educational benefit (defined nowhere in the Bankruptcy Code) is ambiguous, it should be presumed to have a meaning similar to the other items in the list set forth in § 523(a)(8)(A)(ii). Scholarship and stipend both refer to funds which are not generally required to be repaid by the recipient. Therefore, in the absence of plain meaning to the contrary, or compelling legislative history, educational benefit must be understood to refer to something other than a loan, especially given that Congress uses the word loan elsewhere in § 523(a)(8). The concept which unites the three separate terms in the list in § 523(a)(8)(A)(ii) is that they all refer to types of conditional grants.").

[103] *See In re Decena*, 549 B.R. at 19 (concluding that, based on this analysis, "[i]t follows that 'educational benefit' does not encompass loans").

[104] *See* Austin Smith, *Where a Student Loan is Not Really a Student Loan*, GET OUT OF DEBT GUY (Dec. 29, 2016), https://getoutofdebt.org/100708/private-student-loan-may-able-eliminated-bankruptcy (applying the canon of *noscitur a sociis* to § 523(a)(8)(A)(ii) and arguing that it supports a narrow reading of "educational benefit").

[105] This canon is frequently discussed in conjunction with *noscitur a sociis* and, like that canon, supports the Narrow Reading of "educational benefit." *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2369 (2016) (observing that the "more limited reading [required by the canon of *noscitur a sociis*] also comports with the presumption 'that statutory language is not superfluous'" (quoting Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 299 n.1 (2006))); Bullock v. BankChampaign, N.A., 569 U.S. 267, 274 (2013) (discussing the canon of *noscitur a sociis* and the canon of surplusage and finding that they both favor the same reading of the disputed term).

[106] NLRB v. SW General, Inc., 137 S. Ct. 929, 941 (2017) (internal quotation marks omitted); *see* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (noting that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 836 (1988) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

other terms or renders entire clauses superfluous.[107] To do otherwise, the canon holds, would cast Congress as an inarticulate drafter who deploys redundant language. Emphasizing the canon's importance, the Supreme Court has—on numerous occasions—described it as a "cardinal principle of statutory construction."[108]

Along this dimension, the Broad Reading again fares poorly. To begin, it renders all the accompanying terms within § 523(a)(8)(A)(ii) irrelevant. Because scholarships and stipends both provide benefits to one's education, Congress would have had no reason to include them in the statute if the Broad Reading were correct. Although this is a point in favor of the Narrow Reading, there is a more compelling one.

To fully appreciate the extent to which the Broad Reading violates the canon against surplusage, it is necessary to step back even further and look at all of § 523(a)(8). Recall that this section of the statute contains three clauses, each of which excepts distinct educational debts from discharge. In addition to the provision excepting scholarships and stipends, there is a clause that excepts any "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"[109] and a third clause that excludes "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."[110]

Under the Broad Reading, these additional clauses are superfluous.[111] Debt obligations backed by the federal government or

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[107] *See* Corley v. United States, 556 U.S. 303, 314 (2009) (explaining that "one of the most basic interpretative canons" is that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004))). Matthew R. Christianson & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 92 TEX. L. REV. 1317, 1447 (2014) (noting that the "presumption against surplusage . . . presumes each term or phrase in a statute adds something and does not duplicate another term or phrase")

[108] *See, e.g.*, *NLRB*, 137 S. Ct. at 941; Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 567 (2013); Alaska Dept. of Envtl. Conservation v. E.P.A., 540 U.S. 461, 489 n.13 (2004); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001); Duncan v. Walker, 533 U.S. 167, 174 (2001).

[109] 11 U.S.C. § 523(a)(8)(A)(i) (2012).

[110] *Id.* § 523(a)(8)(B).

[111] *See In re* Scott, 287 B.R. 470, 474 (Bankr. E.D. Mo. 2002) ("If the third provision of section 523(a)(8) were interpreted to mean that all educational loans were excepted from discharge then the first two categories . . . would certainly be rendered meaningless and superfluous . . . . The third category would subsume the first two provisions and make them completely unnecessary. Such an interpretation is contrary to statutory interpretation

nonprofit institutions and qualified educational loans both fall under the broad interpretation of educational benefit. These exceptions are undeniably funds that recipients use to advance their educations. Therefore, when courts adopt the Broad Reading, they render irrelevant every other exception that Congress set forth in these three clauses. This is a clear violation of the canon against surplusage,[112] particularly given the existence of an alternative reading that preserves meaning for all three sections of the statute.[113] As the Supreme Court has held in similar contexts, it is imperative to "resist a reading of [a term] that would render superfluous an entire provision passed in proximity as part of the same Act."[114]

Although the vast majority of courts adhere to the Broad Reading, in the past couple of years, a small number of bankruptcy judges have embraced the Narrow Reading on the basis of this argument.[115] As one such court wrote, the Broad Reading

> would render § 523(a)(8)(B) . . . superfluous and makes no sense. After all, if any educational loans of any kind are excepted from discharge by § 523(a)(8)(A)(ii), what addition does excepting qualified educational loans under the Internal Revenue Code make to the discharge exception? [Those loans] would be no more than a subset of such loans already excepted from discharge under § 523(a)(8)(A)(ii).[116]

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and to common sense.").

[112] *See* Chevron Mining Inc. v. United States, 863 F.3d 1261, 1283 n.15 (10th Cir. 2017) (citing Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013) ("The canon against surplusage indicates that we generally must give effect to all statutory provisions, so that no part will be inoperative or superfluous—each phrase must have distinct meaning.")).

[113] *See* Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)) ("The canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'"); Yates v. United States, 135 S. Ct. 1074, 1085 (2015) (quoting Marx v. General Revenue Corp., 568 U.S. 371, 386 (2013) ("'[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.'")).

[114] *Yates*, 135 S. Ct. at 1085 (2015); *see also*, United States v. Jicarilla Apache Nation, 564 U.S. 162, 185 (2011) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law" (quoting Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988))).

[115] *See, e.g.*, *In re* Christoff, 527 B.R. 634 (9th Cir. B.A.P. 2015) ("[W]e must presume that, in organizing the provisions of § 523(a)(8) as it did in BAPCPA, Congress intended each subsection to have a distinct function and to target different kinds of debts.").

[116] *In re* Nunez, 527 B.R. 410, 415 (Bankr. D. Or. 2015); *see In re* Schultz, Adv. Pr. No. 16-AP-03042, 2016 WL 8808073, at *3 (Bankr. D. Minn. Dec. 13, 2016) (reaching the same conclusion).

Similarly, another court observed that the Broad Reading

> effectively find[s] that subsection 523(a)(8)(A)(i) is subsumed by subsection 523(a)(8)(A)(ii). Such an interpretation also results in subsection 523(a)(8)(B) being subsumed by subsection 523(a)(8)(A)(ii), and renders subsection 523(a)(8)(B) superfluous. It defies logic to suggest that Congress added subsection 523(a)(8)(B) in 2005 to encompass a subset of loans already covered under subsection 523(a)(8)(A)(ii).[117]

Ultimately, this court endorsed the Narrow Reading, finding "that section 523(a)(8)(A)(ii) is not a 'catch-all' provision designed to encompass any educational claim arising out of any transaction that bestows an educational benefit on a debtor."[118]

Before this section concludes, it is necessary to discuss one final textualist principle—the whole act canon. This rule of statutory construction instructs that provisions of a statute must be read in the context of the entire statute.[119] One of the key corollaries of this canon is that "identical words used in different parts of the same statute carry the same meaning."[120] Therefore, to understand the meaning of "educational benefit" in this context, it is worth looking at how the term is used elsewhere in the statute.[121]

As mentioned, the phrase "educational benefit" does appear in an earlier provision—namely, § 523(a)(8)(A)(i).[122] In that instance, it takes the following form: "an educational benefit overpayment or

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[117] *In re* Decena, 549 B.R. 11, 19 (Bankr. E.D.N.Y. 2016), *rev'd in part and vacated in part*, 562 B.R. 202 (E.D.N.Y. 2016).

[118] *Id. See also In re* Scott, 287 B.R. 470, 474 (Bankr. E.D. Mo. 2002) (Educational benefit "clearly has a plain meaning. It does not need to be construed broadly to except all loans for educational benefits from discharge . . . An example of such an obligation would be for funds provided as grants that must be repaid only under certain conditions (like the failure of a medical student grant recipient to practice in a physician shortage area after graduation).").

[119] *See* United States v. Cooper, 396 F.3d 308, 313 (3d Cir. 2005) (writing that the "Whole Act Rule instructs that subsections of a statute must be interpreted in the context of the whole enactment"); WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 646 (5th ed. 2014) ("The key to the whole act approach is, therefore, that all provisions and other features of the enactment must be given force, and provisions must be interpreted so as not to derogate from the force of other provisions and features of the whole statute.").

[120] Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1723 (2017).

[121] *See* United States v. Ticklenberg, 563 U.S. 647, 666 (2011) (noting that "[i]dentical words used in different parts of a statute are presumed to have the same meaning absent indication to the contrary").

[122] *See supra* Part I.A.

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."[123] Notably, the phrase has not been a subject of controversy in this context. Even more interestingly, though, in interpreting this provision, courts have consistently adopted a meaning that tracks the Narrow Reading. They have, in other words, concluded that "educational benefit overpayments" are excess payments made as part of conditional educational grants. An opinion by a New Mexico district court provides a clear, representative explanation: "Educational benefit overpayment occurs in programs like the G.I. Bill, where students receive periodic payments upon their certification that they are attending school. When a student receives funds but is not in school, this is a [sic] educational benefit overpayment."[124]

To use "educational benefit" in completely different ways in related sections of the same statute would be to disregard the whole act canon. Quite simply, on the textualist front, the evidence is overwhelming. From the canon against surplusage to the canon of *noscitur a sociis* to the whole act canon, the principal tools in the textualist toolkit all favor the Narrow Reading.

B. Legislative Intent

Although certain strains of textualism maintain that the text is the only relevant consideration,[125] most judges are open to the possibility that legislative history can illuminate the meaning of a statute.[126] Even among those who fall into this latter camp, though,

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[123] 11 U.S.C. § 523(a)(8)(A)(i) (2012).

[124] *In re* Coole, 202 B.R. 518, 519 (Bankr. D. N.M. 1996); *see also In re* Alibatya, 178 B.R. 335, 338 (Bankr. E.D.N.Y. 1995) ("Clearly, Plaintiff's failure to pay his student housing obligations cannot be deemed debt for 'an educational benefit overpayment.' Defendant paid nothing to Plaintiff. NYU merely allowed Plaintiff to live at school facilities in consideration for certain charges which were not paid. No linguistic gyration can twist a no payment or underpayment by Plaintiff to an overpayment by Defendant.").

[125] *See, e.g.*, Harbison v. Bell, 556 U.S. 180, 198 (2009) ("Congress' intent is found in the words it has chosen to use.") (Thomas, J., concurring); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (quoting Oliver Wendell Holmes) ("I don't care what [Congress'] intention was. I only want to know what the words mean."). *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–48 (1997).

[126] *See, e.g.*, Milner v. Dep't of Navy, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text."); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("[L]egislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL.

there is disagreement over the appropriate use of legislative history. Some judges maintain that it is only relevant when the statutory language is ambiguous,[127] but others are willing to look to legislative history even in circumstances where the plain meaning is apparent from the text alone.[128] Regardless of how much weight one places on legislative history, the best reading of the student loan discharge statute remains unchanged. The legislative history—just like the statutory text—demands the Narrow Reading of "educational benefit."

To understand legislative intent in this context, one must understand the evolution of § 523(a)(8). Accordingly, I start the discussion in 1976. Prior to that year, educational debt held no special status in the Bankruptcy Code. It could be discharged via the normal bankruptcy process in the same manner as other unsecured claims.[129] With the passage of the Higher Education Amendments of 1976, however, the situation changed.[130] That legislation excepted federally guaranteed student loans from discharge for a period of five years after the loans first became due.[131] To discharge student loan debt during the five-year period, a debtor would have had to prove undue hardship.

Congress mandated this waiting period to prevent abuse and

L. REV. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute.");

[127] *See* United States v. Woods, 571 U.S. 31, 47 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous.").

[128] *See* Darby v. Cisneros, 509 U.S. 137, 147 (1993) (observing that "[r]ecourse to the legislative history . . . is unnecessary in light of the plain meaning of the statutory text," but nonetheless choosing to review the legislative history and finding that it is consistent with the Court's interpretation of the statute).

[129] *See* 11 U.S.C. § 35(a) (1976) (omitting student loans from the list of nondischargeable debts); Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 473 (2012) (noting that "[s]tudent loans were dischargeable until 1976").

[130] *See* Higher Education Amendments of 1976, Pub. L. No. 94-482, §127(a), 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976)).

[131] The restriction was inserted in the Bankruptcy Code at 11 U.S.C. § 523(a)(8) (1978):

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

protect the integrity of the federal student loan system.[132] The alleged fear was that recent graduates were exploiting the system by taking on publicly guaranteed debts and then discharging them through bankruptcy once they received their university degrees.[133] Because recent graduates generally have little in the way of assets, such a strategy would permit unscrupulous debtors to foist the entire cost of their education upon taxpayers.[134]

Over the years, Congress has carved out additional exceptions under the guise of protecting the student loan market from such unscrupulous debtors. For instance, in 1979, Congress amended the Bankruptcy Code so that the five-year waiting period would toll during loan deferment and forbearance periods.[135] And in 1984, they expanded the set of nondischargeable student loans to include those that are funded by any nonprofit institution.[136]

Even greater changes came in 1990. That year, Congress extended the waiting period from five years to seven years and—more importantly for our purposes—added to the list of nondischargeable debts any "obligation to repay funds received as an educational benefit, scholarship or stipend."[137] During the congressional hearings there was only one exchange that mentioned

[132] *See, e.g.*, Roundtree–Crawley v. Educ. Credit Mgmt. Corp., (*In re* Crawley), 460 B.R. 421, 432 (Bankr. E.D. Pa. 2011) (citing *In re* Pelkowski, 990 F.2d 737, 743 (3d Cir. 1993)). ("Section 523(a)(8) is intended to prevent abuse of the bankruptcy process as well as to preserve the integrity of the student loan program by protecting it from fiscal doom."); *In re* Segal, 57 F.3d 342, 348 (3d Cir.1995) (citing 124 Cong. Rec. 1791–98 (1978)) ("Although limited, the legislative history of section 523(a)(8) teaches that the exclusion of educational loans from the discharge provisions was designed to remedy abuses of the educational loan system by restricting the ability of a student to discharge an educational loan by filing for bankruptcy shortly after graduation, and to safeguard the financial integrity of educational loan programs.").

[133] *See, e.g.*, Corso v. Walker, 449 B.R. 838, 846 (W.D. Pa. 2011) ("Congress sought to help 'preserve the integrity of the student loan program' and, thus, protect creditors from the 'legal loophole' which permitted the practice of students receiving the benefit of higher education and then discharging their student loans before they became 'wage-earning members of the community.'" (quoting *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993))).

[134] *See, e.g.*, *In re* Renshaw, 222 F.3d 82, 86–87 (2d Cir. 2000) (observing that "because student loans are generally unsecured and recent graduates often have few or no assets, these debtors have an incentive to try to discharge their educational loans in bankruptcy. If successful, they can then enjoy the higher earning power the loans have made possible without the financial burden that repayment entails."); H.R. Rep. No. 95-595, 536 (1977) (statement of Rep. Ertel) (arguing that dischargeable student loans "encourage fraud").

[135] *See* Pub. L. No. 96-56, 93 Stat. 387, 387 (1979) (modifying the waiting period so that it is "exclusive of any applicable suspension of the repayment period").

[136] *See* Pub. L. No. 98-353, 98 Stat. 333, 376 (1984) (striking out "of higher education" in the phrase "nonprofit institution of higher education").

[137] *See* The Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4965 (1990).

this addition to the statute. It transpired when the chair of the Subcommittee on Economic and Commercial Law asked the U.S. attorney for the Eastern District of Texas to explain "[t]he specific problem [the provision] is designed to address."[138]

The U.S. attorney responded as follows:

> This section adds to the list of non-dischargeable debts, obligations to repay educational funds received in the form of benefits (such as VA benefits), scholarships (such as medical service corps scholarships) and stipends. These obligations are often very sizable and should receive the same treatment as a "student loan" with regard to restrictions on dischargeability in bankruptcy.[139]

This answer precisely aligns with the Narrow Reading. It states that educational benefits are not loans but rather "educational funds received in the form of benefits."[140] They are, in other words, conditional educational grants. In addition to giving VA benefits as an example, the U.S. attorney provided further evidence of the meaning of educational benefit by citing the Eighth Circuit case of *U.S. Department of Health and Human Services v. Smith*.[141]

Smith was a 1986 case that centered on a medical student who had been awarded approximately fourteen thousand dollars in tuition assistance from the Physician Shortage Area Scholarship Program—a federal program designed to encourage physicians to work in underserved areas.[142] As a condition of receiving the award, Smith agreed to practice medicine in an area with a physician shortage for three years following the completion of his medical training.[143] After graduation, however, Smith declined to work in an area that satisfied the terms of the agreement.[144] In response to Smith's breach, the U.S. Department of Health and Human Services sought to collect from him approximately twenty-eight thousand dollars—an amount that included the principal of the original award plus interest.[145] Shortly

[138] *Federal Debt Collection Procedures of 1990: Hearing on P.L. 101–647 Before the H. Subcomm. on Econ. and Commercial Law of the H. Judiciary Comm.*, 101st Cong. 42 (June 14, 1990) (Mr. Brooks' Questions for the Record for Mr. Wortham).

[139] *Id.* at 74–75.

[140] *Id.* at 74.

[141] *Id.* at 75.

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

[143] *Id.*

[144] *Id.*

[145] *Id.*

thereafter, Smith filed for bankruptcy.[146]

The question before the court was whether the tuition assistance qualified as a nondischargeable loan. At the time, § 523(a)(8) only excepted from discharge debts "'for an educational loan made . . . by a governmental unit, or made under any program funded . . . by a governmental unit.'"[147] Both the bankruptcy court and district court found that Smith's debt was not a "loan" and was, therefore, dischargeable.

On appeal, however, the Eighth Circuit reversed, holding that "loan" could be read to include contingent "obligation[s] to repay."[148] The Court based its decision, not on the language of the statute, but rather on the congressional purpose underlying the provision—namely, to prevent debtors from abusing the student loan system.[149] As the Court observed, "[a]lthough we recognize that the language of PSASP . . . arguably may give rise to certain ambiguities . . . the circumstances which led to the enactment . . . compels the conclusion that Congress intended § 523(a)(8) of the Bankruptcy Code to except from dischargeability debts incurred under scholarship programs such as PSASP." When Congress added the "educational benefit" language to § 523(a)(8) in 1990, it did so to codify the ruling in *Smith* and thereby preempt a potential circuit split.[150]

In addition to Congress' awareness of *Smith*, another factor indicating that Congress intended the Narrow Reading is the absence of any discussion or debate over the provision. As mentioned, the sole reference to the meaning of "educational benefit" was the U.S. attorney's response to the congressman's question. If Congress had intended the clause to except from discharge all debts that advanced a debtor's education, surely it would have engendered substantial debate and public opposition from at least some legislators. The fact that none of them discussed the provision, much less objected to its inclusion, strongly suggests that Congress intended the Narrow Reading. This is particularly true given that the congressional debate over the original 1978 student loan discharge exception was both

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[146] *Id.*

[147] *Id.* at 124 (quoting 11 U.S.C. § 523(a)(8)).

[148] *Id.* at 125–27.

[149] *Id.* at 126–27.

[150] *In re* Campbell, 547 B.R. 49, 55 (Bankr. E.D.N.Y. 2016) (reviewing the legislative history and determining that "[t]he phrase 'educational benefit' first appeared in § 523(a)(8) of the Bankruptcy Code in 1990, as codification of the holding in U.S. Dep't of Health & Human Servs. v. Smith").

extensive and contentious.[151]

Despite this strong evidence, in the nearly thirty years since Congress added the "educational benefit" language to § 523(a)(8), only a handful of courts have looked to the legislative history of the provision. To their credit, though, those courts have concluded that the Narrow Reading provides the correct interpretation of educational benefit. As one bankruptcy court held, the "legislative history unambiguously indicates that Congress added the phrase 'educational benefit' to section 523(a)(8) in order to [exempt conditional educational grants from discharge]."[152] Likewise, in finding that a bar exam loan from a for-profit lender was not an "educational benefit," another court ruled that the Narrow Reading "is consistent with legislative history."[153] Like the textual analysis, the legislative history is clear. Congress intended that the phrase "obligation[s] to repay funds received as an educational benefit" refer only to a very small category of educational debt—namely, conditional educational grants.

At this point, one might raise an objection based upon the theory of implied ratification. This doctrine holds that, when Congress reenacts a statutory provision, it intends to endorse the prevailing judicial interpretation of that provision. In the current circumstance, such an argument would maintain that Congress impliedly ratified the Broad Reading in 2005 when it reenacted § 523(a)(8)(A)(ii) without adding language to clarify the meaning of educational benefit. Congress's decision not to speak on the matter, in other words, acts to codify the dominant judicial reading.

As the Supreme Court has observed, interpreting congressional silence as equivalent to deliberate action is "at best [a] treacherous" endeavor.[154] Accordingly, the Court has refused to

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[151] *See* H.R. Rep. No. 95–595, 95th Cong., 1st Sess. 132–162 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787; 124 Cong. Rec. H466–472 (daily ed. February 1, 1978); S. Rep. No. 95–989, 95th Cong., 2d Sess. 79 (1978); 124 Cong. Rec. H11096 (daily ed. Sept. 28, 1978); 124 Cong. Rec. S17412 (daily ed. October 6, 1978); *see also In re* Boylen, 29 B.R. 924, 926 (Bankr. N.D. Ohio 1983) (noting that "[w]ith regard to the [1978] exception to discharge for student loans, the legislative history is extensive, providing pages of debate and pages of congressional comments along with letters from individuals both in support of and opposing this exception to discharge").

[152] *In re* Decena, 549 B.R. 11, 20 (Bankr. E.D.N.Y. 2016)), *rev'd in part and vacated in part*, 562 B.R. 202 (E.D.N.Y. 2016). The court observed that "Congress intended section 523(a)(8)(A)(ii) to encompass alternatives to the typical debtor–creditor relationship in the education context. These alternatives encompass cash benefit programs, such as veteran educational benefits, stipends for teaching assignments, conditional grants, cash scholarships and other obligations that are distinct from traditional student loans." *Id.*

[153] *In re* Campbell, 547 B.R. 49, 55–60 (Bankr. E.D.N.Y. 2016).

[154] Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find

accept implied ratification arguments unless the litigant can show that Congress "considered [the interpretation] in great detail."[155] In the present case, such evidence is lacking. The legislative history supplies no indication that Congress gave any thought to the meaning of educational benefit during the 2005 BAPCPA floor debates, much less that it considered the issue in great detail.[156] In fact, of all the contemporaneous uses of the term "educational benefit" in the Congressional Record, not a single one is consistent with the Broad Reading. To the extent the phrase references student debt, it does so only to signify conditional educational grants.[157]

The most compelling point weighing against implied ratification, however, is the 2005 amendment to § 523(a)(8). While reenacting the "educational benefit" language, Congress added part B, which serves to exempt from discharge "any other qualified education loan."[158] If Congress meant to endorse the Broad Reading through its reenactment, it would not have added this entirely new section to the statute. After all, the Broad Reading of educational benefit includes qualified education loans, so express mention of this category would be both redundant and confusing. The implied ratification argument is, in short, a nonstarter.

C. Policy Consequences

In addition to text and legislative history, many judges also weigh policy considerations when interpreting a statute's meaning. William Eskridge, one of the foremost proponents of this policy-based approach to statutory interpretation, maintains that judges should ask " 'not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.' "[159] This analysis

in congressional silence alone the adoption of a controlling rule of law.").

[155] NLRB. v. Gullett Gin Co., 340 U.S. 361, 366 (1951); *see also* Assoc. of Am. Railroads v. I.C.C., 564 F.2d 486, 493 (D.C. Cir. 1977) ("The Supreme Court has indicated that in order to bring this 'doctrine of reenactment' into play, Congress must not only have been made aware of the administrative interpretation, but must also have given some 'affirmative indication' of such intent.") (citations omitted).

[156] The burden of proof is quite high. *See* TVA v. Hill, 437 U.S. 153 (1978) (holding that Congress was not aware when only congressional committees had expressed understanding)

[157] *See, e.g.*, 151 Cong. Rec. 5427 (2005) (statement of Rep. Edolphus Towns) (praising the Veterans Self-Employment Act because it would allow veterans to "apply a portion of [their] educational benefit[s] to defray the portion of a franchise purchase cost attributable to training").

[158] 11 U.S.C. § 523(a)(8)(B) (2012).

[159] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 50 (1994)

incorporates a normative dimension into statutory interpretation. Whereas the other methods ask what is, this method asks what ought to be.

In defense of this interpretative framework, Eskridge argues that, when ambiguities arise in a statute, "it seems sensible that 'the quest is not properly for the sense originally intended by the statute, [nor] for the sense sought originally to be put into it, but rather for the sense which can be quarried out of it in the light of the new situation.' "[160] He goes on to write that "[i]nterpretation is not static, but dynamic. Interpretation is not an archeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances."[161] Judges must, in other words, be mindful of the real-world effects of their decisions.[162] In the present case, this normative analysis requires understanding the broader effect of the Bankruptcy Code and appreciating how the student loan exception fits into that framework.

The former inquiry is straightforward. For more than a century, the Supreme Court has held that consumer bankruptcy laws exist to give individuals a "new opportunity in life," free and clear from crippling debts.[163] This bestowal of a second chance is referred to as bankruptcy's "fresh start" policy[164] and is what the Supreme Court has described as the "principal purpose of the Bankruptcy Code."[165] Over the decades, courts,[166] Congress,[167] and scholars[168]

(quoting Arthur Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950)).

[160] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987).

[161] *Id.* at 1482.

[162] Ronald Dworkin envisions a similar, though somewhat more ambitious, framework in which statutory meaning changes as "law's integrity" develops. *See* RONALD DWORKIN, LAW'S EMPIRE 313–54 (1986).

[163] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating the fresh start policy is a "public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" (emphasis omitted)); Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554–55 (1915) ("It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.").

[164] For a discussion of the fresh start policy, see generally Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

[165] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 365 (2007). Notably, bankruptcy has not always been tied to the idea of a fresh start, nor has discharge always been an option for American debtors. *See* United States v. Kras, 409 U.S. 434, 447 (1973) (noting

have repeatedly affirmed the importance of providing debtors with an opportunity to obtain a fresh start.

Notably, the mere fact that such individuals view the fresh start as a laudable policy goal does not mean that it is. Declarations by government officials, although relevant, are not conclusive determinants of the objective desirability of a given statutory reading. Instead, they merely serve as indirect evidence that can guide a judge in identifying the social impact of various possible interpretations. For this reason, it is worth looking at the reasons why judges, politicians, and academics have all endorsed the fresh start policy.

There are two primary justifications: protecting the individual and protecting society.[169] With regard to the former, there exists substantial research showing that people are subject to a number of cognitive biases that cause them to underestimate risks.[170] These deficiencies lead individuals to overestimate their likelihood of success and consequently miscalculate their likelihood of financial ruin. Bankruptcy offers people a way to recover when such unanticipated financial risks come to pass. In doing so, the fresh start

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that discharge is "a legislatively created benefit, not a constitutional one, and . . . [was] withheld, save for three short periods, during the first 110 years of the Nation's life").

[166] *See, e.g.*, Segal v. Rochelle, 382 U.S. 375, 380 (1966) (suggesting that bankrupt individuals have a right to "start[] out on a clean slate"); *In re* Hudgens, 149 Fed. App'x 480, 483 (7th Cir. 2005) ("The primary purpose of the bankruptcy discharge is to give the debtor a 'fresh start.'" (quoting *In re* Chambers, 348 F.3d 650, 653 (7th Cir. 2003))); *In re* Seminole Oil & Gas Corp. 963 F.2d 368 (4th Cir. 1992) ("The fundamental goal of bankruptcy is to provide the debtor a 'fresh start' free from . . . the dismembering hands of creditors.").

[167] *See, e.g.*, 151 CONG. REC. H2053 (daily ed. Apr. 14, 2005) (statement of Rep. Goodlatte) (emphasizing the need for "objective standards [to] help ensure that the fresh start provisions of Chapter VII will be granted to those who need them . . . ."); 145 CONG. REC. H2655 (daily ed. May 5, 1999) (statement of Rep. Gekas) ("We, our enlightened forefathers, saw fit to allow the Congress to evolve in a situation in which a fresh start would be accorded to an ordinary citizen who cannot meet his obligations . . . ."); REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 91-137, pt. 1, at 71–80 (1973).

[168] *See, e.g.*, Rafael Efrat, *The Fresh-Start Policy in Bankruptcy in Modern Day Israel*, 7 AM. BANKR. INSTITUTE L. REV. 555, 555 (1999) ("The notion that such individuals should be able to promptly and effectively re-join economic life through an unduly punitive and certain bankruptcy system is an essential component of any progressive and industrialized society."); Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986) ("The opportunity for an individual debtor to obtain relief from indebtedness and begin anew as a productive member of society—commonly termed the 'fresh start policy'—has been an essential principle of our bankruptcy laws for more than seventy-five years.").

[169] For a thorough discussion of the normative justifications for the fresh start policy, see Jackson, *supra* note 164, at 1405–24.

[170] For a discussion of the seminal research illustrating these cognitive biases, see RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE 17–192 (1980).

policy seeks to correct for problems that arise not out of immoral action but rather out of cognitive biases that misled people who believed they were making sound decisions.

At a society-wide level, the fresh start policy has a number of other benefits. First, an individual who is unable to get out from under his debts will likely turn to social welfare programs for assistance. This course of action places taxpayers on the hook for debtors' poor financial decisions. Because society was not a party to the original contract, it seems unreasonable to expect taxpayers to shoulder the costs if there are other parties better able to monitor risk. In this situation, the creditor is such a party. A system that permits bankruptcy discharges is one that encourages creditors to be judicious when extending lines of credit. After all, if creditors lend to individuals who are unable to repay the loan, they will bear the loss when a borrower discharges the debt.

A second way in which the fresh start policy benefits society is by encouraging individuals to be productive. As John Weistart has written, "excessive debt, with its attendant pressure on family and emotional stability and job security [might] so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance."[171] This argument rests on the idea that an individual who is overburdened by his debts will be far less productive than one who receives the benefits of his efforts. The fresh start policy mitigates this problem by enabling debtors to reach a position where they are once again incentivized to work and make productive contributions that benefit society.[172]

To further this goal, the Bankruptcy Code provides debtors with a process to eliminate the burden of their debt obligations. In exchange for surrendering their nonexempt assets or part of their future income, debtors are able to discharge most of their existing debts.[173]

Although the fresh start policy confers many benefits on society, it is clear that a blanket rule allowing the discharge of any

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[171] John Weistart, *The Costs of Bankruptcy*, 41 L. & CONTEMP. PROB. 107, 111 (1977).

[172] This is not to say that the procedures underlying the fresh start policy cannot be improved upon. *See* Katherine Porter & Dr. Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 70 (2006) (finding that "many former debtors continue to experience financial hardship that is as bad as or worse than the distress that initially triggered their bankruptcy filings").

[173] The precise contours of the debtors' obligations depend upon whether they file under chapter 7 or chapter 13 of the Bankruptcy Code. *See* 11 U.S.C. §§ 701–84, 1301–30 (2012).

debts would be problematic. There are some actions that are so morally objectionable or that would so severely undermine the functioning of the bankruptcy system that it is reasonable to exclude the associated debts from discharge. The purpose of the Bankruptcy Code is, after all, to give honest debtors a new lease on life so they can become productive members of society once again; the purpose is decidedly not to give unscrupulous debtors a method to cheat the system and force society to carry the cost of their immoral decisions.

On this basis, Congress has enacted two kinds of exceptions to the fresh start policy. First, the Bankruptcy Code identifies a number of general activities that, if undertaken by the debtor, preclude a discharge. For instance, debtors are not entitled to a discharge if they transferred or destroyed property with the intent to defraud a creditor,[174] knowingly and fraudulently presented false evidence in connection with the bankruptcy proceeding,[175] unlawfully refused to obey a court order,[176] or filed for bankruptcy fewer than eight years prior.[177]

In addition to these general exceptions that focus on a debtor's conduct, there is a separate section of the Bankruptcy Code that exempts specific debts from discharge.[178] This list of nondischargeable debts includes debts for tax evasion,[179] debts incurred via fraud, false pretenses,[180] embezzlement, or larceny,[181] debts for child support or alimony,[182] debts for willful or malicious injury,[183] debts arising due to injuries or deaths caused while the debtor was driving under the influence of drugs or alcohol,[184] debts for criminal restitution,[185] and finally, student loan debts.[186]

As the listing suggests, both the general and specific carveouts have a common justification.[187] They seek to discourage fraud and

[174] *Id.* § 727(a)(2).
[175] *See id.* § 727(a)(4).
[176] *See id.* § 727(a)(6).
[177] *See id.* § 727(a)(8).
[178] *See id.* § 523(a)
[179] *See id.* § 523(a)(1)(c).
[180] *See id.* § 523(a)(2).
[181] *See id.* § 523(a)(4).
[182] *See id.* § 523(a)(5).
[183] *See id.* § 523(a)(6).
[184] *See id.* § 523(a)(9).
[185] *See id.* § 523(a)(13).
[186] *See id.* § 523(a)(8).
[187] There are a number of other provisions in this portion of the Bankruptcy Code that set forth administrative requirements for receipt of a discharge. *See, e.g.*, *id.* § 727(a)(11) (requiring debtors to complete a financial management course prior to receiving a discharge).

abuse of the bankruptcy system.[188] If debtors were free to transfer away their property prior to filing or to fabricate financial records, the bankruptcy system would be unable to function. In addition to promoting efficiency, these exceptions are also designed to penalize debtors for engaging in morally objectionable conduct. From tax evasion to drunk driving to intentionally harming others, the exceptions are designed to ensure that debtors are held accountable for their unethical actions. In light of this characteristic, student loans are an odd addition to the group.

Taking on educational debt does not earn one moral condemnation. To the contrary, most people consider it a prudent decision, and the system is even structured to encourage students to borrow money to fund their educations.[189] For this reason, it is surprising that student loan obligations are treated the same as embezzlement and tax evasion. Emphasizing this exact point, one congressman stated:

> the bankruptcy provision . . . visits a special discrimination upon [student loan debtors] . . . it treats educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony-dodging. No other legitimately contracted consumer loan, applied to a legitimate undertaken [sic], is subjected to the assumption of criminality which this provision applies to every educational loan. This [provision], whatever else it may be called, hardly deserves the name of "student assistance." On the contrary, it is a direct, unmitigated, slap in the face of every single student borrower in the nation. It assumes that borrower's bad intentions, and deprives him of a right which every other citizen has available to him if he needs it.[190]

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[188] *See, e.g.*, *In re* Cox, 41 F.3d 1294, 1296 (9th Cir. 1994) ("The purpose of [section 727] is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs." (internal quotations omitted)); *In re* Zhang, 463 B.R. 66, 86 (Bankr. S.D. Ohio 2012) ("The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate information without having to do costly investigations." (internal quotations omitted)); *In re* Jones, 327 B.R. 297, 303 (Bankr. S.D. Tex. 2005) ("The purpose of 727(a)(3) is to force the Debtor to produce dependable records such that the Chapter 7 Trustee, the creditors, and the Court may rely on these records in tracing the Debtor's financial history and condition." (citing Meridian Bank v. Alten, 958 F.2d 1226, 1230 (3d Cir. 1992))).

[189] *See, e.g.*, U.S. Dep't of Educ., *Federal Student Loans for College or Career School Are an Investment in Your Future*, https://studentaid.ed.gov/sa/types/loans (discussing the various types of federally subsidized student loan programs).

[190] H.R. Rep. No. 94-1232 (1976).

Not all members of Congress, however, agreed with this portrait of well-intentioned student loan debtors. A number argued that student loan debtors who sought discharges were abusing the system, not unlike those individuals who had evaded taxes or committed fraud. Representative Allan Ertel's statement is perhaps the most direct in its support for this position:

> [Student loan discharges] encourage fraud . . . . [A]s a student leaves college to find a job, that student would have two options: (1) repay a substantial loan at a time when that student's financial situation is probably at its lowest, or (2) discharge the debt in bankruptcy, having received the benefit of a free education. If Student A elects to repay the loan, honoring the legal and moral obligation that was incurred, he begins his career with a substantial debt and the accompanying financial pressure. Meanwhile, Student B (who chooses to declare bankruptcy) can begin with a clean slate and is free to spend his initial earnings on other items . . . . Student B is rewarded for refusing to honor a legal obligation. The lesson that Students A and B have learned is that it 'does not pay' to honor one's debts or other legal obligations. A valuable educational program should not be destroyed because of a loophole that Congress can easily correct.[191]

If Congressman Ertel's fears were warranted, then an expansive discharge exception might be defensible on policy grounds. There is, however, no evidence that any appreciable number of borrowers sought to exploit the system, much less that the federal student loan program was on the verge of being "destroyed" by debtor abuses.[192] Quite the opposite, in fact. The empirical data show that student loan debtors are not cold, calculating decision makers,

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[191] H.R. Rep. No. 95-595, 536 (1977) (statement of Rep. Ertel); *see also* H.R. Rep. No. 595, 95th Cong., 2d Sess. 133, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6094 ("[E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and relying for repayment solely on the debtor's future increased income resulting from the education . . . . In addition, there have been abuses of the system by those seeking freedom from educational debts without ever attempting to repay.") (remarks of Rep. Erlenborn).

[192] *See* Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 473 (2012) (noting that "[t]he nondischargeability of student loans . . . depended on a theoretical argument that former students might abuse the discharge by going to school and then filing in bankruptcy before getting a lucrative job, despite lack of evidence that this was actually happening").

racing to exploit every legal loophole to gain an advantage.[193] Instead, as a group, they work hard to repay their loan obligations and only turn to bankruptcy after exhausting other options.[194]

Notably, Congress was aware of this fact prior to the floor debate surrounding the original 1978 student loan discharge exception. Earlier that year, the General Accounting Office released a study finding that only three-tenths of one percent of the amount of federally insured student loans were discharged through bankruptcy.[195] In other words, for every one hundred dollars in student loan debt, only three cents were discharged. Keep in mind that this low percentage was at a time when there were no barriers to eliminating student loan debt through bankruptcy. As the General Accounting Office's study showed, there was no need to except educational debts from discharge. Contrary to the fear of widespread

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[193] *See* Oliver B. Pollack & David G. Hicks, *Student Loans, Chapter 13, Classification of Debt, Unfair Discrimination and the Fresh Start after the Student Loan Default Prevention Initiative Act of 1990*, 1993 DET. C.L. REV. 1617, 1621 (arguing that the "concern . . . was more perceived than real"); Kurt Weise, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Test of "Undue Hardship,"* 26 ARIZ. L. REV. 445, 446 (1984) (noting that "less than one percent of all matured educational loans had been discharged in bankruptcy" (citing H.R. Rep. No. 95-595, at 133 (1977))); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009) ("Tragically, Congress disregarded empirical evidence from a General Accounting Office study which found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy."). Upon analyzing student loan bankruptcy filings surrounding the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, scholars found no evidence "that would indicate widespread opportunistic behavior by private student loan borrowers before the policy change." Rajeev Darolia, *Should Student Loans be Dischargeable in Bankruptcy?*, BROOKINGS (Sep. 29, 2015), https://www.brookings.edu/blog/brown-center-chalkboard/2015/09/29/should-student-loans-be-dischargeable-in-bankruptcy.

[194] One attorney who handles student loan undue hardship cases described the situation as follows: "There is a story about doctors crossing the stage as they graduate medical school with a diploma in one hand and a bankruptcy filing in the other . . . .[But] there is no data to support this. The average consumer does not want to file bankruptcy." Zack Friedman, *Can Student Loans Be Discharged In Bankruptcy?*, FORBES (May 19, 2017) (quoting Josh Cohen), https://www.forbes.com/sites/zackfriedman/2017/05/19/student-loans-bankruptcy/#69e310cc2ecf.

[195] *See* H.R. Rep. No. 95-595, at 148 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6108 (statement of Rep. James O'Hara) (highlighting that only "two-tenths of one percent of the loans made have been discharged in bankruptcy, involving less than three-tenths of one percent of the dollars"); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 249 (2006) (lamenting that the "empirical data, like much empirical data gathered in Washington, fell on deaf ears"). This lack of evidence has, unfortunately, not stopped courts from asserting that a problem existed. *See, e.g.*, *In re* Renshaw, 222 F.3d 82, 87 (2d Cir. 2000) (asserting that "Congress enacted § 523(a)(8) because there was evidence of an increasing abuse of the bankruptcy process that threatened the viability of educational loan programs and harm to future students as well as taxpayers").

abuse, few student loan debtors were filing for bankruptcy and even fewer were seeking to game the system. As one congressman observed, the student loan discharge exception is nothing more than "a discriminatory remedy for a 'scandal' which exists primarily in the imagination."[196]

In light of the lack of evidence of abuse, it makes no sense to adopt the Broad Reading of educational benefit. Doing so penalizes all of the debtors who are acting in good faith in order to prevent a nonexistent kind of fraud. Unlike the Broad Reading, the Narrow Reading comports much better with the sound policy goals of the Bankruptcy Code. Specifically, this reading precludes a type of discharge that only arises in situations worthy of moral opprobrium. It effects only those cases where the borrower, due to his own changed preferences, refuses to honor the terms of the agreement.[197] By adopting the Narrow Reading, courts can eliminate a potential loophole without harming upstanding debtors. Whereas the Broad Reading clearly contravenes the Bankruptcy Code's underlying goal of offering debtors a fresh start in the absence of fraud, the Narrow Reading is consistent with this policy.[198]

Conclusion

In the two decades since Congress excepted from discharge "obligation[s] to repay funds received as an educational benefit," courts have interpreted the phrase in a more and more expansive manner. Today, "educational benefit" has come to mean any loan that an individual uses—or professes to use—to advance her education. This interpretation, which I have referred to as the Broad Reading, has led billions of dollars in student loans to be miscategorized as nondischargeable. The error has been detrimental to a large number of student loan debtors, depriving many individuals of the protections of bankruptcy and forcing them to

[196] *See* H.R. Rep. No. 94-1232 (1976).

[197] If the borrower is unable to honor the terms of the agreement due to incapacity or other severe hardship, the undue hardship exception would provide an escape valve.

[198] In discussing the scope of the student loan exception, politicians have noted its incompatibility with the Bankruptcy Code's fresh start policy. *See* Press Release, Dick Durbin United States Senator Illinois, As Student Loan Debt Surpasses $1 Trillion, Senators Introduce Legislation To Address Crisis (Jan. 23, 2013), *available at* https://www.durbin.senate.gov/newsroom/press-releases/as-student-loan-debt-surpasses-1-trillion-senators-introduce-legislation-to-address-crisis ("A basic principle of our country is a fresh start for those who get in over their heads with debt, if they're willing to face the rigors of bankruptcy.") (quoting Senator Sheldon Whitehouse).

shoulder burdensome debts they have little hope of repaying.[199]

Fortunately, there is a way to prevent these harms from befalling any other debtors. All courts must do is interpret the student loan exceptions in line with the Narrow Reading. By doing so, judges would not only be furthering pragmatic policy goals but also adopting a reading that is required by both the statutory text and the legislative history.

In this Article, I have argued that the Narrow Reading follows from all of the prevailing interpretive methodologies. In light of this assuredness, one may wonder why the Broad Reading has prevailed in the vast majority of cases. The answer is simple. Debtors have not contested that interpretation. Instead, they have largely allowed creditors' arguments to go unchallenged and given courts little reason to consider—much less adopt—the Narrow Reading. By highlighting the legally unfounded arguments that creditors have used to influence student loan proceedings, I hope to provide debtors and their attorneys with a roadmap to push back against the Broad Reading. As I have shown, courts are willing to endorse the Narrow Reading. They just need borrowers to present the merits of the argument.

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[199] *See* Austin C. Smith, *The Misinterpretation of 11 U.S.C. § 523(a)(8)*, AM. BANKR. INST. (Dec. 28, 2016), https://www.abi.org/committee-post/the-misinterpretation-of-11-usc-%C2%A7-523a8 (noting that the bankruptcy courts' "overbroad interpretations have abrogated the fresh start for thousands of debtors and provided commercial lenders with protections from discharge in circumstances that were never intended by the Bankruptcy Code").

II

116TH CONGRESS
1ST SESSION

S. 1414

To provide bankruptcy relief for student borrowers.

IN THE SENATE OF THE UNITED STATES

MAY 9, 2019

Mr. DURBIN (for himself, Ms. WARREN, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. BROWN, Ms. HARRIS, Ms. HIRONO, Ms. KLOBUCHAR, Mr. LEAHY, Mr. MARKEY, Mr. MERKLEY, Mr. REED, Mr. SANDERS, Mrs. SHAHEEN, Mr. VAN HOLLEN, Mr. WHITEHOUSE, and Ms. HASSAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide bankruptcy relief for student borrowers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Student Borrower Bankruptcy Relief Act of 2019".

SEC. 2. AMENDMENTS.

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

(b) CONFORMING AMENDMENT.—Section 1328(a)(2) of title 11, United States Code, is amended by striking "(8),".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall apply only with respect to cases commenced under title 11, United States Code, on or after the date of enactment of this Act.

○