Selected Issues in Discharge of Student Loans and Hardship Discharge

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Discharge of Student Loans

11 U.S.C. § 523(a)(8) provides that a discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) does not discharge a qualifying educational loan:

(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; [1]

[1]Section 523(a)(8) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Prior to BAPCPA, § 523(a)(8) of the Bankruptcy Code read 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) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or 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. § 523(a)(8).

Undue Hardship

The term "undue hardship" is not defined by the Bankruptcy Code, but the section's legislative history implies that the purpose behind the statute was to set a high bar to discharge for educational loans, in order to protect the solvency of the educational loan program, while maintaining the Code's overall principle of providing a fresh start for the honest but unfortunate debtor. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1977).

> The heightened standard for discharging student loans is absolutely necessary to prevent abuses of the educational loan system and to safeguard the financial integrity of that system in order to preserve its benefits for future students who will rely on the system as the means for obtaining a college education. The discharge of student loans is reserved for those most extreme instances of financial destitution.

Douglas v. Educ. Credit Mgmt. Corp., 366 B.R. 241, 263 (Bankr. M.D. Ga. 2007).

> There are two policy bases for the nondischargeability of student loans. First, "legislative history indicates a Congressional policy of excepting discharge in those inequitable situations where debtors with superior education and employment skills were intentionally abusing the fresh start policies ... [of] the bankruptcy laws." ... [T]he second policy basis for enacting the student loan nondischargeability statute was "to preserve the financial integrity of the loan system by assuring the availability of monies to students in the future."

Kidd v. Student Loan Xpress, Inc. and Xpress Loan Servicing, 458 B.R. 612 (Bankr. N. D. Ga. 2011) (internal citations omitted).

Determining If an Undue Hardship Exists

The three-prong test first established by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Educ. Servs Corp.*, 831 F.2d 395 (2nd Cir. 1987), has become the standard adopted by several circuit courts of appeals as the appropriate standard for undue hardship. In 2003, the Eleventh Circuit Court of Appeals adopted the *Brunner* undue hardship test in *Hemar Ins. Corp. of Am. v. Cox*, 338 F.3d 1238 (11th Cir. 2003) (While "[b]ankruptcy courts use a wide variety of tests to determine whether the debtor has demonstrated undue

hardship . . . [s]everal of our sister circuits . . . have adopted the test set forth by the Second Circuit in *Brunner*. Id. at 1241).[2]

The three prongs of the *Brunner* standard are as follows:

(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.

Brunner, 831 F.2d at 396; *Cox*, 338 F.3d at 1241.

A debtor seeking to discharge a debt that falls under 11 U.S.C. §523(a)(8) bears the burden of proving the existence of undue hardship. *In re Ekenasi*, 325 F.3d 541 (4th Cir. 2003); *In re Faish*, 72 F.3d 298 (3d Cir. 1995). In cases regarding the dischargeability of debt, the standard of proof is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291

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[2] In the Eighth Circuit, a "totality of the circumstances test" is used to determine whether it would be an "undue hardship" on a debtor to require her to repay the student debt she owes. [*In re Long,* 322 F.3d 549 (8th Cir. 2003), *citing Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews),* 661 F.2d 702 (8th Cir. 1981).] This test requires the bankruptcy court to examine the totality of the circumstances, "with special attention to" (1) the debtor's current and future "reasonably reliable financial resources;" (2) the debtor's and his or her dependents' reasonable, necessary living expenses and (3) "any other circumstances unique to the particular bankruptcy case." Regarding the first and second factors, the debtor should demonstrate that she has "done everything possible to minimize expenses and maximize income," and the possibility of changes in the future should also be presented. Many courts assessing the question of undue hardship under the totality-of-the-circumstances approach have resorted to a list of factors as a guide. Factors to be examined include:

1. total incapacity now and in the future to pay one's debts for reasons not within the control of the debtor;
2. whether the debtor has made a good-faith effort to negotiate a deferment or forbearance of payment;
3. whether the hardship will be long-term;
4. whether the debtor has made payments on the student loan;
5. whether there is permanent or long-term disability of the debtor;
6. the ability of the debtor to obtain gainful employment in the area of study;
7. whether the debtor has made a good-faith effort to maximize income and minimize expenses;
8. whether the dominant purpose of the bankruptcy petition was to discharge the student loans; and
9. the ratio of the student loan to the total indebtedness.

While it has not expressly adopted the totality-of-the-circumstances test, the Sixth Circuit has employed a similar approach. It expressly rejected sole use of the *Brunner* test and held that the courts should look at many factors not limited to those set forth in *Brunner.* [*Hornsby v. Tennessee Student Assist. Corp.,* 144 F.3d 433 (6th Cir. 1998).] Excerpted from: Craig Peyton Gaumer, *Discharging Health Education and Other Government-Related Student Loans,* Am. Bankr. Inst. Journal, May 2005.

(1991). If it is determined that any of the three prongs of the *Brunner* standard is not met by a debtor seeking a discharge of a qualifying student loan, then the inquiry is immediately terminated, and the loan obligations are deemed nondischargeable. *See Faish*, 72 F.3d at 305.

1. Can the debtor maintain a minimal standard of living if forced to repay the loans?

In determining whether a debtor can maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans, the Bankruptcy Court for the Northern District of Alabama identified six factors that it deemed necessary for a minimal standard of living in America, including shelter; basic utilities; food and personal hygiene products; vehicles and the costs associated with a vehicle; health insurance; and some source of recreation. *Ivory v. United States*, 269 B.R. 890, 899 (Bankr. D. Ala. 2001).

The Bankruptcy Court for the Middle District of Georgia utilized these factors, adding that the six *Ivory* factors must be viewed with common sense when applying the standard to determine the reasonableness of each expense.

> If Debtor expends funds for items not necessary for the maintenance of a minimal standard of living or if Debtor expends too much for an item that is needed to maintain that minimal standard, then it is unlikely that, given Debtor's present circumstance, the first prong of the *Brunner* test is satisfied where such overpayment would permit Debtor to cover the expense of her student loan debt without sacrificing a minimal standard of living.

Douglas v. Educ. Credit Mgmt., Corp. (*In re Douglas*), 366 B.R. 241, 254 (Bankr. M.D. Ga. 2007).

A Debtor's failure to attempt to secure a reduced monthly payment through the Ford Program was fatal to his request that the court find repayment of the loan would be an undue hardship because it was unable to determine if the Debtor could meet the first prong of the *Brunner* test.

> Wieckiewicz's eligibility under the Ford Program would play a substantial role in whether he would be able to show undue hardship under *Brunner*. If he qualified for the Ford Program, Wieckiewicz's loan payments could have been reduced to $0 per month, and eventually the loans would be forgiven. On the other hand, if Wieckiewicz did not qualify, the bankruptcy judge indicated a strong likelihood that Wieckiewicz's loan payments were high enough that he would be able to establish undue hardship under *Brunner* because he would not be able to maintain a minimal standard of living.

Wieckiewicz v. Educ. Credit Mgmt. Corp., 2011 U.S. App. LEXIS 21051 (11th Cir. Fla. Oct. 17, 2011).

2. Do additional circumstances exist indicating that the Debtor's state of affairs is likely to persist for a significant portion of the repayment period of the student loans?

The Debtor also bears the burden of proving that additional circumstances exist to indicate that her hardship is likely to persist for a significant portion of the repayment period of the loans sought to be discharged. "Under *Brunner*, undue hardship does not exist simply because the debtor presently is unable to repay his or her student loans; the inability to pay must be 'likely to continue for a significant time,' … such that there is a '**certainty** of hopelessness' that the debtor will be able to repay the loans within the repayment period." *Educ. Credit Mgmt. Corp. v. Mosley* (*In re Mosley*), 494 F.3d 1320, 1326 (11th Cir. Ga. 2007) (citation and internal quotation omitted). A debtor must show "a total incapacity . . . in the future to pay [her] debts for reasons not within her control." *In re Mallinckrodt*, 274 B.R. 560, 566-67 (S.D. Fla. 2002) (quoting *Brightful v. Pa. Higher Educ. Assistance Agency*, 267 F.3d 324, 328 (3d Cir. 2001)). A "certainty of hopelessness" should be present in order to satisfy the second prong. *See also, In re Downey*, 255 B.R. 72, 76-77 (Bankr. N.D. Fla. 2000) (Plaintiff, a public defender, provided no evidence that her financial situation was unlikely to improve).

The Court in *Douglas v. Educ. Credit Mgmt., Corp.* elaborated on this *Brunner* requirement:

> Applying prong 2 "does not necessarily require future income predictions." Instead, prong 2 focuses on "the present existence of circumstances--circumstances in addition to a present lack of ability to pay--that strongly suggest an inability to pay the loan over an extended period of time…." Simply stated, under prong 2, the debtor must prove by a preponderance of the evidence that her financial situation is not likely to improve. The debtor is not required to prove that her financial situation will persist due only to a serious illness, psychological problem, disability, or other exceptional circumstance; other types of circumstances could apply as well. In making its determination, a court should consider factors such as the debtor's age, age of the debtor's dependents, debtor's education, work and income history, physical and mental health, and other relevant circumstances. Satisfaction of prong 2 should be based upon a "certainty of hopelessness" into the future, "not simply a present inability to fulfill [a] financial commitment." A "'bleak forecast of the near future . . . [where] the debtor's straits are only temporary is insufficient to demonstrate undue hardship under the second prong of *Brunner*." Meeting the standard set forth under prong 2 is not an easy task for a debtor.

Douglas v. Educ. Credit Mgmt., Corp. (In re Douglas), 366 B.R. 241, 255-256 (Bankr. M.D. Ga. 2007) (footnotes omitted).

The Eleventh Circuit has recognized that a debtor's choice of profession also impacts this factor:

> 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. See *Frushour*, 433 F.3d at 401 433 F.3d at 401 (finding that "[h]aving a low-paying job . . . does not in itself provide undue hardship" where debtor was voluntarily employed in her preferred field as decorative painter); *Gerhardt*, 348 F.3d at 92 (stating that "nothing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim it would be an undue hardship to repay his student loans."); *Oyler*, 397 F.3d at 386 (refusing to discharge student loan debt of joint debtors where one debtor chose to work in low-paying job as a church pastor); *In re Grigas,* 252 B.R. 866 (Bankr. D.N.H. 2000) (finding that debtor who sought to confine employment to chosen field with little compensation and few opportunities did not meet *Brunner's* second prong); see also *Mallinckrodt*, 274 B.R. at 568 (stating that "[t]he student loan program does not guarantee that debtors will find financially rewarding employment in the field of their choice.").

Matthews-Hamad v. Educ. Credit Mgmt. Corp. (In re Matthews-Hamad), 377 B.R. 415, 422 (Bankr. M.D. Fla. 2007)

The requirements of the second prong of the *Brunner* test are necessarily demanding, because while many graduates do not have the means to repay their student loans early in their

career, given time and experience in the workforce, they typically become better able to repay creditors.

3. Has the Debtor made a good faith effort to repay the debt?

The third prong of the *Brunner* undue hardship test examines if the debtor has made "good faith" efforts to repay the student loan obligations prior to seeking a determination of dischargeability due to undue hardship. Good faith is measured under *Brunner* by the debtor's "efforts to obtain employment, maximize income, and minimize expenses." *Downey, supra*, 255 B.R. at 77 (citing *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993)).

The *Douglas* Court explained:

> Satisfaction of this third prong of the *Brunner* test requires a showing that the debtor made efforts "to satisfy the debt by all means--or at least by some means--within the debtor's reasonable control." A lack of bad faith is not the applicable test for deciding the third prong of *Brunner*. Actual payments are not required to prove good faith. The debtor is tasked with proving that either a good faith effort was undertaken to repay the student loans or "that the forces preventing repayment [were] truly beyond his or her reasonable control." "Since a debtor's good faith is interpreted in light of his ability to pay, a complete failure to make even minimal payments on a student loan does not prevent a finding of good faith where the debtor never had the resources to make payments."
> …
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> The "good faith" prong of *Brunner* has been described as: a moving target that must be tested in light of the particular circumstances of the party under review …. [T]he characterization of that effort must reflect not only a party's objective conduct, but also the environment in which that conduct occurs. In those instances in which the debtor cannot maintain a minimal standard of living even without payment of student loans, the demonstration of good faith does not necessarily command a history of payment. It does require a history of effort to achieve repayment, such as when a borrower diligently uses a deferment period to attempt the reorganization of her financial affairs.

Douglas, *supra* at 366 B.R. 259-260 (footnotes omitted).

Also relevant are the debtor's attempts to repay the obligation. Generally speaking, many of the recent cases addressing this issue indicate a willingness to consider participation in a

program such as Income Contingent Repayment Plan as one, non-dispositive factor to be considered in hardship analysis.[3] "Debtor's effort to seek out options to make the student loan debt less burdensome is an important component of the good-faith inquiry. [] Although not dispositive, it shows that the debtor takes her loan obligations seriously and is trying to repay them despite her unfortunate circumstances." *Matthews-Hamad, supra* at 377 B.R. 423.

Selected Issues in Student Loan Dischargeability

1. Does the closing of the school affect the dischargeability of a student loan?

The student loan exception to discharge focuses on the kind of debt involved without any regard to the student's satisfaction of the educational services provided or the identity of the borrower. *See Salter v. Educ. Res. Inst. (In re Salter)*, 207 B.R. 272, 275 (Bankr. M.D. Fla. 1997) (holding that "the proper focus should be on the kind of debt involved, rather than how the money was spent, or who was the borrower"); *Educ. Res. Inst., Inc. v. Varma (In re Varma)*, 149 B.R. 817, 818 (N.D. Tex. 1992) ("The relevant inquiry into the applicability of this section is the purpose of the loan, not the beneficiary of the education.").

Debtor's focus on the acts of Silver State [in closing before the debtor completed her courses] is akin to the losing arguments advanced by co-signors on a student loan debt where

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[3] The William D. Ford Federal Direct Loan Program, Subpart B – Borrower Provisions (34 CFR 685.209), states, in relevant part: (2) The annual amount payable under the income contingent repayment plan by a borrower is the lesser of –

> (i) The amount the borrower would repay annually over 12 years using standard amortization multiplied by an income percentage factor that corresponds to the borrower's adjusted gross income (AGI) as shown in the income percentage factor table in a notice published annually by the Secretary in the Federal Register; or (ii) 20 percent of discretionary income.

(3) For purposes of this section, discretionary income is defined as a borrower's AGI minus the amount of the "HHS Poverty Guidelines for all States (except Alaska and Hawaii) and the District of Columbia" as published by the United States Department of Health and Human Services on an annual basis.

…

(5) Each year, the Secretary recalculates the borrower's annual payment amount based on changes in the borrower's AGI, the variable interest rate, the income percentage factors in the table in the annual notice published by the Secretary, and updated HHS Poverty Guidelines (if applicable).

they received no direct educational benefit. *Kidd v. Student Loan Xpress, Inc. (In re Kidd),* 458 B.R. 612, 621 (Bankr. N.D. Ga. 2011). "The decision of whether or not to borrow for a college education lies with the individual . . . If the leveraged investment of an education does not generate the return the borrower anticipated, the student . . . must accept the consequences of the decision to borrow." *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993). "Cases have repeatedly held that where the debtor chose to pursue a course of study, the relative value of that study to the debtor in the job market is not a consideration in determining whether or not repayment of the loans constitutes an 'undue hardship.'" *Vang v. UW Stout Student Servs*. (*In re Vang*), 324 B.R. 76, 83 (Bankr. W.D. Wis. 2005).

2. Partial discharge of student loans?

Courts addressing the issue of whether a bankruptcy court has the power to enter a partial discharge have reached three different conclusions. The "strict approach" adopted by the Eleventh Circuit holds that the plain language of § 523(a)(8) requires an all-or-nothing framework – either all of the loans are dischargeable or they are not. *See, e.g., Hemar Ins. Corp. of Am. v. Cox* (*In re Cox*), 338 F.3d 1238 (11th Cir. Ga. 2003); *United Student Aid Funds, Inc. v. Taylor* (*In re Taylor*), 223 B.R. 747 (9th Cir. BAP 1998); *Young v. PHEAA* (*In re Young*), 225 B.R. 312 (Bankr. E.D. Pa. 1998).

> The language of § 523(a)(8) clearly and unambiguously provides that the bankruptcy laws do "not discharge an individual debtor from *any* debt" arising from a student loan. 11 U.S.C. § 523(a)(8) (emphasis added). The only exception is that an individual debtor may be discharged of his student loan indebtedness upon a showing that "excepting such debt from discharge . . . will impose an *undue hardship* on the debtor." Id. (emphasis added). There is no other language within § 523(a)(8) that could reasonably be construed to permit a discharge, partial or otherwise, absent a finding of "undue hardship."

Cox, 338 F.3d at 1242.

> Furthermore, there is no evidence of an intent to permit judicially created exceptions to § 523(a)(8) via the "fresh start" principle.

….

> Because the specific language of § 523(a)(8) does not allow for relief to a debtor who has failed to show "undue hardship," the statute cannot be overruled by the general principles of equity contained in § 105(a). To allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of § 523(a)(8) mandates would be "tantamount to judicial legislation and is something that should be left to Congress, not the courts."

Id. at 1243.

An opposing view concludes that student loans may be partially discharged in a multitude of ways, including the discharge of a partial principal amount. *Kapinos v. Graduate Loan Center*, 243 B.R. 271, 277 (W.D. Va. 2000) ("[T]he bankruptcy court may exercise its equitable power under § 105 to discharge a portion of [the debtor's] student loans even if it finds that the *Brunner* standard has not been satisfied.")

A third approach "applies §523(a)(8) to a debtor's educational debt on a loan-by-loan basis, with the result that some of a debtor's student loans may be discharged while others may be found nondischargeable." *Grigas v. Sallie Mae Serv. Corp.* (*In re Grigas*), 252 B.R. 866, 873 (Bankr. D.N.H. 2000); *see also, Educ. Credit Management Corp. v. Kelly* (*In re Kelly*), 312 B.R. 200 (1st Cir. BAP 2004).

Regardless of the approach taken by the courts, as the United States Court of Appeals for the Sixth Circuit set forth in *Miller v. Pa. Higher Educ. Assistance Agency* (*In re Miller*), 377 F.3d 616 (6th Cir. 2004) as a threshold matter, the vast majority of courts would hold that even a partial discharge could not be considered unless and until the debtor satisfied the *Brunner* requirements. *Id.* at 622. The Court stressed "that the requirement of undue hardship must

always apply to the discharge of student loans in bankruptcy - regardless of whether a court is discharging a debtor's student loans in full or only partially." *Id.*

3. Evidence of medical condition.

In *Educ. Credit Mgmt. Corp. v. Mosley*, (*In re Mosley*), 494 F.3d 1320 (11th Cir. Ga. 2007), the debtor was an impoverished veteran with back problems, depression, anxiety and alcoholism. The student loan creditor argued that without providing corroborating medical evidence, records or testimony to prove his condition and its severity, his claims could not be taken as fact and therefore hardship could not be established. The Eleventh Circuit disagreed and, based in part on precedent from other courts across the country, decided that the debtor's credible testimony was enough upon which to base a decision.

> The Sixth Circuit recently rejected Educational Credit's position in *Barrett v. Educational Credit Management Corp.*, 487 F.3d 353, 356 (6th Cir. 2007). In *Barrett*, the bankruptcy court discharged the debtor's student loans after concluding that the debtor established undue hardship under *Brunner* because various medical conditions, particularly avascular necrosis, caused him severe pain that prevented him from working and made employers reluctant to hire him. *Id.* at 357-58. The bankruptcy court's conclusion was based largely on the debtor's testimony at the adversary proceeding, where the debtor also introduced tax records and a letter from his doctor that documented his cancer treatment but not his avascular necrosis. *Id.* at 361. The Sixth Circuit concluded that this evidence was sufficient to support the conclusion of undue hardship, rejecting Educational Credit's argument that the debtor was required to produce corroborating medical evidence. *Id.* at 359. The court reasoned that requiring corroborating evidence when the debtor cannot afford expert testimony or documentation "imposes an unnecessary and undue burden on [the debtor] in establishing his burden of proof." *Id.* at 360 (quoting Bankruptcy Appellate Panel opinion) (internal quotation marks omitted). As the court explained, the crucial requirement is that the debtor show how his medical conditions prevent him from working, *id.*, and this can be accomplished by an array of evidence, including the debtor's credible testimony, *id.* at 361.

Mosley, 494 F.3d at 1325.

Contrariwise, in the case of *In re Burton*, 339 B.R. 856 (Bankr. E.D. Va. 2006), the Court went to great lengths to discuss the medical evidence necessary to carry the debtor's burden of proof in student loan dischargeability cases. In *Burton*, the debtor suffered from severe mental disorders which prevented him "from engaging in substantial gainful activity." *Id.* at 867. The debtor lived in an efficiency apartment "for people who are formerly homeless and disabled" and received Social Security disability as his sole source of income. *Id.* at 866, 867. Despite these dire conditions, the Court, although sympathetic to the debtor, found that he simply failed to meet his burden of proof and held the student loans nondischargeable. In so holding, the Court stated as follows:

> This Court believes that Burton has suffered many hardships, such as hospitalizations and job losses, and that he has had a difficult time remaining consistently employed. However, the difficulty with this prong for the Court lies in the fact that while Burton testified to a difficult employment history where he was incapable of sustaining permanent lucrative employment, it is equally clear that this inability to sustain long-term employment was due largely to his medical problems. Despite this, however, Burton did not present any evidence besides his own testimony regarding how his medical condition will impact his ability to sustain future long-term employment.

Id. at 874.

4. Timing of dischargeability claim in Chapter 13.

In the case of *Pair v. United States Dept. of Educ. (In re Pair),* 269 B.R. 719 (Bankr. N.D. Ala. 2001), the court held that, in a Chapter 13 case, an undue hardship proceeding is not ripe for adjudication until the end of a Chapter 13 case when the debtor's financial circumstances are clearer.

> [I]t is impossible to determine whether a Chapter 13 debtor will be able to maintain a minimal standard of living after receiving a discharge because the debtor's income could increase during the three to five year life of a Chapter 13 plan. Further, at the end of a plan a debtor's circumstances will have changed. The

> debtor will receive a discharge of most debts which may increase the debtor's ability to pay at least a portion of the student loan. Finally, the court found that filing an undue hardship complaint at the beginning of a case demonstrates a lack of good faith under *Brunner*.

269 B.R. at 720. *See also: United States v. Lee*, 89 B.R. 250 (N.D. Ga. 1987), *aff'd United States v. Hochman (In re Hochman)*, 853 F.2d 1547 (11th Cir. 1988) (determination of dischargeability of student loan debt prior to "successful completion of all payments under a Chapter 13 Plan is "premature").

5. Cosigner Liability

Non-student obligors on student loans have argued that the dischargeability provision for student loans does not apply, and the debts are dischargeable without a showing of undue hardship, because the borrower is not the student. The vast majority of cases reject this argument, principally based on the plain language of the statute and secondarily, on Congress' intent to protect the student loan program. Noting that the statute excepts from discharge an *individual* debtor from *any* debt, and does not distinguish between student and non-student borrowers, the court in *Kentucky Higher Educ. Assistance Auth. v. Norris (In re Norris),* 239 B.R. 247, 251 (M.D. Ala. 1999) held that "there is no requirement in §523(a)(8) that the loans be for the direct educational benefit of the borrower [and that] in analyzing the exception to discharge under this section, the focus should be on the nature of the debt and the lender rather than on the status of the debtor" noting that a majority of cases have held that a co-signor's, guarantor's or non-student's liability is nondischargeable under § 523(a)(8). 239 B.R. 251. *See also Lawson v. Sallie Mae, Inc. (In re Lawson),* 256 B.R. 512 (Bankr. M.D. Fla. 2000); *Salter v. The Educ. Resources Inst., Inc. (In re Salter),* 207 B.R. 272 (Bankr. M.D. Fla. 1997).

A small number of courts have reached a contrary result which excludes non-student obligors from the reach of this provision, determining a literal application of statute to be contrary to the

expressed legislative intent of preventing recent graduates from discharging their educational loans. *See e.g. In re Pryor*, 234 B.R. 716 (Bankr.W.D.Tenn. 1999).

Hardship Discharge

11 U.S.C § 1328

1328:

…

(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

…

1. Notice to Creditors:

Upon the filing of a

Rule 4007. Determination of Dischargeability of a Debt

(c) Time For Filing Complaint … Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.

> Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). …

(d) Time For Filing Complaint Under § 523(a)(6) in Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.

> On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

2. Elements of a Hardship

The ultimate evidentiary burden to establish an entitlement to a hardship discharge under 11 U.S.C. §1328(b) rests upon the debtor. If all three elements are satisfied, the granting of a hardship discharge is within the discretion of this Court and may be granted after notice and a hearing. .

i. Circumstances for which the debtor should not justly be held accountable:

Courts differ on whether the change in circumstances must be "catastrophic" or whether some lesser degree of change is sufficient.

> Courts have limited the application of hardship discharge to catastrophic circumstances. *See In re Dark*, 87 Bankr. 497 (Bankr. N.D. Ohio 1988) (a hardship discharge was denied where debtor's marriage had terminated, debtor had lost the financial assistance from her mother due to the mother's death, and debtor had surgery which resulted in a reduction of her employment and income); *In re Graham*, 63 Bankr. 95 (Bankr. E.D. Pa. 1986) (the death of the debtor warranted a hardship discharge); *In re Bond*, 36 Bankr. 49 (Bankr. E.D. N.C. 1984) (a hardship discharge was allowed where debtor had died). Unanticipated death precluding completion of payments under a confirmed plan has been understandably held to be a circumstance beyond the debtor's control. As one leading authority has noted: "hardship discharge under § 1328(b) is reserved for

> the truly worst of the awfuls -- something more than just the temporary loss of a job or temporary physical disability." K. Lundin, *Chapter 13 Bankruptcy*, § 9.18 at 9-26 (1990).

In re White, 126 B.R. 542, 545 (Bankr. N.D. Ill. 1991). *But see Bandilli v. Boyajian* (*In re Bandilli*), 231 B.R. 836 (B.A.P. 1st Cir. R.I. 1999) (excerpted below).

> We are unwilling to read the word catastrophic into the statute.
> …
> Congress has not hesitated in several areas of the Bankruptcy Code to insert a "charged" term to better elucidate its intention. For example, in § 707(b), dismissal is only appropriate where the court finds "substantial abuse." In § 523(a)(8), discharge of a student loan is permitted only where the court finds that nondischargeability of the debt would cause an "undue hardship." And, in § 524(c), the court must determine the absence of "undue hardship" before reaffirmation of a prepetition debt by an individual debtor will be deemed enforceable or require counsel for the debtor to so certify. Yet, for the first element of § 1328(b), Congress has asked only that the Court determine whether the debtor is "justly . . . accountable" for the plan's failure. The word "accountable" is comparatively mild to the emotionally-laden term "catastrophic." Of course, we are mindful that a request for discharge under § 1328(b) merits special vigilance.

Bandilli, 231 B.R. at 840 (footnotes omitted). *See also*, *In re Edwards*, 207 B.R. 728, 730 (Bankr. N.D. Fla. 1997) (declining to impose a requirement for catastrophic circumstances, noting the absence of such a requirement in the statute, that creditors must be paid at least what they would have been paid in a chapter 7 case and the limited [pre-BAPCPA] nature of a chapter 13 discharge.)

> Requiring that a debtor demonstrate the existence of catastrophic circumstances seems overly harsh given the fact that §1328(b)(2) requires that unsecured creditors must have received at least the amount they would have received in a liquidation under Chapter 7. Congress's use of the phrase "for which the debtor should not justly be held accountable" in §1328(b)(1) is much milder than the emotionally-laden "catastrophic."

In re Bacon, 2003 Bankr. LEXIS 2386, 4-5 (Bankr. S.D. Ga. Aug. 19, 2003).

Whatever the threshold, Courts generally agree that "a request for a hardship discharge is to be treated with some gravity, and that the loss of employment alone is insufficient." (citations omitted).

Other considerations:

- Circumstances arising after the petition date or confirmation date are more relevant than prepetition events or those occurring during the early months of a case.
- Economic circumstances must not have existed or been foreseeable at the time of confirmation, must be beyond debtor's control, and the debtor must have made every effort to overcome the circumstances.
- Something more than a temporary loss of job or temporary physical disability is required.
- Circumstances should not have been caused by the debtor's misconduct, *i.e.* substance abuse or criminal acts.
- A modification of the plan should be impossible.

ii. The value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7.

The application of the rule above is illustrated in *In re Easley*, 240 B.R. 563 (Bankr. W.D. Mo. 1999):

> In other words, the Easleys' were retaining nonexempt property that they valued at $10,000.00, therefore, their unsecured creditors were entitled to plan payments with a value of at least $10,000.00 as of the effective date of the plan. The Bankruptcy Appellate Panel for the Eighth Circuit (the BAP) recently held that the effective date of a Chapter 13 plan is the date the plan is confirmed. And, the BAP held that the liquidation analysis, or best interest of creditor's test, is performed only once in Chapter 13, and that is at the time of confirmation. If the Easleys valued their boat, motor, and trailer at $10,000.00 prior to confirmation, and the plan was confirmed based upon that valuation, then that is the value to be used throughout the case for purposes of the liquidation analysis. Since they have had possession and use of the boat for over 18 months, any depreciation in its value since the effective date of the plan is not to be considered in determining whether the best interest of creditors' test has been met.

240 B.R. at 566 (internal footnotes omitted).

iii. Modification is not practical:

Considerations:

- A deceased debtor's plan is not practical to modify.
- Modification to reduce required plan payments to amount already paid as an alternative to a hardship discharge. .
- Modification is not possible when the debtor's plan has exceeded 5 years at the time of the request for a hardship discharge.
- A failed request for a hardship discharge may be problematic for a debtor who later attempts to modify because he has already asserted that a modification is not practical.
- The Bankruptcy Code prefers modification of the plan as a solution to a debtor's problems and it should be attempted whenever it is feasible. *Bacon*, 2003 Bankr. LEXIS 2386, at 6.

3. Other conditions to discharge Post-BAPCPA

The following are all applicable to discharges under § 1328(b):[4]

- 11 U.S.C. § 1328 (f) limits on successive discharge;
- 11 U.S.C. § 1328(g) requirement for the completion of a course concerning personal financial management; and

[4] An individual debtor in a chapter 7 or chapter 13 case shall file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form. Fed. R. Bankr. P. 1007(b)(7). In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case *no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code.* Fed. R. Bankr. P. 1007(c).

- 11 U.S.C. § 1328(h) regarding the requirement for a finding that there is no reasonable cause to believe that § 522(q)(1) may be applicable to the debtor or that there is a pending proceeding related to § 522(q).

BAPCPA requires debtors bound by a judicial or administrative order, or by statute, to pay a domestic support obligation to certify that all amounts payable under such order or such statute have been paid before receiving a discharge under § 1328(a). The same certification is not required under § 1328(b) discharge. But because § 523(a)(6) is an exception to discharge in a Chapter 13 case only at hardship discharge under § 1328(b), a separate deadline is required at hardship discharge for the filing of complaints under § 523(a)(6). On motion by a Chapter 13 debtor for hardship discharge under § 1328(b), Bankruptcy Rule 4007(d) requires the court to enter an order fixing a time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) (only) with 30 days' notice of the deadline to all creditors. If the Chapter 13 debtor files a motion for hardship discharge before completion of payments under the plan, the bankruptcy court must give at least 30 days' notice of a deadline for the filing of a complaint to determine the dischargeability of debt for willful and malicious injury under § 523(a)(6).