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2022 Consumer Practice Extravaganza

A Breakdown of § 523(a)(8) and Case Law Updates

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CONCURRENT SESSION

2022

523(a)(8): Breakdowns and Updates

- Hon. Elizabeth Gunn, Bankruptcy Court for the District of Columbia
- Ronald Peterson, Jenner and Block
- Moderator Karlene Archer, Legal Aid Society for Mid-NY

11 U.S.C. 523(a)(8)

- (a) A discharge under section 727, 1141, 1192 [1] 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.

11 U.S.C. 523(a)(8)(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*

- Includes: federal student loans, student loans backed by federal programs, student loans from a program funded by a governmental unit or nonprofit institution

- Exception is analyzed under the *Brunner* standard

11 U.S.C. 523(a)(8)(A)(i): Case Law

- *Brunner* standard developments: *Rosenberg*
- Is a partial discharge permissible?
  - *Randall v. Navient Sols. (In re Randall)*, 628 B.R. 772 (Bankr. D. Md. 2021)

11 U.S.C. 523(a)(8)(A)(ii)

- *an obligation to repay funds received as an educational benefit, scholarship, or stipend*
- Includes conditional scholarships/stipends
- Does it include loans that do not fall under (A)(i)?

11 U.S.C. 523(a)(8)(A)(ii): Case Law

- Are private loans not otherwise covered dischargeable under this section?
  - *Crocker v. Navient Sols., LLC*, 941 F.3d 206 (5th Cir. 2019)
  - *McDaniel v. Navient Sols., LLC,* 973 F.3d 1083 (10th Cir. 2020)
  - *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595 (2d Cir. 2021)

- What remedies are there for all of these borrowers whose loans were discharged, seemingly unbeknownst to student loan creditors?
  - *In re Hilal Khalil Homaidan*, Nos. 08-48275-ess, 13-46495-ess, 17-1085-ess, 2022 Bankr. LEXIS 2426 (Bankr. E.D.N.Y. Sep. 2, 2022)
  - *Golden v. Discover Bank (In re Golden),* 630 B.R. 896 (Bankr. E.D.N.Y. 2021)

11 U.S.C. 523(a)(8)(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*

- "Qualified education loan" determinations largely involve "cost of attendance" definitions

11 U.S.C. 523(a)(8)(B): Case Law

- *Conti v. Arrowood Indem. Co. (In re Conti),* 982 F.3d 445 (6th Cir. 2020)
- *Youssef v. Sallie Mae, Inc. (In re Homaidan)*, Nos. 08-48275-ess, 13-46495-ess, 17-1085-ess, 2022 Bankr. LEXIS 2940 (Bankr. E.D.N.Y. Oct. 17, 2022)

ANALYSIS OF STUDENT LOAN DISCHARGE UNDER § 523(a)(8)

By Morgan Allred and Karlene Archer

ISSUES

I. What types of student loans are excepted from discharge under 11 U.S.C. § 523(a)(8)(A)–(B) of the Bankruptcy Code?

II. When does excepting a student loan from discharge impose an undue hardship on a debtor?

SHORT ANSWERS

I. Three categories of student loans are excepted from discharge under 11 U.S.C. § 523(a)(8) of the Bankruptcy Code: (1) loans the government or a nonprofit institution funded in whole or in part; (2) obligations to repay funds received as an educational benefit, scholarship, or stipend; and (3) qualified education loans.

II. If a debtor's student loans fall into one of the categories set forth by 11 U.S.C. § 523(a)(8), a debtor may only discharge those student loans if excepting them from discharge would impose an undue hardship on the debtor. In most circuits, a showing of undue hardship requires the debtor to prove the *Brunner* factors by a preponderance of the evidence.

ANALYSIS

I. Determining which student loans are excepted from discharge under 11 U.S.C. § 523(a)(8).

Exceptions to discharge in a bankruptcy proceeding are governed by 11 U.S.C. § 523. For determining the dischargeability of student loans, specifically, § 523(a)(8) is controlling. The Code states that, absent a showing of undue hardship, a debtor may not discharge any debt that falls into one of three categories, including:

> (A)(i) [A]n 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[.]

11 U.S.C. 523(a)(8). Importantly, the creditor must establish by a preponderance of the evidence that a debt qualifies as an exception to discharge under § 523. Grogan v. Garner, 498 U.S. 279, 286–88 (1991); Traversa v. Educ. Credit Mgmt. Corp. (In re Traversa), 444 F. App'x 472, 474 (2d Cir. 2011) (summary order), cert. denied, 568 U.S. 817, 133 S. Ct. 135, 184 L. Ed. 2d 29 (2012) (quoting Brunner, 831 F.2d at 396). A debt must only qualify under one of the three categories set forth in § 523(a)(8) to be excepted from discharge. In re Cleveland, 559 B.R. 265, 271 (Bankr. N.D. Ga. 2016) ("A failure of a loan to qualify under one of the provisions does not eliminate the possibility of it qualifying as non-dischargeable under the other provisions."). If the creditor establishes that the debt is excepted from discharge under the Code, the burden shifts to the debtor to prove undue hardship in order to discharge the debt. In re Ivory, 269 B.R. 890, 893 (Bankr. N.D. Ala. 2001).

A. Loans the government or a nonprofit institution funded in whole or in part under § 523(a)(8)(A)(i).

Courts have broadly interpreted the language of § 523(a)(8)(A)(i) to except government-funded and nonprofit-funded loans from discharge. See In re Vuini, No. 6:11-AP-00227, 2012 WL 5554406, at *3 (Bankr. M.D. Fla. Nov. 14, 2012) ("Section § 523(a)(8) has been amended several times from its original enactment in 1978, and each time Congress has *increased* its scope to provide additional protections to lenders offering loans of all kinds to students pursuing higher education.").

Firstly, the Bankruptcy Code expansively defines "governmental unit" to include a department, agency, or instrumentality of the United States, a state, commonwealth, district, territory, municipality, foreign state, or other foreign or domestic government. 11 U.S.C. § 101(27).

Secondly, the statutory language "made, insured, or guaranteed by" encompasses a wide range of loans. Essentially, the Section excepts from discharge any loan "in which a governmental unit or a nonprofit institution had a defined role." In re Crocker, 941 F.3d 206, 217 (5th Cir. 2019). More specifically, a court may find that a governmental unit made a loan when it was simply the lender and holder of the loan obligation without any regard for the source of the funds. In re Shore, 707 F.2d 1337, 1339 (11th Cir. 1983) ("The particular funds on which the governmental unit draws to fund the loan does not alter the definition."). A court may also determine that a governmental unit or nonprofit institution funded a loan if it made a "meaningful contribution to the provision of the loan, including to the guarantee of the loan." In re Kidd, 458 B.R. 612, 618 (Bankr. N.D. Ga. 2011). It is possible that a nonprofit meaningfully contributed to the loan where it "contribute[d] to the availability of the funds to students." Id. ("The district court found § 523(a)(8) to be applicable and that a guarantee by a nonprofit constitutes funding.") (citing In re Taratuska, No. CIV.A. 07-11938-RCL, 2008 WL 4826279, at *3 (D. Mass. Aug. 25, 2008)). It is not necessary that a nonprofit institution or a governmental unit incur a minimum amount of financial risk in order for a court to find that it funded a student loan. Id. at 619. Importantly, a nonprofit institution or a governmental entity is only required to fund the loan program generally, rather than directly fund an individual debtor's student loans. Id.

B. An obligation to repay funds received as an educational benefit, scholarship, or stipend under § 523(a)(8)(A)(ii).

Courts are split on how to interpret and apply § 523(a)(8)(A)(ii) to student loans. The two contrasting lines of thought are as follows: (1) the Code Section only excepts from discharge those payments to the debtor that are conditional educational grants, rather than loans, or (2) the Section broadly excepts from discharge any obligation to repay funds that the debtor received as an educational benefit. The first is getting the most attention recently, with three recent circuit opinions all echoing each other.

Under the first line of reasoning, the language of § 523(a)(8)(A)(ii) only excepts from discharge educational payments that the debtor received as a conditional grant of funds. In re Crocker, 941 F.3d 206 (5th Cir. 2019); In re McDaniel, 973 F.3d 1083 (10th Cir. 2020); Homaidan v. Sallie Mae, Inc., 3 F.4th 595 (2d Cir. 2021); In re Christoff, 527 B.R. 624 (B.A.P. 9th Cir. 2015). Consequently, the Section does not except from discharge educational payments that the debtor initially received as a loan.[1] In re Crocker, 941 F.3d at 223. Rather, Congress intended for the Section to make nondischargeable those educational payments that conditioned the debtor's repayment of such funds on the debtor's failure to meet certain obligations associated with the funds. Id.

In the case of In re Crocker, two debtors took out separate loans from a for-profit, non-governmental affiliate of Sallie Mae and later transferred the loans to Navient Credit Finance Corporation ("Navient"). In re Crocker, 941 F.3d 206, 209 (5th Cir. 2019). One of the debtors took out a loan to pay for his bar exam preparatory materials, while the other debtor obtained his loan to pay for the tuition and expenses required for technical school. Id. After both debtors filed for bankruptcy, Navient contended that the debtors' education loans were excepted from discharge under § 523(a)(8)(A)(ii) because the Section encompassed private student loans,

[1] Recall that this section is only referenced when the debt is excepted from discharge under § 523(a)(8)(A)(i).

generally. Id. at 210. The court held that the debtors' loans were dischargeable under the Code. Id. at 218. The court explained that it must narrowly construe discharge exceptions in favor of the debtor to promote the Code's policy of granting debtors a fresh start. Id. Looking at the plain language, the court pointed to the fact that § 523(a)(8)(A)(i) and § 523(a)(8)(B) both use the term "loan," while § 523(a)(8)(A)(ii) does not. Id. at 218–19 ("If 'Congress includes particular language in one section of a statute but omits it in another' – let alone in the very next provision – courts presume 'Congress intended a different meaning.'") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted). Moreover, the court used *noscitur a sociis* to define "benefit," and it determined that "granting, not borrowing" was the common quality between stipends and scholarships. Id. at 219–20 ("The brevity of the list in the text we must review does not compel ignoring the relevant term's neighbors."). Accordingly, the court concluded that "benefit," as used in § 523(a)(8)(A)(ii), must include a granting of funds that do not need to be repaid. Id. at 220. The Court also explained that interpreting "educational benefit" to include both private and public loans would render § 523(a)(8)(A)(i) and § 523(a)(8)(B) superfluous. Id. Finally, focusing on the statutory history for Subsection (a)(8), the court explained that the only change Congress made to this Subsection in 2005 was the addition of a comma after "scholarship." Id. at 223. From 1990 to 2005, courts interpreted this Section to exclude for-profit loans. Id. The fact that Congress did not materially change the Section meant that the courts' uniform interpretation of it should continue to attach to the later version of the Section. Id. (citing Texas Dep't of Hous. & Cmt. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 537 (2015)). Consequently, the court stated, "We conclude that 'educational benefit' is limited to conditional payments with similarities to scholarships and stipends." Id. at 224.

A similar case came before the Tenth Circuit Court of Appeals as a matter of first impression, and the court found that § 523(a)(8)(A)(ii) did not except an educational loan from discharge. In re McDaniel, 973 F.3d 1083, 1086 (10th Cir. 2020). In the case of In re McDaniel, the debtors took out multiple private student loans from "Sallie Mae, Inc.—which later became Navient" before filing for bankruptcy Id. at 1086–87. The court held that § 523(a)(8)(A)(ii) did not except the private loans from discharge. Id. at 1092. The court first looked to the Section's text to discern Congress's intention, and it found that the disjunctive "or" between § 523(a)(8)(A)(i) and §523(a)(8)(A)(ii) indicated that the "educational benefit" language in the former had a separate meaning from the "educational benefit" language in the latter. Id. at 1095. Because the latter does not include the term "loan," the court presumed that the Section did not encompass private loans. Id. ("If Congress had wanted the exception…to cover student loans, we presume it would have used the term 'educational loan'…just as it used the term in defining the scope of the exceptions in the statute's adjoining subjections."). The court asserted that common sense requires it to find that "benefit" must refer to funds that the recipient does not need to repay. Id. at 1096. Agreeing with the court in In re Crocker, this court found that, using the canon of *noscitur a sociis*, the common quality between "educational benefit, "scholarship," and "stipend" was that they were all grants rather than loans. Id. at 1098. Consequently, § 523(a)(8)(A)(ii) refers specifically to conditional grants of funding. Id. The court also utilized the same "superfluous" argument that the court in In re Crocker used to support its determination that "educational benefit" does not mean "loan." Id. at 1097, 1103. Finally, the court pointed to the Webster's Dictionary definition of "benefit," which defined it as a "payment [or] gift [such as] financial help in time of sickness, old age, or unemployment," as supporting its understanding of the Subsection. Id. at 1097–98.

A case with almost identical facts also came before the Second Circuit Court of Appeals as a matter of first impression, and the court found that § 523(a)(8)(A)(ii) did not except private educational loans from discharge. Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 599 (2d Cir. 2021). In Homaidan, a debtor took out several private loans from Sallie Mae, "a corporation to which Navient is the successor," to fund his college education. Id. The Court held that § 523(a)(8)(A)(ii) did not except the debtor's private student loans from discharge. Id. at 600. Looking to the plain meaning of "obligation to repay funds received as an educational benefit," the court explained that Congress could not have intended to "except all educational loans from discharge" by using "such stilted terms." Id. at 601. Rather, conditional grants of funds "fit the statutory text more naturally." Id. at 602. The court further explained that Congress must have intentionally omitted the term "loan" from the Section because Congress used it in both the Sections preceding and following § 523(a)(8)(A)(ii). Id. ("Congress used the word 'loan' several times in § 523(a)(8) but left it out of § 523(a)(8)(A)(ii), signaling that the omission was intentional.").

Next, the court reiterated that broadly reading the Section to encompass all loans that a debtor took out for educational purposes would violate the canon against surplusage, as it "would draw virtually all student loans within the scope of § 523(a)(8)(A)(ii)" and include the student loans that the other Sections were meant to individually address. Id. Rather, the court adopted the presumption that a statute with three individual categories was meant to "target different kinds of debt[]." Id. at 603 (citing Inst. of Imaginal Stud. v. Christoff, 527 B.R. 624, 634 (9th Cir. BAP 2015)). Finally, the court used *noscitur a sociis* to define "educational benefit" by limiting its scope to be consistent with the other terms in the subsection's list: scholarship and stipend. Id. at 604. Because scholarships and stipends are conditional grant payments that the recipient

ordinarily does not have to repay, "educational benefit" similarly refers to such conditional grant payments rather than loans. Id. at 604–05.

Under the second line of reasoning, however, Section 523(a)(8)(A)(ii) encompasses a broad definition of what may be considered an "educational benefit," including loans for bar exam studying, private day school, and educational lines of credit from private banks. In re Skipworth, No. ADV. 09-80149-JAC-7, 2010 WL 1417964, at *2 (Bankr. N.D. Ala. Apr. 1, 2010); In re Cardona, No. 15-16365-BKC-LMI, 2015 WL 9459883, at *3 (Bankr. S.D. Fla. Dec. 23, 2015); In re Goldstein, No. 11-81255-MGD, 2012 WL 7009707, at *2 (Bankr. N.D. Ga. Nov. 26, 2012). This reasoning has been criticized by courts using the statutory interpretation guidance from Crocker, McDaniel and Homaidan.

C. Any other educational loan that is a qualified education loan under the Internal Revenue Code of 1986 § 221(d)(1).

Section 523(a)(8)(B) excepts from discharge "qualified education loans." 11 U.S.C. 523(a)(8)(B). To define "qualified education loans," the Section refers to the Internal Revenue Code. Id. If a loan satisfies the definition provided in the Internal Revenue Code § 221(d)(1), then it is nondischargeable under § 523(a)(8)(B). In re Mallett, 625 B.R. 553, 556 (Bankr. M.D. Fla. 2021); Jason Iuliano, Student Loan Bankruptcy and the Meaning of Educational Benefits, 93 AM. BANKR. L.J. 277, 287 (2019) ("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.").

Under 26 U.S.C. § 221(d)(1), a "qualified education loan" is "any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses." Id. The debtor can either incur the expenses on his own behalf or someone else can incur them on behalf of the debtor, the debtor's spouse, or the debtor's dependent. § 221(d)(1)(A). The expenses must have been used for

education that the debtor received while he was an eligible student. § 221(d)(1)(C). Additionally, Section 221(d)(2) defines "qualified education expenses" as "the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087//…) at an eligible educational institution, reduced by the sum of" various scholarships, payments, and financial aid that the tax code excludes from gross income. § 221(d)(2). The full extent of the expenses that comprise the "cost of attendance" is detailed in 20 U.S.C. 1087//, and it includes, in part, tuition and fees, room and board, materials, books, supplies, transportation, and miscellaneous personal expenses. 20 U.S.C. 1087//.

Essentially, "qualified education expenses" are simply the "costs[s] of attendance" at an "eligible educational institution." In re Quintanilla, No. 8:17-AP-00800-RCT, 2020 WL 7333590, at *3 (Bankr. M.D. Fla. Nov. 20, 2020). This means that only the amount of the student loans up to the cost of attendance are nondischargeable under § 523(a)(8)(B). Jason Iuliano, Student Loan Bankruptcy and the Meaning of Educational Benefits, 93 AM. BANKR. L.J. 277, 287 (2019) ("[I]f 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.").

Moreover, an "eligible educational institution" is an institution that is both described in § 481 of the Higher Education Act of 1965 (HEA) (20 U.S.C. § 1088) and is eligible to participate in a Title IV program (20 U.S.C. §§ 1070 et seq.). Id. at *3. Under § 481 of the HEA, an "institution of higher education" must be a public or private nonprofit institution, a proprietary institution of higher education, a post-secondary vocational institution, or an institution outside of the United States comparable to a 20 U.S.C. 1141(a) institution. Id.; 20 U.S.C. § 1088 (1997); 20 U.S.C. § 1141(a). To be eligible to participate in a Title IV program under 20 U.S.C. § 1094(a), an institution "must be an institution of higher education…and shall…enter into a

program participation agreement with the Secretary [of Education]." In re Quintanilla, No. 8:17-AP-00800-RCT, 2020 WL 7333590, at *4 (Bankr. M.D. Fla. Nov. 20, 2020).

Finally, an "eligible student" under 26 U.S.C. § 25A(b)(3) is a student who satisfies the criteria set out under § 484(a)(1) of the HEA and is enrolled in at least one-half of the normal full-time work load for the student's program of study. Id.; 26 U.S.C. § 221(d)(3); 26 U.S.C. § 25A(b)(3). A student satisfies the criteria established in § 484(a)(1) if he is enrolled in a degree, certificate, or other program to receive a recognized educational credential at an institution of higher education that is a Title IV eligible school. In re Quintanilla, 2020 WL 7333590, at *4 (Bankr. M.D. Fla. Nov. 20, 2020). One court summarized the definition of a "qualified education loan" as follows:

> [A] "qualified education loan" under § 523(a)(8)(B) requires (i) a "taxpayer;" (ii) to incur debt solely to pay for "qualified higher education expenses;" (iii) with such expenses attributable to education furnished when the recipient was an "eligible student;" (iv) and for there to be a temporal relationship between the expenses and the incursion of the debt. "[Q]ualified higher education expenses" are comprised of the "cost of attendance" at an "eligible educational institution." And an "eligible student" is a student enrolled or accepted in an appropriate program at an "eligible educational institution" who meets certain course load requirements.

Id.

In the case of In re Conti, the Sixth Circuit Court of Appeals held that a debtor's private loans for attending a four-year university were nondischargeable under § 523(a)(8)(B). In re Conti, 982 F.3d 445, 447 (6th Cir. 2020). There, a debtor received five private loans from Citibank to fund her education at the University of Michigan. Id. Her loans were specifically for students pursuing an education at a four-year college or university, and they were capped at the full cost of education after taking into account any of the student's financial aid. Id. To determine whether the debtor's loans were "qualified education loans" under § 523(a)(8)(B), the court had to look to the initial purpose of the debtor's loans, rather than how she actually used the loans. Id.

at 449. This starting point stems from the Section's requirement that the loan was "incurred…to pay" for qualified higher education expenses. Id. The court pointed to the public policy consideration that examining the debtor's ultimate use of the borrowed funds, as opposed to the initial purpose, could reward debtors for misusing the funds for non-educational expenses. Id. This, of course, would not support "Congress' goal of preserving the financial integrity of the student loan system." Id. To identify the loan's purpose, the court looked to the lender's agreement with the borrower. Id. Here, the debtor's applications and promissory notes expressly tied the loans to her status as a student, capped the amount at the cost of attendance minus any financial aid, limited the use of the funds to specific educational expenses, and called for the University of Michigan to certify that the debtor used the loans in accordance with those requirements. Id. Additionally, Citibank directly transferred the funds to the University of Michigan. Id. Together, these facts were sufficient to support the court's finding that the debtor incurred the loans "solely to pay qualified higher education expenses." Id.

Refinanced loans are also “qualified education loans” under Internal Revenue Code § 221(d)(1) if the original loan was a “qualified education loan.” See Juber v. Conklin (In re Conklin), No. 3:19-CV-00091-KDB, 2020 U.S. Dist. LEXIS 59888 (W.D.N.C. Apr. 6, 2020). This includes nontraditional loans, such as those from family members. See id. at *22; see also In re Mallett, 625 B.R. 553, 554 (Bankr. M.D. Fla. 2021) (finding a loan from a family member intended to refinance an educational loan was a qualified educational loan where the original loan was a qualified educational loan, and where the debtor had claimed a tax deduction on the interest paid on the loan from the family member).

D. "Educational Benefit" and Parent Loans/Cosigners

The majority of courts have held that §523(a)(8) excepts a student debt from discharge even if the debtor is not the beneficiary of the educational loan debt. In re Norris, 239 B.R. 247, 251 (M.D. Ala. 1999) ("An examination of the case law reveals that the majority of courts that have considered this issue agree that § 523(a)(8) excepts from discharge a guaranteed educational loan debt even if the debtor is not the beneficiary of the loan."); In re Pelkowski, 990 F.2d 737, 741 (3d Cir. 1993); In re Goldstein, No. 11-81255-MGD, 2012 WL 7009707, at *3 (Bankr. N.D. Ga. Nov. 26, 2012); Matter of Selmonosky, 93 B.R. 785, 787 (Bankr. N.D. Ga. 1988). Although not all courts are in agreement about applying the § 523(a)(8) exception to a debtor who was merely a guarantor or cosigner of someone else's education loan, "most courts hold that the guarantor or cosigner cannot discharge the obligation." Joan N. Feeney et al., Exceptions to Discharge—Student Loans, 2 Bankruptcy Law Manual §8:13 (5th ed. 2021). There are some bankruptcy courts, though, that hold that the Section does not apply to an "accommodation party who received no benefits from the loan proceeds." In re Meier, 85 B.R. 805, 806 (Bankr. W.D. Wis. 1986).

There is a minority of courts that do not agree that § 523(a)(8) excepts student loans from discharge when the debtor was not the recipient of the educational benefit of the loans. See In re Boylen, 29 B.R. 924, 925 (Bankr. N.D. Ohio 1983); In re Meier, 85 B.R. 805, 806 (Bankr. W.D. Wis. 1986). In In re Boylen, a married debtor incurred a loan to attend school. In re Boylen, 29 B.R. at 924. Her husband did not attend school and was, instead, only a co-maker on her student loan debt. Id. After they filed for bankruptcy, the court had to determine whether the § 523(a)(8) exception from discharge applied to the husband. Id. The court held that the Section did not apply to him based on the Section's legislative history. Id. at 925–26 ("[T]his Court finds that the United States Congress intended that this exception be applicable only to the student debtor and

not to any co-makers on the debt."). The court conceded that the Section's language was plain and did not, facially, limit the exception to student debtors only. Id. at 926. The court found, however, that applying the plain language of the Section would frustrate Congress's intent to prevent students from abusing the Code's fresh start policy upon graduation. Id. Moreover, the court explained that Congress sought to treat student loans differently than other loans because creditors rely upon the student's future ability to make a higher income after graduation when they extend funds to them. Id. Finally, the court relied on the fact that throughout the Section's legislative history, Congress only ever referred to "students" rather than to "co-makers" or "co-debtors" who are also liable on student loans. Id. Because the husband in this case did not receive either an educational benefit or a higher income from the student loan, the court determined that § 523(a)(8) did not except his obligation from discharge. Id. at 926–27 ("Such an exception would be utterly contrary to the fresh start pervasive throughout the Bankruptcy Code and the Bankruptcy Act of 1898 and the purposes for which this exception was enacted.").

The court in In re Meier reached the same result under similar circumstances. In re Meier, 85 B.R. 805, 806 (Bankr. W.D. Wis. 1986). There, the debtor's ex-husband took out student loans, and the debtor signed the promissory note for the loan as an "endorser." Id. at 805. The debtor did not receive any educational benefit from the funds. Id. The court held that the Section did not apply to the debtor as a surety of the promissory note with secondary liability. Id. at 806. The court explained that the Section's language, "debt for an educational loan," is pointed at the principal obligor, which is the party who received the "debt for an educational loan" and not the accommodation party who did not receive any benefits. Id. The court explained that the debt that the Section intended to except from discharge is the principal obligor's "debt for an educational loan," rather than any secondary liability. Id. The court supported its conclusion with its

understanding of Congress's intent behind § 523. Id. Congress enacted the exceptions to student loan discharge to prevent students from discharging their loans before "reap[ing] the benefits of the high paying jobs their student loans enabled them to obtain." Id. Excepting the secondary liability of an accommodation party from discharge does not further that congressional intent. Id.

II. Establishing undue hardship under *Brunner*.

If, in any particular case, a court finds that a debtor's loan is nondischargeable under § 523(a)(8), the burden shifts to the debtor to prove that excepting the loan from discharge will cause undue hardship. In re Fields, No. AP 10-70021, 2012 WL 3235844, at *4 (Bankr. N.D. Ala. Mar. 23, 2012). Although the Bankruptcy Code does not define "undue hardship," most circuits have adopted the *Brunner* factors as the relevant test for finding an undue hardship. In re Cox, 338 F.3d 1238, 1241 (11th Cir. 2003). Accordingly, to establish undue hardship, the debtor must show:

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

Id. The debtor must prove each of the three prongs of the *Brunner* test, otherwise the court "must find that the student loan is not dischargeable." In re Fields, 2012 WL 3235844, at *5. The debtor must prove all three elements by a preponderance of the evidence. In re Mosely, 494 F.3d 1320, 1324 (11th Cir. 2007) (citing Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)). Importantly, the same test for undue hardship applies to educational loans that parents have taken out to further their children's education. In re Gordon, No. ADV.07-009049-MGD, 2008 WL 5159783, at *5 (Bankr. N.D. Ga. Oct. 10, 2008).

A. Minimal Standard of Living

In order for a debtor to establish that he cannot maintain a minimal standard of living, he must make "more than a showing of tight finances." In re Fields, 2012 WL 3235844, at *5. The standard does not require a debtor to show that he would have to "live a life of abject poverty" if he had to repay his student loans. Id. Accordingly, this standard "lies somewhere between poverty and mere difficulty." Id. For this analysis, a court must compare a debtor's disposable income, which is the difference between his monthly income and his reasonable and necessary monthly expenses, with the monthly payment that would be necessary for the debtor to repay his student loans. Id. To determine whether a debtor's expenses are reasonable and necessary, a court "must apply its common sense knowledge gained from ordinary observations in daily life and general experience." Id. (quoting In re Douglas, 366 B.R. 241, 253–54 (Bankr. M.D. Ga. 2007)). Essentially, a debtor must prove that if he is forced to repay the loan, he will not be able to afford basic living necessities. In re Clark, No. 15-42603-BEM, 2021 WL 5702705, at *6 (Bankr. N.D. Ga. Nov. 29, 2021). Accordingly, a court should consider daily expenses such as shelter, basic utilities, food, personal hygiene products, vehicles, and the costs associated with having a vehicle, health insurance, and recreation. Id.

The Bankruptcy Court for the Northern District of Alabama, Southern Division, has established a series of criteria that may be helpful in determining whether a debtor is able to maintain a minimal standard of living. In re Ivory, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). For that court, a minimal standard of living "is a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities." Id. The specific items necessary to maintain a minimal standard of living include:

> 1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.

> 2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.
> 3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
> 4. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.
> 5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
> 6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

Id. For the subjective evaluation of a debtor's income and expenses, this court calls upon "[c]ommon sense, knowledge gained from ordinary observations in daily life, and general experience" to determine whether a debtor's expenses are "unnecessary or unreasonable, whether someone is paying for something that is not needed, or whether someone is paying too much for something that is needed." Id. at 899–90.

In addition to subjective criteria, the Bankruptcy Court for the Northern District of Alabama, Southern Division, also utilizes "widely accepted objective criteria." Id. at 903. The court looks to the United States Department of Housing and Urban Development for the fair market value of rent and non-telephone utilities for a family that matches the debtor's familial and economic characteristics. Id. at 904. Moreover, the court uses the United States Department of Agriculture's Official USDA Food Plans to establish the average monthly cost of a low-cost meal plan for a family that matches the debtor's family size. Id. The United States Bureau of the Census publishes the amount that the average "consumer unit" with a certain gross annual income spends on housekeeping supplies, personal care products, apparel and services, and

health care. Id. at 904–06. The American Automobile Association provides figures to determine the cost to purchase, own, operate, and maintain an "economy automobile" that can inform the court's determination of an average monthly car-related expenditure. Id. at 905. Additionally, the court uses the Internal Revenue Service Collection Financial Standards to determine "cut-outs" of income for basic living expenses, the United States Department of Health and Human Services' Poverty Guidelines, and the studies that the Economic Policy Institute conducts concerning the specific budgetary requirements of American working families to evaluate the debtor's expenses against the "minimal standard of living" threshold. Id. at 906–08.

Finally, a court may consider whether a debtor's enrollment in an Income-Contingent Repayment Plan would allow the debtor to make payments on her loans while still maintaining a minimal standard of living. In re Acosta-Conniff, 632 B.R. 322, 329 (Bankr. M.D. Ala. 2021). If a debtor is eligible for such a program and her income would allow her to make those reduced payments while maintaining a minimal standard of living, this could be strong evidence that a debtor cannot satisfy the first *Brunner* prong.

B. Additional Circumstances

To satisfy the second prong, a debtor must show that his inability to pay is "likely to continue for a significant time." In re Mosely, 494 F.3d 1320, 1326 (11th Cir. 2007). This standard requires there to be a "certainty of hopelessness" regarding a debtor's prospects of repaying the loans within the repayment period. Id. The "additional circumstances" that a debtor may show can consist of "illness, disability, a lack of useable job skills, or the existence of a large number of dependents." In re Fields, No. AP 10-70021, 2012 WL 3235844, at *6 (Bankr. N.D. Ala. Mar. 23, 2012). Moreover, a court may consider the "debtor's age, the age of debtor's dependents, debtor's education, work and income history, physical and mental health, and other relevant

circumstances." In re Clark, No. 15-42603-BEM, 2021 WL 5702705, at *10 (Bankr. N.D. Ga. Nov. 29, 2021). If a debtor has a full-time career "in a field appropriate to their education, at a reasonable rate of pay," a court should avoid penalizing the debtor "based on speculation that jobs elsewhere may pay marginally more." In re Acosta-Conniff, 632 B.R. 322, 337 (Bankr. M.D. Ala. 2021).

Often, a court's main consideration for this factor is whether the "additional circumstances" that it is considering are beyond the debtor's control or are the result of his own choices. In re Fields, 2012 WL 323584, at *6 (citing Oyler v. Educ. Credit Mgmt. Corp., 397 F.3d 382, 385 (6th Cir. 2005)). Essentially, the additional-circumstances prong addresses the policy behind the dischargeability status of student loans as a whole: that the debtor sought to equip herself with the benefit of a higher education to improve her future financial situation. In re Matthews-Hamad, 377 B.R. 415, 422 (Bankr. M.D. Fla. 2007). Even if a debtor did not complete her pursuit of higher education, just having a low-paying job is often not enough for a court to find that additional circumstances exist, unless the reason the debtor has a low-paying job was the result of factors that were beyond the debtor's control. See id. ("Several courts have found that the fact that a debtor has a low-paying job without much upside earning potential is not enough to satisfy this prong of the *Brunner* test.").

C. Good Faith Effort

In determining whether a debtor made a good faith effort to repay his student loans, a court must evaluate a debtor's efforts to obtain employment, maximize income, and minimize expenses. Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 852-53 (9th Cir. 2013); In re Mosely, 494 F.3d 1320, 1327 (11th Cir. 2007). It is important to this inquiry that a debtor's default on his loans resulted from factors beyond his reasonable control rather than from his own choices.

Hedlund at 852, Mosley at 1327. The fact that a debtor has failed to make payments on his loans, by itself, is insufficient to establish a lack of good faith. Mosley at 1327. If a debtor has attempted to negotiate a repayment plan for his student loans under the Income-Contingent Repayment Plan, that is a factor that weighs in favor of demonstrating good faith. Id. If a debtor has not enrolled in such a repayment plan, that fact does not, on its own, prevent a debtor from demonstrating a good faith effort to repay. Id. This is true because it is often not feasible for a debtor to participate in a repayment program, as it "may require them effectively to 'trad[e] one nondischargeable debt for another' because any debt that is discharged under the program is treated as taxable income." Id. (citing In re Barrett, 487 F.3d 353, 364 (6th Cir. 2007)), but see Murphy v. United States Dep't of Educ. (In re Murphy), 535 B.R. 97, 109 (Bankr. W.D. Pa. 2015) (finding the tax assessment of discharged debt after income-based repayment "speculative").

Parent Loans and Undue Hardship

Section 523(a)(8) does not limit the discharge exception to loans taken out by students for their own benefit. The inquiry is the same whether the loan's obligor is the student or the student's parent(s). See In re Feenstra, 51 B.R. 107 (Bankr. W.D.N.Y. 1985); In re Hammarstrom, 95 B.R. 160 (Bankr. N.D. Cal. 1989); Hamblin v. Educ. Credit Mgmt. (In re Hamblin), 277 B.R. 676 (Bankr. S.D. Miss. 2002); In re Sanders, 454 B.R. 855, 857 (Bankr. M.D. Ala. 2011).

In the case of In re Sanders, the United States Bankruptcy Court for the Middle District of Alabama analyzed a case in which two parents, who were "either directly or on a guarantor basis responsible for the student loan payments incurred by their son," filed for bankruptcy with over $236,000 in student loans. In re Sanders, 454 B.R. 855, 857 (Bankr. M.D. Ala. 2011). Although

the court did not conduct a full undue-hardship analysis under the *Brunner* factors, the court explained that it would be even more difficult for the parent debtors in this case to meet the high burden of proving undue hardship than for debtors who take out loans for their own education. Id. at 862. This is because the parent debtors are not solely limited by their own characteristics and circumstances but are, rather, beneficiaries of their younger dependent's situation. See id. The court explained, "The son here is young and with his first job, so proving that over the long term of his loan repayment period he will not ever see a financial increase will be near to impossible." Id. Moreover, because he had the potential to increase his financial situation, he consequently had the opportunity to financially assist his parents in the future. Id. As a result, the son's potential success cut against the parents' argument for undue hardship. Id.

Faculty

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Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the sole the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." She serves on the advisory board of the *American Bankruptcy Law Journal* and the board of the Federal Bar Association Bankruptcy Section, and she is a former board member of the International Women's Insolvency & Restructuring Confederation, a former committee chair of ABI's Consumer Bankruptcy and Litigation Committees, and an associate editor of the *ABI Journal*. Judge Gunn is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

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