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BANKRUPTCY—Student Loans for Life, The Discharge of Student Loans Under 11 U.S.C. § 523 (A)(8)—Using the Eighth Circuit's Totality-of-the-Circumstances Test and the Partial Discharge Method

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BANKRUPTCY—STUDENT LOANS FOR LIFE, THE DISCHARGE OF
STUDENT LOANS UNDER 11 U.S.C. § 523(A)(8)—USING THE EIGHTH
CIRCUIT’S TOTALITY-OF-THE-CIRCUMSTANCES TEST AND THE PARTIAL
DISCHARGE METHOD

I. INTRODUCTION

These days, neither a high school diploma nor a college degree guarantees a career. However, society tells us that everyone should go to college and earn a degree.¹ Society convinces us that “college is more or less a synonym for success.”² After a few decades of high school counselors attempting to get so many high school students to college, a college degree has lost a lot of its value.³ With so many more people going to college, the employment opportunities are just not available.⁴

Furthermore, the price of attending college has done nothing but increase.⁵ In fact, “[t]he national average cost of attending a four-year public college is over \$28,000 per year, and the average cost of attending a four-year private college is now over \$59,000 [per year].”⁶ With expenses running on average more than \$100,000 for a degree, student loans are a must for a huge percentage of students.⁷ In 2012, more than seventy percent of students accrued some sort of student loan debt.⁸

Those student loans can wreak havoc on the individuals taking the loans, on their families, and on the economy as a whole for years down the line.⁹ Some individuals choose to turn to bankruptcy after struggling to pay

1. Shannon Doyne, *How Necessary is a College Education?*, N.Y. TIMES (Apr. 30, 2012, 6:03 AM), <https://learning.blogs.nytimes.com/2012/04/30/how-necessary-is-a-college-education/>.

2. *Id.*

3. Don Philabaum, *Are We Producing Too Many College Graduates?*, LINKEDIN (Mar. 8, 2015), <https://www.linkedin.com/pulse/we-producing-too-many-college-graduates-don-philabaum/>.

4. *Id.*

5. Troy Onink, *College Costs Could Total As Much As \$334,000 In Four Years*, FORBES (Jan. 31, 2015, 11:59 PM), <https://www.forbes.com/sites/troyonink/2015/01/31/collegecould-cost-as-much-as-334000-total-in-four-years/#da9438dc86a4>.

6. *Id.*

7. *Quick Facts About Student Debt*, INST. FOR COLLEGE ACCESS & SUCCESS (Mar. 2014), https://ticas.org/sites/default/files/pub_files/Debt_Facts_and_Sources.pdf.

8. *Id.*

9. Phyllis Korkki, *The Ripple Effect of Rising Student Debt*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/business/the-ripple-effects-of-rising-student-debt.html>.

off their student loans, but an ambiguity in the statutory language has led to a split among the federal circuits on how to discharge those loans.¹⁰

This note will critically analyze different methods that the circuits have utilized when deciding how and when to discharge student loans. The Bankruptcy Code establishes the statute to determine how student loans are to be handled in 11 U.S.C.A. § 523.¹¹ However, the statute is ambiguous, leaving room for different interpretations by the courts.¹² First, this note will present the development of the two main approaches that have emerged throughout the circuits for determining whether a debtor has an “undue hardship” under section 523.¹³ Then, this note will explain the two main approaches courts have taken when deciding how much of the loan to discharge if an undue hardship is established.¹⁴ This note will argue that the Supreme Court of the United States should resolve the circuit split in favor of the United States Court of Appeals for the Eighth Circuit’s totality-of-the-circumstances test and partial discharge to embrace the purpose of the Bankruptcy Court.¹⁵ Specifically, after weighing the merits of the various courts’ approaches and taking into account all of the legislative history dealing with 11 U.S.C. § 523(a)(8),¹⁶ this note advocates for courts to use the totality-of-the-circumstances test to determine if an undue hardship exists, and then allow for the partial discharge of student loans under the broad equitable authority of Section 105 of the Code.¹⁷

II. BACKGROUND

This section will first discuss the treatment of student loans upon bankruptcy proceedings. Then, this section will discuss the statutory ambiguities which give rise to the split of authority among the circuits

10. Simple. Thrifty. Living., *Top 10 Reasons People Go Bankrupt*, HUFFPOST (Mar. 24, 2015), https://www.huffingtonpost.com/simple-thrifty-living/top-10-reasons-people-go-b_6887642.html.

11. 11 U.S.C.A. § 523(a)(8)(A)–(B) (Westlaw through Pub. L. No. 111-327) (“A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for . . . (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined . . . , incurred by a debtor who is an individual.”)

12. *Id.*

13. *See infra* Part II.C.

14. *See infra* Part II.D.

15. *See infra* Part III.A.

16. 11 U.S.C.A. § 523(a)(8); *see infra* Part II.B.1.

17. *See infra* Part III.

regarding what constitutes an “undue hardship,” and if the Court finds an undue hardship exists, whether it should allow partial discharge of the debt or require an “all or nothing” approach.

A. The History of Bankruptcy

Bankruptcy has been a part of the American legal system since the very beginning.¹⁸ The framers of the United States Constitution knew that bankruptcy was important to a functional society when they included the power to enact “uniform laws on the subject of Bankruptcies” under Article I powers of the legislative branch.¹⁹ James Madison believed that the “bankruptcy was intimately connected with the regulation of commerce.”²⁰ The first bankruptcy laws the United States passed were basically a copy of the English bankruptcy system in 1800.²¹ However, this code was repealed in 1803 and then implemented again in 1841²² only to be repealed in 1843, then implemented again in 1867, and repealed again in 1878.²³ During these years, the different states implemented their own bankruptcy laws giving the bankruptcy courts no clear path to a unified code.²⁴

Congress did not successfully exercise its Article I power until 1898 with the Bankruptcy Act of 1898; the first substantially-permanent bankruptcy code on a federal level.²⁵ This Act was in effect for eighty years until the Bankruptcy Reform Act of 1978 became effective.²⁶ Both the Act in 1898 and the Reform Act in 1978 brought uniformity to the country by taking and keeping the power out of the state court’s hands. The Reform Act brought some stability to the law of bankruptcy. However, the circuits have not interpreted the language in the code the same on every issue.

18. U.S. CONST. art. I, § 8, cl. 4.

19. *Id.*

20. Charles Jordan Tabb, *The History of Bankruptcy Law in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) (quoting THE FEDERALIST NO. 42).

21. *See id.* at 7.

22. *Id.* at 13.

23. *Id.* at 13–14 (“Each instance of federal legislation followed a major financial disaster: [T]he Act of 1800 followed the Panic of 1797; the Act of 1841 came after the Panic of 1837; the 1867 Act followed the Panic of 1857 and the Civil War; and finally the 1898 Act was passed in the wake of the Panic of 1893.”).

24. *See id.* at 13.

25. *See id.* at 23.

26. Enactment of Title 11 of the United States Code, H.R. Res. 8200, 95th Cong. (1978).

B. Bankruptcy Has a Broad Reach

The key concept behind the court of Bankruptcy is a fair new start for someone who has been struggling financially.²⁷ The entire point of bankruptcy is equity: “courts of bankruptcy are essentially courts of equity, and their proceedings inherently [are] proceedings in equity.”²⁸ When people are forced into a situation that they need to file for bankruptcy, they should not be forced to remain in debt strictly because some of their debt is from a student loan that they could have been struggling with for years.²⁹

The Bankruptcy Court gains its authority through many different specific statutes in the Code, as well as other general statutes. The language in Section 105 of the Bankruptcy Code is used to expand the authority of the court.³⁰ The bankruptcy courts use Section 105 to “issue orders as necessary to state law courts and administrative panels[.]”³¹ Also, “as this part will make clear, courts use § 105 in a manner not explicitly contemplated by Code to issue orders to private parties.”³² Section 105 was initially intended to operate as a bankruptcy-specific, gap-filling power because the courts believed that the general gap-filling powers of the All Writs Act were not sufficient to address all issues that could arise in the vast array of situations in bankruptcy court.³³

The Supreme Court has stated that Section 105 gives bankruptcy courts the “broad authority” to accomplish tasks that are important to the functioning of the Code.³⁴ This “broad authority” has caused several different schools of thought to develop. The majority view of the statute is to interpret Section 105 in a very broad and liberal way.³⁵ One court stated:

[t]he Code . . . states that bankruptcy courts may ‘issue any order, process, or judgement that is necessary or appropriate to carry out the provisions’ of the Code . . . Th[is] statutory directive [is] consistent with

27. See *Sherwood Partners Inc. v. Lycos*, 394 F.3d 1198, 1203 (9th Cir. 2005) (discussing the ideal embodied by the Bankruptcy Code that gives “the honest debtor” a fresh start and a new financial life through a bankruptcy discharge).

28. *Pepper v. Litton*, 308 U.S. 295, 304 (1939).

29. See Ann K. Wooster, *Discharge of Student Loan on Ground of Undue Hardship Under Bankruptcy Code of 1978 (11 U.S.C.A. § 523(a)(8)(B))—Good Faith Based on Making Payments and Negotiating Repayment Plan*, 62 A.L.R. FED. 2d 545 (2012).

30. Compare 28 U.S.C.A. § 1651(a) (Westlaw through Pub. L. No. 115-231), with 11 U.S.C.A. § 105(a) (Westlaw through Pub. L. No. 115-231).

31. Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L. J. 793, 802 (2003).

32. *Id.*

33. *Id.*

34. *United States v. Entergy Res. Co.*, 495 U.S. 545, 549 (1990).

35. See *id.*

the traditional understanding that bankruptcy courts, as courts in equity, have broad authority to modify creditor-debtor relationships.³⁶

When the Supreme Court uses language like this, it gives other courts the impression that Section 105 allows the judges to do just about whatever they believe will further the goal of bankruptcy, which is to give a fresh, fair start to the people involved.³⁷ This view has been utilized by the bankruptcy court when it comes to the discharge of student loans under Section 523.³⁸

Bankruptcy is typically an opportunity to resolve tremendous debt that has put the individual in a situation that seems to be unbearable.³⁹ However, because of 11 U.S.C.A § 523(a)(8), the default for student loans is that they are not dischargeable in bankruptcy and cannot be included in a general discharge.⁴⁰ “The legislative history behind the student loan exception to discharge indicates a Congressional concern for those cases of abuse of the bankruptcy laws by former students whose motivation in seeking relief was primarily to avoid payment of their educational loans.”⁴¹ The problem arose when students went to expensive undergraduate schools and expensive graduate programs, then before any of the payments would become due, they would file for bankruptcy to avoid payments.⁴² At the time, having a clean slate at the beginning of their careers was better than being in major debt.⁴³ These actions led Congress to enact 11 U.S.C. § 523(a)(8).⁴⁴ Congress’s purpose was to “safeguard the financial integrity of the educational loan programs.”⁴⁵ The Code states bankruptcy will not discharge an individual debtor from loans taken in order to receive an education.⁴⁶ Not only the funds taken for tuition itself, but also funds taken for the cost of living while receiving an education will not be dischargeable under Section

36. *Id.*

37. *Saxman v. Educ. Credit Mgmt. Corp.*, 325 F.3d 1168, 1173 (9th Cir. 2003).

38. *See Lawson v. Sallie Mae, Inc. (In re Lawson)*, 256 B.R. 512, 518–20 (Bankr. M.D. Fla. 2000).

39. Cara O’Neill, *See What Bankruptcy Can and Cannot Do*, NOLO, <https://www.nolo.com/legal-encyclopedia/chapter-7-13-bankruptcy-limits-benefits-30025.html> (last visited Mar. 15, 2018).

40. *See Watkins v. Educ. Credit Mgmt. Corp. (In re Watkins)*, 461 B.R. 57, 59–60 (W.D. Mo. 2011); 11 U.S.C.A § 523(a)(8) (Westlaw through Pub. L. No. 115-231).

41. *Ford v. N.Y. State Higher Educ. Servs. Corp. (In re Ford)*, 22 B.R. 442, 444 (Bankr. W.D. N.Y. 1982).

42. *See Rafael I. Pardo & Michelle R. Lacey, Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Student Debt*, 74 U. CIN. L. REV. 405, 419–23 (2005).

43. *Id.* at 424.

44. *Id.*

45. *Karben v. First Nat’l Bank of Md. and Nellie Mae, the Educ. Res. Inst., Inc. (In re Karben)*, 201 B.R. 681, 683 (Bankr. S.D.N.Y. 1996).

46. 11 U.S.C.A § 523(a)(8) (Westlaw through Pub. L. No. 115-231).

523 of the Code.⁴⁷ However, such debt may be discharged if excepting the debt “would impose an undue hardship on the debtor and the debtor’s dependents.”⁴⁸

C. Origins of the “Undue Hardship” Circuit Split

When Congress passed 11 U.S.C. § 523(a)(8), it intended to “safeguard the financial integrity of the educational program.”⁴⁹ 11 U.S.C.A. § 523(a)(8) states that “[a] discharge . . . does not discharge an individual debtor from any debt . . . unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents.”⁵⁰ Congress has never defined the parameters necessary for a debtor to be considered to have an undue hardship justifying the discharge of debt incurred for student loans under section 523(a)(8).⁵¹ Apparently Congress would prefer the bankruptcy courts to “craft a working definition.”⁵² “At a minimum, however, it is established that ‘undue hardship’ denotes a heightened standard, requiring a showing beyond the garden-variety financial hardship experienced by most debtors who seek bankruptcy relief.”⁵³ Because a bankruptcy case has to be judged on a case-by-case basis, as every case is so specific to the circumstances, it is extremely hard to define a term like undue hardship.⁵⁴ The wording of the statute gives room for a divide among the circuits.

Congress’s purpose behind the statute is to keep students from taking too many loans for college without any intention of paying the loans back to the creditor.⁵⁵ Before Congress implemented the statute, students would discharge their loans before making any real effort to make any substantial payments to the companies who had distributed the loans.⁵⁶ 11 U.S.C. § 523 (a)(8) was implemented to keep the student loan industry in check by keeping students from cheating the system.⁵⁷

47. *Id.*

48. *Id.*

49. *Karben*, 201 B.R. at 683 (quoting *Hudak v. Union Nat’l Bank of Pittsburgh (In re Hudak)*, 113 B.R. 923, 924 (Bankr. W.D. Pa. 1990).

50. 11 U.S.C.A. § 523(a)(8).

51. *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

52. *Id.*

53. *Wolph v. U.S. Dep’t of Educ. (In re Wolph)*, 479 B.R. 725, 729 (Bankr. N.D. Ohio 2012) (quoting *Educ. Credit Mgmt. Corp. v. Frushour*, 433 F.3d 393, 400 (4th Cir. 2005)).

54. The lack of definitions in § 101 of the Bankruptcy Code could have been intentional on the part of Congress because they did not know how to define it, so they could have left it for the courts to define.

55. *Pardo & Lacey*, *supra* note 42, at 420.

56. *Id.*

57. *Id.* at 420–21.

1. *The Evolution of the “Undue Hardship” Test*

The initial test to determine if there was in fact an undue hardship was the *Johnson* test.⁵⁸ Under the *Johnson* test, a court considered the following: (1) an analysis of the debtor’s past resources and future potential resources; (2) the good faith of the debtor in trying to pay back the debt from the student loans; and (3) a policy analysis to establish why the debtor is filing for bankruptcy.⁵⁹ Courts did not utilize this test for very long in comparison to the tests to come.⁶⁰ The *Johnson* test was used for about eight years, but was eventually deemed to be too harsh on the debtor and did not allow the undue hardship requirements to be met for the majority of cases.⁶¹ Even though courts did not use the test for long, it laid the foundation for the evolution of the tests that followed.⁶²

The second test to be developed, eight years after the *Johnson* test, was the *Bryant* Poverty test.⁶³ The court in *Bryant* acknowledged that the *Johnson* test was too complicated and was hard to implement.⁶⁴ The *Bryant* Poverty test was based on the poverty line and established the standard for undue hardship based on an individual’s income being at or near the poverty line; however, those with income substantially more would still have the ability to discharge student debt if unique and extraordinary circumstances could be shown making the debt dischargeable.⁶⁵ To combat the complexity of the *Johnson* test, this test gave the courts an easier method and a slightly lower threshold to determine if an “undue hardship” occurred.⁶⁶ Like the *Johnson* test, the *Bryant* Poverty Test would soon be abandoned.⁶⁷

2. *Evolution into the Modern Split of Authority*

The Second Circuit later formulated a third test, now the majority view throughout the circuits – the *Brunner* test.⁶⁸ The *Brunner* test is a three-

58. See Pa. Higher Educ. Assistance Agency v. Johnson (*In re Johnson*), 5 B.C.D. 532 (Bankr. E.D. Penn. 1979).

59. *Id.*

60. B.J. Huey, Note, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(A)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 104–05 (2002).

61. *Id.* at 104.

62. *Id.*

63. See Bryant v. Pa. Higher Educ. Assistance Agency (*In re Bryant*), 72 B.R. 913 (Bankr. E.D. Pa. 1987).

64. *Id.* at 914 n.2.

65. *Id.* at 915–16.

66. *Id.* at 915.

67. See Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2nd Cir. 1987).

68. *Id.*; see also Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, 84-DEC J. KAN. B.A. 24, 32 (2015).

pronged test, and the debtor must satisfy all three prongs in order to have the student loans discharged.⁶⁹ The three prongs are:

(1) the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents; (2) that state of affairs is likely to persist for a significant portion of the payback period of the student loans; and (3) the debtor has made a good faith effort to pay back the student loans.⁷⁰

Circuit courts have in some form or fashion adopted this approach.⁷¹ Some courts are of the opinion that it is a simpler test to follow, making the courts rule more fairly across every situation than the tests that had come before it.⁷² According to the *Brunner* court, this method “more reliably guarantees” the court’s approach to decide if it should allow for the student loans to be discharged.⁷³

The *Brunner* test is still considered, by some, to be far harsher than necessary to achieve the goals of bankruptcy.⁷⁴ “These applications show that an overly restrictive interpretation of the *Brunner* test fails to further the Bankruptcy Code’s goal of providing a ‘fresh start’ for the honest but unfortunate debtor, and can cause harsh results for individuals seeking to discharge their student loans.”⁷⁵ Even though the thresholds for the *Johnson* test and the *Bryant* Poverty test are considered to be harsher than the *Brunner* test, the *Brunner* test sets a very high standard to establish an “undue hardship.”⁷⁶

The Eighth Circuit was the first circuit to break away from the *Brunner* test, creating a new “totality of the circumstances” test to determine if a

69. *Brunner*, 831 F.2d at 396.

70. *Id.*

71. *C.f.* Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 300 (3d Cir. 1995); Educ. Credit Mgmt. Corp. v. Frushour (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005); U.S. Dep’t of Educ. v. Gerhardt (*In re Gerhardt*), 348 F.3d 89, 91 (5th Cir. 2003); Oyler v. Educ. Credit Mgmt. Corp. (*In re Oyler*), 397 F.3d 382, 385 (6th Cir. 2005); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); United Student Aid Funds v. Pena (*In re Pena*), 155 F.3d 1108, 1112 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1311 (10th Cir. 2004); Hemar Ins. Corp. of Am. v. Cox (*In re Cox*), 338 F.3d 1238, 1241 (11th Cir. 2003).

72. Jonathan L. Marsh, Note, *Bankruptcy Law—Discharging Student Loans Under 11 U.S.C. § 523(A)(8)(B): Find Some Dependents, Make a Few Payments and Disconnect the Cable Television (A Discussion of Pennsylvania Higher Education Assistance Agency v. Faish (In re Faish))*, 41 VIL. L. REV. 1087, 1111–12 (2015).

73. *Brunner*, 831 F.2d at 396.

74. See Long v. Educ. Credit Mgmt. Corp. (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003).

75. *Polleys*, 356 F.3d at 1308 (quoting *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918)).

76. *Id.* at 1311.

debtor was experiencing an undue hardship.⁷⁷ This test took a more forgiving approach for the debtor compared to the *Brunner* test, as an attempt to embrace the core value of bankruptcy court.⁷⁸ A few years after the Eighth Circuit ruled in *In re Long*, the First Circuit abandoned the *Brunner* test in order to embrace the totality-of-the-circumstances test of the Eighth Circuit.⁷⁹ The Eighth and the First Circuits are the only two circuits that have departed from the *Brunner* test.⁸⁰

The court in *In re Long* established a more lenient standard that would allow for the totality-of-the-circumstances to be considered, including the debtor's past, present, and likely future financial circumstances, and the reasonable living expenses of the debtor, with other relevant facts and circumstances involving this case taken into consideration.⁸¹ This method allows for other factors to be taken into the equation. *In re Hurst* utilized similar factors to decide how to establish if an undue hardship existed.⁸² This test gives the court the freedom to take into account any relevant factors that the debtor can present.

Using the totality-of-the-circumstances test to determine if an undue hardship exists is the minority view compared to the *Brunner* test—nine circuits to two. The *Brunner* test was developed through the *Johnson* test and the *Bryant* Poverty test.⁸³ However, due to the harsh nature under *Brunner* towards the debtor, the Eighth Circuit broke away when the *In re Long* court developed the totality-of-the-circumstances test. This case developed a method that has been seen as a more debtor friendly approach in determining if an undue hardship exists.⁸⁴

D. The Second Ambiguity—Is All, Some, or None of the Debt Discharged?

After the Court has determined if an “undue hardship” exists using the *Brunner* test or the totality-of-the-circumstances test, the Court must

77. *In re Long*, 322 F.3d at 553.

78. *Id.* at 554.

79. *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

80. *Id.*; see *In re Long*, 322 F.3d at 553.

81. *In re Long*, 322 F.3d at 554.

82. *Hurst v. Southern Ark. Univ.* (*In re Hurst*), 553 B.R. 133, 135 (B.A.P. 8th Cir. 2016).

83. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987).

84. *In re Long*, 322 F.3d at 554; *Roth v. Educ. Credit Mgmt. Corp.* (*In re Roth*), 490 B.R. 908, 920–23 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring) (arguing that even some of the circuits that follow the *Brunner* test agree with the totality-of-the-circumstances approach and believe that the *Brunner* test is too harsh and does not embrace the entire situation to give the best chance to establish an undue hardship).

determine whether to allow partial discharge of the debt or follow an “all or nothing” approach to discharge.⁸⁵

1. *It's All or Nothing*

The ambiguity surrounding the term “undue hardship” in § 523(a)(8) is not the only term to give the courts trouble; a second ambiguity has arisen from § 523(a). Courts have interpreted the term “discharge” in several different ways.⁸⁶ This issue could have been completely avoided if the drafters of the Bankruptcy Code would have defined one of the most crucial words to the Code.⁸⁷ However, the Code does not define the term, leaving the courts to determine what the term means and how it can and should be used.⁸⁸

One approach courts have taken to interpret the term “discharge” is the strict all-or-nothing approach.⁸⁹ This approach interprets the plain meaning of § 523(a)(8)(A)(1), focusing on the section that states that a debtor cannot discharge any debt that is incurred to receive a higher education.⁹⁰ Under this approach, the debt is either discharged in whole or not at all.⁹¹ Some courts have reasoned that if Congress had included the words “to the extent that” in § 523(a)(8), the section might have had a different meaning; however, the omission supports the notion that Congress intended debt discharge to be either in full or none at all.⁹²

2. *Partial Discharge*

A partial discharge using Section 105 of the Bankruptcy Code is the second and most prominent interpretation of how to discharge a student loan if a court determines that an undue hardship exists.⁹³ Section 105 of the Code allows the bankruptcy court to do what it was created to do, which is

85. Scott Pashman, Note, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(A)(8): Reassessing “Undue Hardship” After the Elimination of the Seven-Year Exception*, 44 N.Y.L. SCH. L. REV. 605, 617 (2001).

86. *Lamanna v. EFS Servs. Inc. R.I. Student Loan Auth. Sallie Mae Serv. Corp. et al. (In re Lamanna)*, 285 B.R. 347, 350–54 (Bankr. D. R.I. 2002).

87. 11 U.S.C.A. § 101 (Westlaw through Pub. L. No. 115-231).

88. *Id.*; see generally *Sherwood Partners, Inc. v. Lynco Inc.*, 394 F.3d 1198 (9th Cir. 2005).

89. *Grigas v. Sallie Mae Servicing Corp. (In re Grigas)*, 252 B.R. 866, 870–71 (Bankr. D. N.H. 2000).

90. *Id.*; 11 U.S.C.A. § 523(a)(8)(A)(1) (Westlaw through Pub. L. No. 115-231).

91. *Lamanna*, 285 B.R. at 350.

92. *Saxman v. Educ. Credit Mgmt. Corp.*, 325 F.3d 1168, 1173 (9th Cir. 2003).

93. *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 438–39 (6th Cir. 1998); see 11 U.S.C.A. § 105 (Westlaw through Pub. L. No. 115-281).

to create a fair, fresh start for the debtor and the creditor.⁹⁴ Section 105(a) of the Code states:

[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.⁹⁵

This section allows for the Code to be used in many different ways throughout the decision-making process of the bankruptcy judges.⁹⁶ Courts use Section 105 to give themselves permission when they are not sure what else would give them permission, falling back on the fact that the bankruptcy court is a court of equity. The judges' goal is to give a fair and reasonable judgment to all parties involved.⁹⁷ Bankruptcy courts, across many different circuits, have interpreted Section 105 to allow partial discharge instead of an all-or-nothing discharge.⁹⁸ If there is an undue hardship on the debtor, the debtor's educational loans may be discharged partially because Section 105 gives the court the authority to do so.⁹⁹ This method still allows for the court to discharge the entire loan if it deems a complete discharge necessary.¹⁰⁰

Courts adopting the partial discharge approach have described it this way:

[e]ven assuming *arguendo* that the phrase "such debt" refers to the debtor's entire debt burden, it does not follow that the express terms of § 523(a)(8) mandate an all-or-nothing discharge. Rather, once the debtor has satisfied the *Brunner* factors and the court has concluded that the

94. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Sherwood Partners, Inc. v. Lycos Inc.*, 394 F.3d 1198, 1203 (9th Cir. 2005).

95. 11 U.S.C.A. § 105.

96. *In re Hornsby*, 144 F.3d at 439; *see* 11 U.S.C.A. § 105.

97. *Gill v. Nelnet Loan Servs. Inc., Colo., Colo. Student Loans Program (In re Gill)*, 326 B.R. 611, 644 (Bankr. E.D. Va. 2005).

98. *In re Hornsby*, 1144 F.3d at 438–39 (6th Cir. 1998); *Saxman v. Educ. Credit Mgmt. Corp.*, 325 F.3d 1168, 1174 (9th Cir. 2003); *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 884 (9th Cir. 2006); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200, 1206–07 (10th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Gouge*, 320 B.R. 582, 587 (W.D. N.C. 2005); *Great Lakes Higher Educ. Corp. & Hemar Ins. Corp. of Am. v. Brown (In re Brown)*, 239 B.R. 204, 211–12 (S.D. Cal. 1999); *In re Gill*, 326 B.R. at 644; *Burton v. Educ. Credit Mgmt. Corp., Continental Serv. Group, Inc. (In re Burton)*, 339 B.R. 856, 868 (Bankr. E.D. Va. 2006).

99. *See* sources cited *supra* note 97.

100. Chandler Harris, Note, *The Dischargeability of Student Loans in the Sixth Circuit*, 49-MAR TENN. B.J. 18, 21 (2013).

debt is too great for the debtor to shoulder, § 523(a)(8) is silent with respect to whether the bankruptcy court may partially discharge the loan. Although § 523(a)(8) is the sole mechanism by which debtors may seek discharge of student debt, it is not the only provision bearing on the dischargeability of student loans.¹⁰¹

Within Section 523 of the Code, two ambiguities create two separate splits in the circuits. The first ambiguity centers around which approach the courts should use, between the *Brunner* test and the totality-of-the-circumstances test, to determine if a debtor has an “undue hardship.”¹⁰² The second ambiguity centers around how to discharge the loan once an “undue hardship” is determined to exist.¹⁰³ Partial discharge and an all-or-nothing approach have both gained ground among the circuits.¹⁰⁴ These circuit splits create an opportunity for the Supreme Court to resolve the ambiguities and uphold the purpose of bankruptcy.

III. COURTS ARE BEST SUITED TO APPLY A TOTALITY OF THE CIRCUMSTANCES TEST AND ALLOW PARTIAL DISCHARGE OF STUDENT LOAN DEBT

This note argues that the courts should embrace the totality-of-the-circumstances approach to determine if a debtor has experienced an “undue hardship.” And once an “undue hardship” has been established, this note argues that the court should allow for the partial discharge of the debt. This approach would take the harsh alternative of the *Brunner* test and the all-or-nothing discharge out of contention, giving the debtor the best opportunity for a clean beginning after filing for bankruptcy. The courts need a clear guide from the Supreme Court to apply to all of the individual cases across every circuit to give an equitable solution to everyone.

101. *Saxman*, 325 F.3d at 1173–74.

102. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987); *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003).

103. *Saxman*, 325 F.3d at 1173 (9th Cir. 2003); *Cheesman v. Tenn. Student Assistance Corp.* 25 F.3d 356, 360–61 (6th Cir. 1994).

104. *Saxman*, 325 F.3d at 1173; *Cheeseman*, 25 F.3d at 360–61.

A. The Totality-of-the-Circumstances Test Best Allows for Every Situation to be Viewed Completely to Embrace Purpose of the Bankruptcy, as the *Brunner* Test is Too Harsh of a Standard for Debtors

The entire concept of the bankruptcy court is to give the debtor a fresh start after struggling financially.¹⁰⁵ The totality-of-the-circumstances approach allows for many different repayment plans that would make the amounts much more manageable for the debtor.¹⁰⁶ The Eighth Circuit's approach to determine when an undue hardship has occurred might not be perfect, but it is a better approach than the *Brunner* test. The *Brunner* test is too harsh on the debtor because it forces that debtor to remain in debt after filing for bankruptcy, which defeats the entire purpose of bankruptcy.¹⁰⁷

In *In re Durrani*, the debtor was able to discharge her student loans under the *Brunner* test; however, the most influential fact that led to the discharge was the fact that the debtor was physically disabled.¹⁰⁸ In this case, the court compared the situation of the debtor to the debtor in *In re O'Hearn* which denied the discharge under the *Brunner* test because the debtor could borrow money from someone else and did not have any "health problems that [hurt] his ability to find work."¹⁰⁹ The standard for discharge should not be whether a person is "physically impaired," and, if so, then discharge is acceptable. The entire set of circumstances should be brought into the equation.

The court of bankruptcy has had a long-standing tradition of taking every single bankruptcy case-by-case.¹¹⁰ This allows for courts to assess the entire situation before ruling. The totality-of-the-circumstances approach embraces this method. Given the harsh and rigid *Brunner* test, the totality-of-the-circumstances test looks at anything that could help evaluate the debtor's financial situation.¹¹¹

In *In re Bronsdon*, the debtor was an elderly woman who decided to go to college in her mid-forties and received a bachelor's degree at the age of fifty.¹¹² She worked for a few years before deciding to go to law school.¹¹³

105. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Sherwood Partners, Inc. v. Lycos Inc.*, 394 F.3d 1198, 1203 (9th Cir. 2005).

106. *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 780–81 (8th Cir. 2009).

107. *See, eg., id.*

108. *Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani)*, 311 B.R. 496, 502 (Bankr. N.D. Ill. 2004).

109. *Id.*

110. *Jespersen*, 571 F.3d at 787 (quoting *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003)).

111. *In re Long*, 322 F.3d at 551–55.

112. *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 794 (B.A.P. 1st Cir. 2010).

She graduated from law school, but could not pass the bar examination.¹¹⁴ She took the examination three times and failed by a substantial margin each time.¹¹⁵ She attempted to gain employment as a receptionist, several different types of secretarial duty positions, among other things, but could not remain employed.¹¹⁶ She had no dependents and no mental or physical disabilities; however, she was able to receive the discharge under the totality-of-the-circumstances test.¹¹⁷ Under this test, any evidence can be brought in to prove that the debtor needs assistance and has experienced an undue hardship.¹¹⁸ Tough times came upon the debtor, she, in good faith, had tried pay off her loan, but was experiencing an undue hardship.¹¹⁹

In *In re Hurst*, the court discusses a long, but not exclusive, list of the different factors that can be brought in by the debtor under the totality-of-the-circumstances test to prove that an undue hardship exists.¹²⁰

(1) total present and future incapacity to pay 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 the 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 loan; and (9) the ratio of student loan debt to total indebtedness.¹²¹

The court does not have to discuss all of the factors, but may use the ones that apply to the current case along with anything else that the debtor believes could help prove his or her hardship exists.¹²² Utilizing the totality-of-the-circumstances test allows the debtor to bring in any sort of information about his or her situation to give the court a complete insight into the life of the debtor.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 794–95.

118. *Bronsdon*, 435 B.R. at 803.

119. *Id.* at 804.

120. *Hurst v. Southern Ark. Univ. (In re Hurst)*, 553 B.R. 133, 138 (B.A.P. 8th Cir. 2016).

121. *Id.*

122. *Id.*

B. Partial Discharge is the Best Option for Everyone Involved

The court of equity is supposed to be fair for everyone involved, including the debtor and the creditor. If the debtor is able to discharge the entire student debt, the creditor will not receive any of the money that he or she is rightfully owed. Taking the partial discharge approach over the all-or-nothing approach allows the creditor to receive some of his or her initial investment back.¹²³ The creditors have acted in good faith, so the court allowing them to receive some of the amount owed is a fairer approach, especially when compared to the alternative of the court wiping out the debt completely or the debt remaining the same with no payments being made.

The partial discharge method gives the court options on how to distribute the loans while simultaneously allowing the creditors an opportunity to be paid back some of the amount they lent to the debtor. One approach that the courts have taken is to discharge all of the interest that has incurred on the loan and to lower the total debt back to the principle amount of the loan issued.¹²⁴ Other courts have decided to lower the monthly payment to a much more reasonable amount, and after a certain number of years, the amount remaining on the student loan will be discharged.¹²⁵ Another approach taken by a court that embraced the partial discharge method is to delay the start date of payment by a few years, which keeps the interest down and gives the debtor a chance to be more financially stable before payments begin.¹²⁶

For example, “[t]he Secretary recalculates the annual payment amount each year based on changes in the borrower’s adjusted gross income and . . . [i]f the borrower has not repaid the loan at the end of twenty-five years, ‘the Secretary cancels the unpaid portion of the loan.’”¹²⁷ Under the partial discharge method, the debtor is still responsible for some of the debt, but after a set amount of time, if a court deems that the debtor cannot pay off the loan, the option is available for the court to release the debtor from the debt.¹²⁸

This approach allows for the court to embrace Section 105 of the code to give everyone involved a fair and equitable discharge. The debtor could have the interest taken off the loan, or the monthly payment lowered, or even the loan discharged completely. This approach allows for no discharge,

123. See *Educ. Credit Mgmt. Corp. v. Mason* (*In re Mason*), 464 F.3d 878 (9th Cir. 2006).

124. *United Student Aid Fund, Inc. v. Espinosa*, 559 U.S. 260, 264 (2010).

125. *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 784 (8th Cir. 2009).

126. *Heckathon v. United States ex rel. U.S. Dep’t. of Educ.* (*In re Heckathon*), 199 B.R. 188, 196 (Bankr. N.D. Okla. 1996).

127. *Jespersen*, 571 F.3d at 781 (quoting 34 C.F.R. § 685.209 (2009)).

128. *Id.*

a full discharge, and most things in between, giving the debtor and the creditor the fairest outcome.

C. Using Totality of the Circumstances and Partial Discharge Provide the Most Equitable Outcome

In bankruptcy, all of the attention is put on the debtor because he or she has the burden of proving if he or she met either the *Brunner* test or the totality-of-the-circumstances test in order for the financial hardship to be removed.¹²⁹ Once the debtor has proven that he or she has sustained an undue hardship because of the student loans, the fair and equitable route to take is for the court to discharge some of the student loan debt.¹³⁰

The partial discharge option, under Section 105 of the Bankruptcy Code, allows for the courts to make case-by-case decisions in order to do what is best for everyone involved.¹³¹ This gives both parties involved a better outcome by not forcing the courts to either discharge all, which is unfair to the creditor, or not discharge any, which is unfair to the debtor. This approach embraces the long-standing concept behind the bankruptcy courts.¹³²

There is another, but far-less common, approach that has been adopted by a few courts. This approach allows a partial discharge without using Section 105 of the Bankruptcy Code.¹³³ Under this option, the court reads Section 523 of the Code and does not interpret the language to force an all-or-nothing approach at all.¹³⁴ This court interprets the plain language of Section 523 to be read to allow for partial discharge of the student loans.¹³⁵ Basically, the court interprets the language in the statute to mean it can make its own determination of how to discharge the student loans because Congress does not define the term discharge in 11 U.S.C. § 101 in the definition section of the Code.¹³⁶ This approach gives the same options as

129. *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 916–17, 923 (B.A.P. 9th Cir. 2013).

130. *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1240–41 (11th Cir. 2003).

131. *Gill v. Nelnat Loan Servs. Inc., Colo., Colo. Student Loans Program (In re Gill)*, 326 B.R. 611, 643 (Bankr. E.D. Va. 2005).

132. *Great Lakes Higher Educ. Corp. & Hemar Ins. Corp. of Am. v. Brown (In re Brown)*, 239 B.R. 204, 212 (S.D. Cal. 1999).

133. *In re Cox*, 338 F.3d at 1243.

134. *Id.*

135. *Id.*

136. *Id.* In this case, the court decided that the debtor did not even need the undue hardship requirement. There have been several courts that have taken this approach. This has been overruled many times, but not on every occasion. There have been several cases that have been upheld. This is a far less popular approach compared to the other two approaches. There is far less steam on this one.

the approach that allows partial discharge because of Section 105, but uses a different reason to get to the final result.

D. The Supreme Court Should Embrace the Eighth Circuit’s Totality-of-the-Circumstances Test and Partial Discharge Method and Give the Courts a Wide Array of Options When Determining How to Discharge Student Loan Debt

Uniformity is needed throughout the entire country on this topic to keep debtors and creditors in similar positions across all jurisdictions.¹³⁷ With the current system in place, the different options give the debtor an opportunity to forum shop to receive the best possible outcome.¹³⁸ This gives an unfair advantage to the debtor over the creditor because the debtor can choose which forum suits his or her needs the best.¹³⁹ Then, there are debtors that might have a winning case in certain forums, but a losing case in another forum; this is too important and affects far too many people to be so drastically different throughout the circuits.

This problem should be answered by the Supreme Court. The Court needs to decide what test should be used to determine if an undue hardship has occurred on the debtor, as well as how to discharge the student debt. The Eighth Circuit’s totality-of-the-circumstances approach is the most straight forward test to use.¹⁴⁰ This approach allows the court to examine the entire situation around the debtor to determine if the hardship exists.¹⁴¹ The bankruptcy courts would be allowed to examine the circumstances that led to the financial struggle, who is at fault, the amount of time the person has been struggling, and how likely that situation is to continue, just to name a few factors.¹⁴² This approach allows for the court to determine if the debtor has an undue hardship through many different factors, opposed to the *Brunner* test which is a strict test with an element centered around the certainty of hopelessness.¹⁴³ The totality-of-the-circumstances option gives

137. Huey, *supra* note 59, at 121.

138. *Id.*

139. *Id.*

140. *See generally* Long v. Educ. Credit Mgmt. Corp. (*In re Long*), 322 F.3d 549 (8th Cir. 2003).

141. *See id.* at 554.

142. *Id.* at 554–55.

143. *See generally* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2nd Cir. 1987) (holding that to discharge a debtor’s student loans, the debtor must show: (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).

the courts freedom to take into account the entire situation to make the best decision for everyone involved.¹⁴⁴

The court also needs to determine how to discharge the student loans once the undue hardship has been established. The all-or-nothing approach either allows for the entire debt to be discharged or none of the debt to be discharged.¹⁴⁵ This approach is mostly unfair to the creditors because they are denied any opportunity to get any of the principle amount that they loaned to the debtor. The partial discharge approach is a far better approach than the all-or-nothing approach. Section 105 gives the courts the authority needed, as long as an undue hardship is established through either the *Brunner* test or the totality-of-the-circumstances test.¹⁴⁶ The option of a partial discharge of the debt incurred through higher education embraces the concept of the court of equity. This gives the courts a wide range of options to give everyone involved a fair outcome. The point of bankruptcy is to get a fresh start, but it is also supposed to be fair for everyone involved.¹⁴⁷ Through this approach, the debtor receives a fair ruling and the creditor still has the opportunity to receive a portion of the initial loan back. The Supreme Court should embrace the Eighth Circuit's totality-of-the-circumstances test and partial discharge method, to give the courts a wide array of options when determining how to discharge the debt.¹⁴⁸

144. *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 799–801 (B.A.P. 1st Cir. 2010).

145. *Grigas v. Sallie Mae Servicing Corp.* (*In re Grigas*), 252 B.R. 866, 870–71 (Bankr. D. N.H. 2000).

146. *Saxman v. Educ. Credit Mgmt. Corp.*, 325 F.3d 1168, 1174–75 (9th Cir. 2003).

147. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

148. There is a very simple explanation as to why this problem has not been addressed by the Supreme Court of the United States. In order for the Supreme Court to hear a case, the person has to appeal the case all the way through the appellate-court system, and that process is incredibly expensive. The bankruptcy courts are a division of the district courts, so in order to appeal this case, the debtor must have needed to file for bankruptcy and then have to fund their appeal through four different appellate courts which is an unrealistic expectation of someone who is experiencing financial hardship. The debtor must begin in Bankruptcy Court, then go to either the District Court or the Bankruptcy Appellate Panel (which is a three-judge panel of judges that are not in the district but are from the circuit) if the jurisdiction has a B.A.P., then go to the Court of Appeals, then the United States Supreme Court. There is no realistic way that a person would actually need to file for bankruptcy if he or she can afford to fund the legal expenses to appeal a case all the way to the Supreme Court. The appellee would have to be able to fund the appeal through four different courts after being deemed to have experienced an undue hardship. This is almost impossible. Comments derived from Interview by author with Peter Alexander, visiting Professor, UA Little Rock William H. Bowen School of Law (February 12, 2018).

IV. CONCLUSION

Congress intended to prevent the abuse of the bankruptcy system when it passed 11 U.S.C. § 523(a)(8) of the Code; however, due to the ambiguous wording and undefined terms, the circuits do not have a clear way to interpret it.¹⁴⁹ There are two different phrases in the code that the circuits have implemented in different ways. The first issue centers around defining what an “undue hardship” is and how to establish that it exists. The Eighth Circuit’s totality-of-the-circumstances approach gives the debtor the best opportunity to establish an undue hardship compared to the *Brunner* test’s harsher approach.

The second issue with the statute centers around what to do with the loan once an undue hardship has been established. Some courts interpret the plain language of the statute to force an all-or-nothing approach to distribution, others interpret there to be a partial discharge option. Partial discharge gives every court involved the most freedom to make the best decision on a case-by-case basis. The Supreme Court must weigh in on the matter because of the vast number of approaches that have been taken since Congress codified Section 523 (a)(8). The Supreme Court should embrace the Eighth Circuit’s approach to determining if an undue hardship exists and allow each court to discharge as much or as little of the debt as it deems fit under the partial discharge approach. Allowing the totality-of-the-circumstances test and partial discharge gives every court the best chance for an equitable resolution.¹⁵⁰

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149. Pardo & Lacey, *supra* note 42, at 420–21. Congress wanted to keep people from racking up thousands of dollars in debt for an education and then discharge it without making any attempt to pay off the loan.

150. Congress has proposed to strike 11 U.S.C. §523(a)(8) from the code completely. See U.S. News & World Report, *What to know About Possible Bankruptcy Rule Changes for Student Debt*, WASH.TOP NEWS (July 17, 2018, 8:00 PM), <https://wtop.com/news/2018/07/what-to-know-about-possible-bankruptcy-rule-changes-for-student-debt/>. This legislation was proposed by Representative Peter DeFazio of the fourth district in Oregon. *Id.* This proposal has happened many times in the past but has not been voted on. *Id.* This proposal will likely die in Congress. *Id.*

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