In the News: Same-Sex Marriage, Student Loan and Marijuana Cases

Featuring Students from the Memphis University Duberstein Moot Court Team

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SAME-SEX MARRIAGE ISSUES IN BANKRUPTCY AFTER *WINDSOR*

Judge Paulette J. Delk
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When the United States Supreme Court decided *United States v. Windsor*, 569 U.S. ___, 133 S.Ct. 2675 (2013), a case in which the Court held that Section 3 of Defense of Marriage Act ("DOMA") violates basic due process and equal protection principles applicable to the federal government (where the stated purpose and practical effect are to impose disadvantage, separate status, and stigma on those who enter into legal same-sex marriages), *Windsor* at 2692-2695, it raised significant and difficult questions for those who must apply the provisions of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. as well as state law in cases involving same-sex couples.

Section 3 of DOMA provides a definition of "marriage" as only between "one man and one woman," and of "spouse" as only a "person of the opposite sex who is a husband or a wife." A close review of the Bankruptcy Code reveals that the term "spouse" is used about 60 times in almost 40 sections or subsections. Now that the Supreme Court has ruled that Section 3 of DOMA is unconstitutional, bankruptcy courts cannot apply those definitions in determining who is a "spouse" under the Bankruptcy Code. But what of state laws that define "spouse" or "same-sex marriage" in terms similar to DOMA? Creditors and trustees are likely to question debtors' rights to claim certain state law exemptions or to benefit from other provisions of the Bankruptcy Code. Is the bankruptcy court to apply those state law definitions?

How has *Windsor* impacted bankruptcy law? What issues has *Windsor* raised regarding the rights of married same-sex couples under the Bankruptcy Code? When conflicting state laws apply, how must bankruptcy courts determine which state's law applies? Choice of law issues abound, and for many of these questions, no clear-cut choice of law rule applies. Does the place of domicile rule apply, or does the place of celebration rule apply? Are there other approaches that should be taken in bankruptcy cases? *Windsor* answered a few questions, but raised significantly more for bankruptcy courts.

INTERSECTION OF MARIJUANA LAW AND BANKRUPTCY LAW

Judge Paulette J. Delk
United States Bankruptcy Judge, Western District of Tennessee
Memphis, Tennessee

Over 20 states have enacted laws legalizing the use of marijuana for medical or recreational use in recent years. With this change in state law, marijuana-related businesses of all kinds have developed, and most have thrived. But while the use, cultivation and distribution of marijuana have been decriminalized in several states, federal law still classifies marijuana as a Schedule 1 drug under the Controlled Substance Act, 21 U.S.C. § 801 *et seq*. This classification means that one in violation of the federal law can be subject to penalties ranging from a misdemeanor to a felony.

Thus, another state law/federal law conflict is created. This conflict presents significant issues when a marijuana-related business finds itself before a federal bankruptcy court. Bankruptcy courts must determine whether a business operating in violation of federal law may remain in the bankruptcy case, *In re Arenas*, 514 B.R. 887, 891-892 (Bankr. D. Colo. 2014), whether the unclean hands doctrine and other equitable principles are applicable, *In re Beaty*, 306 F.3d 915, 922 (9th Cir. 2002), whether a plan can be confirmed, *Arenas* at 892-894, or whether a creditor whose business is marijuana-related is entitled to protection under the Bankruptcy Code, *Northbay Wellness Group v. Beyries* (*In re Beyries)*, 2011 WL 5975445, No. 10-13482, Adv. No. 10-1181 (Bankr. N.D. Cal. Nov. 29, 2011).

Bankruptcy courts have been consistent in their analyses of these issues. As long as the Controlled Substance Act classifies marijuana as a Schedule 1 drug, it is clear that individuals and

businesses involved in marijuana, even if only indirectly, cannot expect to receive benefits under the Bankruptcy Code.

Making the Debtor's Case for Discharging Student Loans: Attacking *Brunner* and Unnecessary Enrollment in Income-Sensitive Repayment Plans

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I. INTRODUCTION

This material has been modified from a brief written for the 2015 Duberstein Bankruptcy Moot Court Competition and focuses on the dischargeability of student loans under 11 U.S.C. § 523(a)(8). As this is being submitted for a consumer bankruptcy conference, this paper purports to attack the widely accepted *Brunner* test in favor of a more debtor-friendly totality of the circumstances approach.

II. THE TWO COMPETING TESTS FOR UNDUE HARDSHIP DETERMINATIONS AND WHY THE TOTALITY APPROACH SHOULD PREVAIL.

Congress did not define "undue hardship" and the phrase has no established meaning in section 523 of the Bankruptcy Code. *See* 11 U.S.C. § 523(a)(8). The dictionary definition of "undue hardship" supports the reasonableness approach of a totality of the circumstances inquiry. *U.S. Dept. of Health & Human Serv. v. Smitley*, 347 F.3d 109, 116 (4th Cir. 2003) ("[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)). Merriam-Webster dictionary defines "undue" as "more than is reasonable or necessary." *See also* BLACK'S LAW DICTIONARY 609, 1759 (9th ed. 2009) (defining undue as "excessive" or "unwarranted"). Thus, the plain language of § 523(a)(8) merely requires a showing that based on a debtor's particular circumstances repayment of the loan would impose an unreasonable hardship. *See Andrews v. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981).

The two leading tests for undue hardship under the context of § 523 originate from the Second and Eighth Circuit Courts of Appeals. The Eighth Circuit appropriately utilizes a totality of the circumstances

test where "reviewing courts must consider the debtor's past, present, and reasonably reliable future financial resources, the debtor's reasonable and necessary living expenses, and 'any other relevant facts and circumstances.'" *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 779 (8th Cir. 2009) (quoting *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981)). Other relevant facts and circumstances could include, but are certainly not limited to, total present & future incapacity to pay debts for reasons outside the control of debtor, the ability of the debtor to obtain gainful employment in the area of study, whether the dominant purpose of the bankruptcy petition was to discharge student loans, and the ratio of student loan debt to total indebtedness. *Jesperson*, 571 F.3d at 779. This totality test is a balancing test based on the belief that fairness and equity require courts to examine undue hardship on the unique facts and circumstances surrounding each particular case. *See Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003).

On the other hand, the Second Circuit applies a rigid three-prong test initially adopted in *Brunner v. New York State Higher Education Services Corp.* All three elements must be satisfied individually before a discharge of the student loan debt may be granted. Thus, if one of requirements of the test is not met, the bankruptcy court's inquiry ends there with a finding of no dischargeability. *In re Brightful,* 267 F.3d 324 (3d Cir. 2001). The *Brunner* test, as it has come to be known, requires that (1) 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 ("minimal standards prong"); (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 ("persistent circumstances prong"); and (3) the debtor has made good faith efforts to repay the loans ("good faith prong"). *See Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). The minimal standard of living under *Brunner* takes into consideration food, clothing, housing, and necessary medical treatments. *Id.* Any excess financial resources should be used to satisfy student loan debt in lieu of discretionary expenditures. *Id.* The financial woes of the debtor must be due to circumstances beyond the debtor's control rather than the result of the debtor's own choice of profession. *In re Barrett*, 487 F.3d 353

(6th Cir. 2007). However, debtors need not demonstrate that they maximized their income in order to receive a discharge. *In re Mason*, 464 F.3d 878 (9th Cir. 2006). But the *Brunner* court held, and many courts thereafter have continued to hold, that dischargeability of student loans should be based upon a "certainty of hopelessness." *In re Brunner*, 46 B.R. 752, 755 (S.D.N.Y. 1985); *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005).

Courts applying the *Brunner* test cannot consider any extraneous factors or the debtor's other circumstances to reach a conclusion even though the bankruptcy court is a court of equity. *See Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995) ("Equitable concerns or other extraneous factors not contemplated by the *Brunner* framework may not be imported into the court's analysis to support a finding of dischargeability.").

A. The plain language of § 523(a)(8) supports a totality of the circumstances approach to undue hardship determination.

The judiciary's duty is "to interpret the Code clearly and predictably using well-established principles of statutory construction." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989)). The cardinal rule of statutory construction is to begin with the express language of the statute. *Germain*, 503 U.S. at 253. Exceptions to a general rule, such as § 523(a)(8), should be construed narrowly so that they are "confined to their plainly expressed terms." *C.I.R. v. Clark*, 489 U.S. 726, 727 (1989) (construing an exception narrowly to preserve "the primary operation of the general rule."); *Bendetti v. Gunness (In re Gunness)*, 505 B.R. 1, 7 (9th Cir. B.A.P 2014). Therefore, if the words of a statute are unambiguous, the interpretation ends with the express language, and the "judicial inquiry is complete." *Germain*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Advocates of the *Brunner* test tend to focus primarily on the 1973 Bankruptcy Commission Report

that discusses the meaning of "undue hardship." Comm'n on the Bankruptcy Laws of the United States, Report, H.R.DOC. NO. 137, 93d Cong., 1st Sess. (1973) ("Commission Report"). However, the report does not support the application of *Brunner's* burdensome undue hardship test. The Commission Report states that as a matter of policy, student loans should not be dischargeable until the debtor demonstrates that "for any reason he is unable to earn a sufficient income" to repay the debt. *Id.* at 140 n.15. The Commission Report further provides that in addition to a debtor's rate of pay and expenses, the debtor's "future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment." *Id.* at 140-41 n.17. The Commission Report makes no mention of requiring the debtor to show "additional circumstances" or a good faith effort to repay the loan. *Id.*; *see also Andrews*, 661 F.2d at 704 (citing the Commission Report and applying the totality of the circumstances approach).

Contrary to the dictionary meaning of "undue hardship," courts applying the *Brunner* test have described "undue hardship" as requiring a "certainty of hopelessness" and a showing of "exceptional circumstances." *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993); *Brunner*, 831 F.2d at 396. There is nothing in the plain language of the statute supporting such a heightened threshold for discharge. Had Congress intended to subject debtors to such a draconian standard, it would have provided language that explicitly conveyed a heightened threshold. *See Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013). For instance, Congress expressly created a higher dischargeability standard for a Health Education Assistance Loan ("HEAL") by requiring a debtor to show that "nondischarge of [the loan] would be unconscionable." 42 U.S.C. § 292f(g). Ironically, several circuits that use the *Brunner* test have adopted a totality of the circumstances approach for determining whether nondischarge of a HEAL loan is "unconscionable." *See Smitley*, 347 F.3d at 117; *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996) (finding the adoption of a single test to be "inappropriate."); *Woody v. DOJ (In re Woody)*, 494 F.3d 939, 948 (10th Cir. 2007).

The Supreme Court has repeatedly articulated that statutory construction is a holistic endeavor. *See, e.g.*, *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

"'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Sec'y of Treasury of United States*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)); see *Timbers*, 484 U.S. at 371 ("[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . ."). Accordingly, the term "undue hardship" under § 523(a)(8) should be interpreted consistently with the characterization of undue hardship in § 524(m)(1). *Naranjo v. Educ. Cred. Mgmt. Corp. (In re Naranjo)*, 261 B.R. 248, 257 (Bankr. E.D. Cal. 2001) (stating §§ 524(c)(3) and 523(a)(8) "should be read to be consistent with each other."). Both sections appear in the same subchapter.

Section 524(m)(1) addresses a debtor's reaffirmation to pay a particular debt. A reaffirmation of debt requires court approval, which will not be granted if repaying the obligation would "impose an undue hardship on the debtor." 11 U.S.C. § 524(c)(3)(B) (emphasis added). Section 524(m)(1) creates an automatic presumption of "undue hardship" if the debtor's disposable income is insufficient to make the payments specified in the agreement. 11 U.S.C. § 524(m)(1). Specifically, undue hardship results when the debtor's disposable income, after all expenses are paid, "is less than the scheduled payments on the reaffirmed debt." 11 U.S.C. § 524(m)(1). This meaning of "undue hardship" is a far cry from the "certainty of hopelessness" required by the *Brunner* test. *In re Roberson*, 999 F.2d at 1136. Additionally, § 523(a)(8) and § 524(m)(1) both refer to "undue hardship" in the context of a debtor's inability to pay a debt obligation, which further supports a consistent interpretation of "undue hardship." *See Stockholms Enskilda Bank*, 293 U.S. at 87 (explaining the use of the same phrase, in the same subchapter, and for a similar purpose, rebuts any claim the meaning of the words is intended to be interpreted differently).

B. Section 523(a)(8) is fundamentally different than it was when the *Brunner* test was adopted.

Absent a clearly expressed legislative intention to the contrary, [the express] language [of a statute] must ordinarily be regarded as conclusive." *United States v. Able Time, Inc.*, 545 F.3d 824, 828 (9th Cir. 2008) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Arguments

based on legislative intent or wise public policy cannot be used to supersede the express provisions of the Code. *See RadLAX*, 132 S. Ct. at 2073.

Temporal considerations were key to Congress' initial decision to limit the dischargeability of student loans in 1978 and except from discharge loans that first became due in the five years preceding the debtor's bankruptcy filing. Bankruptcy Reform Act of 1978, PUB. L. NO. 95-598, § 523(a)(8), 92 Stat. 2549, 2678 (effective Oct. 1, 1979) (emphasis added). When Congress initially adopted the "undue hardship" language, it did not contemplate a situation in which a student would be unable to discharge the loan after five years of obtaining the debt. *Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 130 n.7 (8th Cir. B.A.P. 1999). Beginning in 1990, Congress made several significant amendments to § 523(a)(8). The changes include extending the dischargeability period from five to seven years, excepting all student loan debt from discharge regardless of the age of the loan, and finally, expanding § 523(a)(8) to include to private student loans. Neil Phillips, *How Poor is Poor Enough? Tracking the Evolution of Student Loan Dischargeability from Judge Haight to Judge Easterbrook*, 12 GEO. J.L. & PUB. POL'Y 329, 334 (2014). Although Congress has fundamentally changed § 523(a)(8) over the last twenty-five years, the *Brunner* test has remained unaltered. *Roth*, 490 B.R. at 920 (referring to *Brunner* as "a relic of long times gone").

C. The *Brunner* test is inconsistent with the policies of the Code and creates an unreasonably high burden for the debtor to satisfy.

The totality of the circumstances approach comports with the fresh start policies of the Code and grants judges the flexibility to render decisions consistent with that policy. The *Brunner* court's interpretation of "undue hardship" essentially reads into § 523(a)(8) additional burdens not required by the statute. As a result, the *Brunner* test has produced inconsistent and inequitable decisions.

The cornerstone of a debtor's economic recovery is the grant of discharge. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934). The Supreme Court has repeatedly acknowledged that one of the most important principles supporting a grant of discharge is the concept of a "'fresh start' for the 'honest but

unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 365 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991)). A fresh start permits the debtor to retain enough assets to survive, prevents the debtor from becoming a burden on the public, and, most importantly, frees the overburdened debtor from the "oppressive weight" of her accumulated debt. Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 364 (1991). The totality of the circumstances approach strikes an equitable balance between the concern for cases "'involving extreme debtor abuse and concern for the overall fresh start policy.'" *Phelps v. Sallie Mae Loan Serv. Center (In re Phelps)*, 237 B.R. 527, 534–35 (Bankr. D.R.I. 1999) (quoting *Law v. Educ. Res. Inst., Inc. (In re Law)*, 159 B.R. 287, 292–93 (Bankr. D.S.D. 1993)). Conversely, if a court finds against the debtor on just one of the *Brunner* prongs, the inquiry ends and the debtor is automatically unable to show undue hardship no matter how desperate the debtor's situation.

III. DEPARTMENT OF EDUCATION REPAYMENT PROGRAMS AND THEIR POTENTIAL EFFECTS ON UNDUE HARDSHIP.

In order for a debtor to make a good-faith attempt at repayment of a student loan debt the debtor must exert reasonable efforts to ensure repayment of the loans. This section will present the relevant case law and arguments for the debtor when a Department of Education repayment plan is available for the debtor and will focus primarily on the Income Contingent Repayment Plan ("ICRP"). Eligible students who borrow under the Federal Direct Loan Program may select one of seven repayment options: standard repayment, graduated repayment, extended repayment, IBR, Pay as You Earn Repayment Plan, Income Sensitive Repayment Plan, or the ICRP. The plans are similar in design and eligibility, but may vary on repayment amount. More details are found on the Department of Education website at https://studentaid.ed.gov/repay-loans/understand/plans.

The annual amount owed under the ICRP is the lesser of: (1) the amount that would be paid if the borrower repaid the loans in twelve years, multiplied by an annual percentage factor that varies based on the borrower s adjusted gross income; or (2) twenty percent of the borrower s discretionary income. 34

C.F.R. § 685.209(b). The majority of courts that have addressed the availability of the ICRP to student loan debtors treat it as a factor to be considered in the undue hardship analysis. These courts appear to fall roughly into two camps: those that have found the ICRP to be a significant factor and those that have found its availability to be largely irrelevant to the undue hardship analysis.

A. Courts' Views on Student Loan Repayment Plans.

The Sixth Circuit, in dicta, stated that "[w]hile not a per se indication of a lack of good faith, . . . [Debtor s] decision not to take advantage of the ICR[P] is probative of her intent to repay her loans." *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch),* 409 F.3d 677, 682 (6th Cir. 2005). The Bankruptcy Appellate Panel for the Ninth Circuit came close to announcing a *per se* rule that failure to negotiate a repayment plan under the ICRP would render the debt nondischargeable. There court noted that the debtor failure to negotiate a repayment schedule was a factor "not beyond her reasonable control." *Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane),* 287 B.R. 490, 500 n.7 (B.A.P. 9th Cir. 2002).

Courts that find that ICRP's availability is largely irrelevant acknowledge that the ICRP places a lower immediate burden on the current obligations of student loan debtors, but they tend to focus on the longer-term debt and tax consequences of the program. When a debt is subject to negative amortization, these courts are likely to note the burden of carrying the growing debt for twenty-five years and the negative tax implications of forgiveness at the end of that period. Some courts have noted that they were not required to consider whether the debtor could make payments through the ICRP over the long term, because if they did so, the bar for discharging student loans would be so high that, in practice, no debtor could reach it. *See Johnson v. Educ. Credit Mgmt. Corp. (In re Johnson),* 299 B.R. 676, 682 (Bankr. M.D. Ga. 2003).

B. Section 523(a)(8) Does Not Require Enrollment in a Repayment Plan to Demonstrate Undue Hardship.

In some cases, the absence of any voluntary payments and the failure to sign up for alternative payment plans may not preclude a finding of good faith if the debtor has otherwise shown a serious attitude toward managing the loans and has made a sincere effort to establish a manageable repayment plan. A few

debtors have successfully argued that their decision not to sign up for income-sensitive repayment options was made in good faith, given their particular life circumstances. *See In re Barrett*, 487 F.3d 353 (6th Cir. 2007) (good faith found where there was no reasonable likelihood, given debtor's medical condition and inability to work full time, that he would ever be able to repay his student loans so that the ICRP did not provide a reasonable alternative to an "undue hardship" discharge).

1. Enrollment in an income contingent repayment plan is not indicative of good faith.

A willingness to participate in a repayment program, while an important indicator of good faith, is not required to satisfy the good-faith prong of the *Brunner* test. *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005). Debtors who fail to make voluntary payments or enroll in a repayment program can still prove good faith. To do so, however, they need a probative explanation for their behavior. *In re Barrett,* 487 F.3d 353, 365-66 (6th Cir. 2007). There is no per se rule that failure to agree to an alternative repayment plan establishes bad faith. *In re Benjumen*, 408 B.R. 9 (Bankr. E.D.N.Y. 2009). Good faith can be satisfied by a showing that the debtor is actively minimizing current household living expenses and maximizing personal and professional resources.

The good faith analysis is a fact-specific standard. *Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004)*. Specifically, section 523(a)(8) requires courts to examine good faith by considering various acts of the debtor rather than focusing on one determinative fact, such as enrollment in an ICRP. Further, "good faith does not necessarily command a history of payment. It does require a history of effort to achieve repayment." *Maulin v. Salliemae (In re Maulin),* 190 B.R. 153, 156 (Bankr. W.D.N.Y. 1995). As such, lack of participation in an ICRP should not prevent discharge of student loans when a debtor otherwise demonstrates a good faith effort to achieve repayment. "Section 523(a)(8) focuses on the burden of the debt itself, and not on the burden of a particular repayment schedule. 11 U.S.C. § 523(a)(8)." *Long v. Educ. Credit Mgmt. Corp. (In re Long*), 271 B.R. 322, 332 (B.A.P. 8th Cir. 2002).

2. Participation in a Repayment Plan Could Be Impractical, Burdensome,

and Futile.

In a number of cases, courts concluded that the debtor's circumstances were so desperate that participation in a repayment program would fail to result in "any meaningful repayment of the debt." *In re Balaski*, 280 B.R. 395, 400 (Bankr. N.D. Ohio 2002). *See also, e.g., Roth v. Educ. Credit Mgmt. Corp. (In re Roth),* 490 B.R. 908, 919-20 (B.A.P. 9th Cir. 2013) ("Given [debtor's monthly plan payment of zero, and likelihood that payment would never increase], we conclude that [d]ebtor's refusal to participate in the [Income Based Repayment Plan] should not be weighed against her . . . ."). When courts look to repayment plans as a factor, they evaluate both the benefits and drawbacks of the repayment programs on the debtor. When there is no indication that the debtor will ever improve her financial affairs to a point allowing her to make repayments on the loan, "the law should not impose negative consequences for failing to sign up for the program." *In re Roth*, 490 B.R. 908, 914 (B.A.P. 9th Cir. 2013). Section 523(a)(8) plainly provides for discharge of student loans regardless of in an income contingent repayment plan.

C. Mandatory Participation in Repayment Plans Conflicts with Bankruptcy Code's Fresh Start Policy.

In *In re Bronsdon*, the district court recognized that the debtor was eligible for a zero monthly payment under the ICRP, but did not penalize the debtor for not participating because "the forgiveness of the student loan would eventually result in a tax liability that would subject the Debtor's Social Security benefits to garnishment." *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 795 (B.A.P. 1st Cir. 2010). Participation could create a "vicious cycle that could leave the Debtor in a financial state much more desperate than the one she is currently enduring." *Id*. Where there is no anticipated significant improvement of the debtor's financial condition, participation in an ICRP "may be detrimental to the debtor's long-term financial health." *Id.* Courts should not surrender their ability to grant a fresh start to a per se rule requiring participation in an agency program. *Krieger v. Educ. Credit Mgmt. Corp*., 713 F.3d 882, 884 (7th Cir. Ill. 2013). Bankruptcy courts are empowered to make the undue hardship determination under section 523(a)(8) without consideration of an ICRP. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004). Adherence to a *per se* rule that first requires the debtor to

exhaust administrative remedies removes this discretion from the court. *In re Bronsdon*, 435 B.R. 803–04. Such a requirement sparks danger in that courts could utilize this mathematical administrative determination as a "substitute for the thoughtful and considered exercise" of the bankruptcy courts. *In re Duranni*, 311 B.R. at 509.

1. Participation in an ICRP could Impose Harsh Tax Consequences on Debtors.

Some debtors may benefit significantly from participation in the ICRP, avoiding default until their financial situation improves. However, the program does have drawbacks the Court must consider in the totality of the circumstances test. When a debtor's payments are less than the monthly interest amount, the interest continues to accrue; the debt increases over time even as the debtor makes his or her scheduled payments. *In re Korhonen*, 296 B.R. at 496–97; *In re Strand*, 298 B.R. at 375; *In re Ford*, 269 B.R. at 677. After the twenty-five year repayment period, this increased debt is cancelled, resulting in income to the debtor. *In re Korhonen*, 296 B.R. at 496–97. This income may be tax able where the debtor is not insolvent and places what is likely to be an insurmountable tax burden on the debtor. *In re Berscheid*, 309 B.R. at 13 ("... [Debtor] would go to his grave either indebted to [Defendant] or, if not, indebted to the IRS ..."); *In re Lee*, 352 B.R. at 97 (cancelled debt treated as tax able income); *In re Limkemann*, 314 B.R. at 196 (cancelled debt leads to "enormous" tax liability), *citing In re Strand*, 298 B.R. at 376–77. Debt forgiven due to discharge is calculated as gross income unless the debtor is insolvent at time of forgiveness. 26 USCS § 180 (a)(1)(b). Take note, however, the exclusion applies only up to the amount by which you are insolvent. *Id.*

2. Section 523(a)(8) and Repayment Plans Are Mutually Exclusive Remedies Because They Accomplish Different Goals.

Repayment plans are designed to help borrowers avoid default by creating a twenty-five-year repayment schedule, not give the debtor a fresh start. Section 523(a)(8) and the repayment programs are based on different ability-to-pay standards, and thus, participation in an ICRP is not a dispositive

determination of undue hardship. *Cumberworth v. U.S. Dep't of Educ. (In re Cumberworth)*, 347 B.R. 652, 660 (B.A.P. 8th Cir. 2006) (citation omitted). To find undue hardship under section 523(a)(8), the court must examine whether the debtor can maintain a minimal standard of living based on her current income and expenses if forced to repay the student loans. The debtor is not required to live below the federal poverty level to demonstrate a "minimal standard of living" under section 523(a)(8). *Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 317 (Bankr. S.D.N.Y. 2002). Under an ICRP, however, the debtor must make repayments toward his student loans if his income exceeds the federal poverty level regardless of whether he lives below a minimal standard of living. 20 U.S.C. § 1087e(d)(1); 34 C.F.R. §§ 685.208–685.209 (2015). Thus, if forced to participate in an ICRP, some debtors could be required to make repayments although she currently lives below the minimal standard of living required in section 523(a)(8).

IV. CONCLUSION

The totality of the circumstances test promulgated by the Eighth Circuit is ideal because the plain language and legislative history of section 523(a)(8) support utilization of a fact-specific undue hardship inquiry. Section 523(a)(8) does not provide exclusive factors to determine undue hardship and rigid adherence to particular factors is a restriction simply not in line with congressional intent. The totality of the circumstances test rests on the belief that fairness and equity require an examination of the unique facts and circumstances that surround each particular bankruptcy. Although the bankruptcy court is one of equity, the *Brunner* test explicitly excludes consideration of extraneous factors and equitable concerns. According to *Brunner*, discharge of student loans requires a certainty of hopelessness and the debtor must show that she will likely never be able to honor her obligations. Underlying these premises is the Supreme Court's holding that exceptions to discharge should be narrowly construed, which furthers the Bankruptcy Code's fresh start policy. The exceptions to discharge should not be enlarged via judicial interpretation because any doubt is to be resolved in the debtor's favor. The undue hardship test adopted in *Brunner* favors the creditor, and thus, contradicts the very basic principle of interpreting statutes in favor of the debtor.

Additionally, the plain language and legislative history of section 523(a)(8) permit discharge of

student loans without consideration of participation in a Depart of Education repayment plan. Nowhere in § 523(a)(8) is the debtor required to participate in one of these repayment plans to receive a student loan discharge. A *per se* rule that first requires the debtor to enroll in a repayment plan removes discretion from the courts to determine undue hardship and places it with an administrative agency. However, a debtor's eligibility to participate in a repayment plan is one of many factors to consider in evaluating the totality of the debtor's circumstances and should not be outcome-determinative.

Section 523(a)(8) and enrollment in repayment programs are exclusive remedies and seek to accomplish two different goals. Section 523(a)(8) provides the honest but unfortunate debtor with a complete fresh start, whereas participation in an ICRP helps the debtor restructure her repayment plan. Hence, participation in an ICRP is often not a wise choice for many debtors. Where there is no chance that the debtor will ever be able to repay the loan, the better result is to give the debtor a fresh start. Thus, the debtor should receive an immediate fresh start where she demonstrates that repayment constitutes an undue hardship regardless of participation in an ICRP.