

## **Student Loans**

*A Practice Guide for Counseling and Assisting Clients*

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1. **STEP 1: GET PAID.** Analyzing student loans for the debtors who are likely to need your help is incredibly time-intensive process. If your analysis determines an AP is appropriate that is also a very long process. Be mindful of the time involved and be sure to get paid.

### **2. STEP 2: DETERMINE IF LOANS ARE FEDERAL, PRIVATE, OR COMBINATION**

#### **a. Federal student loans**

- i. made or guaranteed by the federal government with terms and conditions governed by statute
- ii. benefits include fixed interest rates and income-driven repayment plans
- iii. can be serviced by a private 3<sup>rd</sup> party; current services with whom the federal government has contracts are: Nelnet, Navient, FedLoan Servicing, Great Lakes, Cornerstone, Mohela, Granite States, HESC/Edfinancial, and OSLA servicing
- iv. federal loans can be known as:
  1. William D. Ford Direct Loan Program
  2. Stafford Loans, both subsidized and unsubsidized
  3. Perkins Loans (this program ended in 2017)
  4. Direct Loans
  5. Direct PLUS Loans (graduate/professional students)
  6. Parent PLUS Loans (for parents)
  7. Federal Family Education Loan Program (FFEL) Loans (made by private lender, but ultimately guaranteed by federal government; this program ended in 2010)
- v. If in default, federal tax refunds can be garnished
- vi. **Loans from any federal loan program can be consolidated into a federal consolidated loan called a “Direct Consolidation Loan”**
- vii. **The National Student Loan Data System (NSLDS) at [NSLDS.ed.gov](https://nslds.ed.gov) will provide an exhaustive summary of all federal loans for an individual**

#### **b. Private student loans**

- i. Cannot be consolidated into a Direct Consolidation Loan
- ii. Private lender determines any forbearance options or repayment options
- iii. Will appear on a credit report – but it can be a challenge if the debt is very old and/or it has been reduced to a judgment and sold to a third party.
- iv. Interest rates tend to be higher and private lenders’ collection activities tend to resemble other unsecured creditors more closely
  1. Must obtain state court judgment to garnish wages, bank accounts, or state tax refunds
  2. **Subject to statute of limitations for collection**
  3. **Options are available if debt is not yet reduced to a judgment**

### 3. STEP 3: CONSIDER OPTIONS OUTSIDE OF BANKRUPTCY

#### a. Federal Loans – goals are (1) keep out of default; and (2) pay off

- i. Direct Consolidation Loan – advise debtor to speak to loan servicer or to speak to another federal loan servicer to consolidate loans
- ii. Forbearance – lowering or postponing payments. Keeps loans out of default status
- iii. Administrative discharges – death, total and permanent disability, closed school, other fraud/false certification

#### b. Private Loans – goals are (1) avoid judgment; and (2) pay off

- i. Refinance
- ii. Settlement (likely demand a lump sum)
- iii. Keep in mind SOL

### 4. STEP 4: CONSIDER OPTIONS AVAILABLE IN BANKRUPTCY

#### a. There are four (4) categories of debt are excluded from discharge under 11 USC § 526(a)(8):

- i. Loans made, insured, or guaranteed by a governmental unit (§ 526(a)(8)(A)(i));
- ii. Loans made under any program partially or fully funded by a government unit or nonprofit institution (§ 523(a)(8)(A)(i));
- iii. Funds received as an educational benefit, scholarship, or stipend (§ 523(a)(8)(A)(ii);

##### 1. What are “funds received?”

- i. *Inst. Of Imaginal Studies v. Christoff* (In re Christoff), 527 B.R. 624, 632 (B.A.P. 9<sup>th</sup> Cir. 2015)(tuition credit received from non-profit was dischargeable based on narrow view of statute because no funds were received)

##### 2. What is an “educational benefit”?

- i. *Golden v. JP Morgan Chase Bank* (In re Golden), 596 B.R. 239, 265 (Bankr. E.D.N.Y. 2019) (“funds received as an educational benefit” refers to certain kinds of education-related conditional grants, and not to all student loans and finding that loans marketed as student loans that were not limited in use were potentially subject to discharge because exceptions are to be interpreted narrowly.)
- ii. *Essangui v. SLF V-2015 Tr.* (In re Essangui), 573 B.R. 614, 621 (Bankr. D. Md. 2017) (proceeds of the Loan used to pay for med school exam preparation fees and her books for the program, as well as ret and living expenses incurred while attending the program, as well as rent and living expenses

incurred while attending the program was dischargeable for the same reason

- iii. *But see* cases that have gone the other way – *Brown v. Citibank, N.A. (In re Brown)*, 539 B.R. 853 (Bankr. S.D. Cal. 2015); and *Skipworth v. Citibank Student Loan Corp. (In re Skipworth)*, 2010 Bankr. LEXIS 1201, 2010 WL 1417964 (Bankr. N.D. Ala. Apr. 1, 2010)
- iv. Any “qualified educational loan” as that term is defined in the Internal Revenue Code (§ 523(a)(8)(B))
  - 1. The Internal Revenue Code defines “qualified education loan” in relevant part at 26 U.S.C. § 221(d):
    - i. “Qualified education loan” means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses...
    - ii. **“Qualified higher education expenses” means the cost of attendance...at an eligible educational institution...for purposes of the preceding sentence, the term “eligible educational institution” has the same meaning given such term by [26 U.S.C.] section 25A(f)(2)...**
      - i. In turn, 26 U.S.C § 25A(f)(2) provides in relevant part as follows:

“Eligible educational institution” means an institution – (1) which is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), as in effect on the date of enactment of this section; and 2) which is eligible to participate in program under title IV of such Act.
    - iii. **Therefore, relevant query in private student loan cases:**
      - i. Was the institution on School Codes list (was it eligible to receive federal financial aid?)  
<https://ifap.ed.gov/ilibrary/document-types/federal-school-code-list>
      - ii. What is the cost of attendance? If the private loan exceeds cost of attendance, then it is dischargeable. To determine cost of attendance, see Exhibit 1.
    - iv. **Burden of proof:** “the creditor bears the initial burden of proving the debt exists and that the debt is of the type excepted from discharge under § 523(a)(8).” *Maas v. Northstar Education Finance, Inc. (In re Maas)*, 497 B.R. 863, 868 (Bankr. W.D.Mich. 2013).
  - 2. Undue Hardship – *Brunner* test
    - i. The Sixth Circuit Court of Appeals, along with the majority of courts, apply the test articulated in *Brunner* to determine whether an undue hardship exists. See

*Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005) (adopting Brunner test in the Sixth Circuit). The Brunner test requires a debtor to establish three elements to qualify for discharge of educational loans on the basis of undue hardship. The elements are:

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;
  3. that the debtor has made good faith efforts to repay the loans.
- ii. **Burden of proof:** "It is the debtor's burden to establish the existence of each of these elements by a preponderance of the evidence." *Trudel v. U.S. Dep't of Educ. (In re Trudel)*, 514 B.R. 219, 226 (B.A.P. 6th Cir. 2014) (citations omitted). At the pleading stage, a plaintiff's allegations must show that a right to relief is plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561, 127 S. Ct. 1955, 1968, 167 L. Ed. 2d 929 (2007).

### The Brunner Test

**(1) Debtor cannot maintain, based on current income and living expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loan;**

**(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 loan; and**

- Being at the top of one's earning potential is not "additional circumstances" sufficient to meet Debtor's burden under the second prong of the Brunner test. [In re Matthews-Hamad](#), 377 B.R. 415, 422 (Bankr. M.D. Fla. 2007) ("[T]he 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.").
- To demonstrate that the debtor's current "state of affairs is likely to persist for a significant portion of the repayment period of the student loans," as required by Brunner's second prong, the debtor must precisely identify her problems and explain how her condition would impair her ability to work in the future. The dischargeability of loans should be based upon "a certainty of hopelessness, not merely a present inability to fulfill financial commitment." *In re Tirch*, 409 F.3d 677, 681 (6th Cir. 2005) (internal citations omitted).
- The Defendant fairly observes that to satisfy this second prong of the Brunner test, the additional circumstances shown "must be indicative of a certainty of hopelessness, not merely a present inability to fulfill financial commitment." *Oyler* at 386 (quotation omitted). "They may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents .... And, most importantly, they must be beyond the debtor's control, not borne of free choice." *Id.* at 386 (quotation omitted). "The debtor must have done everything within their power to improve their financial

situation." *Storey v. National Enterprise System* (In re Storey), 312 B.R. 867, 872 (Bankr N.D. Ohio 2004) (cited in Oyler at 386).

- To satisfy the second prong, Barrett must show that circumstances indicate a "certainty of hopelessness, not merely a present inability to fulfill financial commitment." *Id.* at 386 (quoting *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993)); see also *In re Hornsby*, 144 F.3d 433, 438 (6th Cir. 1998) (observing that debtors "need not live in abject poverty before a discharge is forthcoming"). These circumstances may include, but are not limited to, "illness, disability, a lack of useable job skills, or the existence of a large number of dependents." *Id.* Ultimately, the most important factor in satisfying the second prong is that the "additional circumstances" must be "beyond the debtor's control, not borne of free choice." *Id.*

### **(3) Debtor's good faith efforts to repay the loan.**

- Furthermore, while deciding to forego alternative arrangements such as the income-contingent repayment plan are not per se proof of bad faith, they are probative of the debtor's intent and the failure to utilize, or at least attempt to utilize, such alternatives should be explained. See Barrett, 487 F.3d at 364; see also *Tirch v. Pennsylvania Higher Education Assistance Agency* (In re Tirch), 409 F.3d 677, 682-83 (6th Cir. 2005). "It is difficult, though not necessarily an insurmountable burden for a debtor who is offered, but then declines the government's income contingent repayment program, to come to this Court and seek an equitable adjustment of their student loan debt." Tirch at 682 (quotation omitted).

## **5. STEP 5: REVIEW OPTIONS WITH CLIENT TO DETERMINE GAME PLAN**

# EXHIBIT 1

## How to find Cost of Attendance for Title IV Schools

<https://nces.ed.gov/ipeds/use-the-data>

IES NCES National Center for Education Statistics

Search

Go

IPEDS Integrated Postsecondary Education Data System

Search IPEDS

Home

Info

User


Help


Menu


IPEDS Data Use Help Desk (866) 558-0658 or [ipedsdata@rti.org](mailto:ipedsdata@rti.org)


### Use the Data


Access IPEDS data submitted to NCES through our data tools or download the data to conduct your research


**IPEDS Survey Components**  
Learn more about the individual IPEDS survey components: view training videos, infographics, answers to frequently asked questions, survey forms, and more.

**Data Trends**  
Use the Trend Generator to view trends on most frequently asked subject areas including: Enrollment, Completions, Graduation Rates, Employees and Staff, Institutional Revenues, and Financial Aid.


**Look Up an Institution**  
Look up information for one institution at a time. Data can be viewed in two forms: institution profile (similar to College Navigator) and reported data (institution's response to each survey question).

**Data Feedback Report**  
Download, print, or customize an institution's Data Feedback Report, a report that graphically summarizes selected institutional data and compares the data with peer institutions.

**Compare Institutions**  
Download IPEDS data files for more than 7,000 institutions and up to 250 variables. Data files are provided in comma separated value (\*.csv) format.

**Survey Data**  
Data are available starting with the 1980-81 collection year for the *Complete data files* and *Custom data files* functions, which zip the data into comma separated value (\*.csv). Beginning with the 2006-07 collection year, data for each collection year are compiled into an *Access database*.

Select download option

**Shortcuts**  
Use these shortcuts to expedite the research process if you are a frequent or returning data user.

Select your shortcut

## Select "Look Up an Institution"

What data would you like to access?

Data Release Cycle Info

Available Data	Provisional Release ⓘ	Final Release ⓘ
Institutional Characteristics (IC)	2017-18	2008-09 to 2016-17
Pricing and Tuition (IC)	2017-18	2008-09 to 2013-14
Admissions (ADM)	2017-18	2008-09 to 2016-17
Completions (C)	2016-17	2005-06 to 2015-16
12-month Enrollment (E12)	2016-17	2005-06 to 2015-16
Fall Enrollment (EF)	2017	2006 to 2016
Student Financial Aid (SFA)	2016-17	2005-06 to 2015-16
Graduation Rates (GR)	2017	2006 to 2016
Outcome Measures (OM)	2017	2015,2016
Finance (F)	2016-17	2005-06 to 2015-16
Human Resources (HR)	2017-18	2006-07 to 2016-17
Academic Libraries (AL)	2016-17	2014-15,2015-16

For years that final data are available, select which release you would like to use:

☐ Use provisional release data ☒ Use final release data

[Continue](#)

## Select "Use Final Release Data"

Search for the School:

**IPEDS**  
Data Center Help Desk (866) 558-0658

Start over Save session Help MAIN MENU

### Look up an institution

Final Release Data ([Change](#))

**1. Select Institutions**

My Comparison Institution - None Selected [i](#) [ADD](#)

How would you like to select institutions to include in your data file/report?

[i](#) By Names or UnitIDs [i](#) By Groups [i](#) By Variables [i](#) By Uploading a File

[i](#) Browse/Search Variables [i](#) Choose from My Variables [i](#) Create Derived Variables [i](#) Upload Variables

Enter either an institution name or UnitID (or a comma separated list of UnitIDs) in the text box below. As you begin typing, a list of matching institutions will appear. You can select a single institution by clicking on it from the list, or, if you want all institutions on the list, click "Select".

Institution Name  [Select](#)

Select "Reported Data"

Select Institutions - You have selected 1 institution(s) [VIEW/MODIFY](#)

How would you like to select institutions to include in your data file/report?

[i](#) By Names or UnitIDs [i](#) By Groups [i](#) By Variables [i](#) By Uploading a File

University of Colorado Boulder ([change institution](#))

[Institution Profile](#) | [Reported Data](#) | [Data Feedback Reports](#)

NOTE: Revisions made through the Prior Year Revision System will not be reflected here.

2017	Institutional Characteristics
2016	Admissions and Test Scores
2015	Fall Enrollment
2014	12-Month Enrollment
2013	Completions
2012	Graduation Rates
2011	GR200
2010	Outcome Measures
2009	Student Financial Aid and Net Price
2008	Finance
2007	Human Resources
2006	Academic Libraries
2005	
2004	
2003	
2002	
2001	

And then choose the appropriate year, and then select "Student Financial Aid and Net Price"

For years before 2009 and for grad school costs, you should select "Institutional Characteristics"

Institution Profile   Reported Data   Data Feedback Reports	
NOTE: Revisions made through the Prior Year Revision System will not be reflected here.	
2017	Institutional Characteristics
2016	Fall Enrollment
2015	Completions
2014	Graduation Rates
2013	Student Financial Aid and Net Price
2012	
2011	Finance
2010	
2009	Human Resources
2008	
2007	
2006	
2005	
2004	
2003	

Then look for the Cost of Attendance Data. This is in “Part F” of the “Student Financial Aid & Net Price” section:

03 Room and board and other expenses by living arrangement				
03a	On-campus	17,436	18,502	15,884
03b	Off-campus (with family)	4,482	5,156	2,142
03c	Off-campus (not with family)	13,698	16,476	14,082
04 Number of Group 3 students by living arrangement				
04a	On-campus	1,868	2,050	2,113
04b	Off-campus (with family)	0	0	0
04c	Off-campus (not with family)	0	0	0
04d	Unknown	0	0	0
Weighted average for room and board and other expenses by living arrangement (excluding unknown values)		17,436	18,502	15,884
See instructions for the formula for this calculation				
06 Total cost of attendance		30,025	31,393	29,215
This value is calculated using the following formula: [F01+F02+F05]				
07 Average amount of grant or scholarship aid awarded to Group 3 students from the following sources: the federal government, state/local government, and the institution		8,777	8,666	8,892
08 Average institutional net price for Group 3 students		21,248	22,727	20,323
This value is calculated using the following formula: [F06-F07]				
As required by the Higher Education Opportunity Act of 2008, these amounts will be posted on the U.S. Department of Education's College Navigator website and used in the U.S. Department of Education's College Affordability and Transparency Lists.				
<div> <div></div> <div> The notes below provide context for the data you've reported above and may be posted on the College Navigator website. Choose one option that best explains your data or choose "Not applicable" if you do not wish to provide. </div> </div>				

**\*\*Note – this is only for undergraduate pricing. If student was in grad school, need to look at “Institutional Characteristics” data below.**

Or in the Institutional Characteristics under Questions 5-13 for pre 2009 or graduate level tuition.



Part D - Student Charges - Price of Attendance

13. Price of attendance for full-time, first-time undergraduate students:

Please enter the amounts requested below. These data will be made available to the public on College Navigator. Data for prior years may be corrected. If your institution participates in any Title IV programs (Pell, Stafford, etc.), you must complete all information for the current year. Leave items that do not apply blank and the system will fill in as "not applicable" or indicate that more information is needed. Estimates of expenses for books and supplies, room and board, and other expenses are those from the **Cost of Attendance report** used by the financial aid office in determining financial need.

Charges for full academic year	2006-07	2007-08	2008-09
<b>Published tuition and required fees:</b>			
<u>In-district</u>	5,643	6,636	7,278
<u>In-state</u>	5,643	6,636	7,278
<u>Out-of-state</u>	23,539	24,798	26,756
<u>Books and supplies</u>	1,698	1,698	1,749
<b>On campus:</b>			
<u>Room and board</u>	8,300	9,088	9,860
<u>Other expenses</u>	3,582	4,212	4,374

You may use the space below to provide context for the data you've reported above. These context notes will be posted on the College Navigator website.

**For Graduate/Professional Programs, you need to substitute the Graduate or Professional Tuition and Fees, for the Published Tuition and Fees listed here (for undergrads) and add books and supplies, room and board and other expenses for the “Cost of Attendance”.**

Then, compare this to the actual amount borrowed and see whether borrower may have any mixed use loans.

## **Student Loans – A World of its Own**

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### **I. Shocking Statistics**

1. Americans owe nearly \$1.75 trillion in federal and private student loan debt, spread out among 45 million borrowers.<sup>1</sup>
  - a. What does \$1.75 trillion look like (besides \$175,000,000,000,000)?
  - b. Credit card debt totals only \$841 billion in the U.S. in Q1 2022.
  - c. Mortgage debt, the largest component of household debt (71% of total household debt), stood at \$11.39 trillion as of June 30, 2022.
  - d. U.S. household debt rose to a record of \$15.84 trillion in the U.S. in Q1 2022.<sup>2</sup>
2. 55% of bachelor's degree recipients graduating from a four-year public and private non-profit colleges in 2020 had student loan debt.
3. The average debt at graduation from four-year public and private non-profit colleges was \$28,400 in 2020, a \$400 decrease from 2019.
4. Students and parents borrowed an estimated \$95.9 billion in the 2020-2021 academic year, and 13% were private and other non-federal loans.
5. Average student loan debt by type for entire course of study:

Debt Type                      Average Debt for Course of Study<sup>3</sup>

Bachelor's degree	\$28,950
Graduate school	\$71,000
Parent PLUS loan(s)	\$28,778
Law school	\$145,500
MBA student	\$66,300
Medical school	\$201,490
Dental school	\$292,169
Pharmacy school loan	\$179,514

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<sup>1</sup> Federal Reserve Bank of St. Louis.

<sup>2</sup> Federal Reserve Bank of New York.

<sup>3</sup> 62% of the class of 2019 graduated with student debt, according to the most recent data available from The Institute for College Access & Success, a non-profit organization that works to improve higher education access and affordability.

Veterinary school	\$183,302
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6. Total federal student loan debt.

Most student loans, about 92%, according to a July 2021 report by MeasureOne, an academic data firm, are owned by the U.S. Department of Education.

Total federal student loan borrowers: 43 million.

Total outstanding federal student loan debt: \$1.62 trillion.

7. Total private student loan debt.

Private student loans make up 7.89% of the total outstanding U.S. student loans, according to MeasureOne.

Total outstanding private student loan debt: \$131.10 billion.

II. Elements of hardship discharge under 11 U.S.C. §523(a)(8)

1. Statutory authority:

The U.S. Bankruptcy Code [11 U.S.C. §523(a)(8)] provides that student loans can be discharged in bankruptcy only if excepting the debt from discharge would impose an “undue hardship” on the borrower:

11 U.S.C. §523 Exceptions to Discharge

(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

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

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

## 2. “Undue Hardship” Case Law:

Undue Hardship allows for the discharge of student loans under certain circumstances, decided on a case-by-case basis, and only under very limited circumstances.

Congress has never defined “undue hardship” in the Bankruptcy Code. Federal courts have established the legal standard for a student loan debtor to prove “undue hardship.” In general, the courts have used the Brunner test to analyze whether undue hardship is proven.

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

1. He or she cannot maintain, based on current income and expenses, a “minimal” standard of living for himself or herself and any dependents if forced to repay the loans;
2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. He or she has made good faith efforts to repay the loans.

### B. “Totality of the Circumstances test”

1. Although the Brunner test is still the majority view, some courts have expressed their reluctance to apply the test due to its rigid and somewhat inflexible nature.
2. Adopted by the First, Seventh, Eighth, and Ninth Circuits
3. The “Totality of the Circumstances” approach requires the bankruptcy court to consider:
  - a. The debtor’s past, present, and reasonably reliable future financial resources;
  - b. A calculation of the debtor’s and her dependent’s reasonable necessary living expenses; and
  - c. Any other relevant facts and circumstances surrounding each particular bankruptcy case.

See: Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549, 554 (8th Cir. B.A.P. 2003); See also Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews), 661 F.2d 702, 704 (8th Cir. 1981); Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon), 435 B.R. 791 (1st Cir. B.A.P. 2010)

4. The main difference between the Brunner test and the Totality of the Circumstances test is that the latter does not include the good faith requirement.

## III. Litigation Issues:

1. Creditor's Burden of Proof:
  - A. Creditor has the initial burden of proving the existence / validity of a debt and that it falls within 11 USC §523(a)(8).
  - B. Standard: preponderance of the evidence.
2. Debtor's Burden of Proof:
  - A. The burden of proof is on the debtor to prove undue hardship.
  - B. Standard: preponderance of the evidence.
3. Expert testimony:
  - A. Many consumer debtors cannot even afford the costs needed to file the underlying bankruptcy case, even without considering the additional costs for the hardship discharge proceeding.
  - B. Expert testimony is not required. In the matter *In re Barrett*, the creditor argued that the debtor did not meet prong two of Brunner because the debtor did not present expert testimony supporting his medical condition. The court rejected the argument and held that since the debtor testified clearly and cogently about his past and present medical conditions, presented a letter from his doctor in support of his assertions, and detailed how his ailment prevents him from holding a job worthy enough to repay his loans, he satisfied the second prong of Brunner. *In re Barret*, 487 F.3d 353 (6<sup>th</sup> Cir. 2007).

#### IV. Recent Cases: Student Loan Debt Discharge under the Brunner Test.

1. *Rosenberg vs. New York State Higher Education Services Corp*, Adv. Proc. No. 18-09023-cgm (Bankr. S.D.N.Y. 2020).
  - A. The borrower, Kevin Rosenberg, a 45-year-old attorney, asked the bankruptcy court to forgive his student loan debt of \$220,000.
  - B. Rosenberg received a bachelor's degree in history from the University of Arizona. After receiving his undergraduate degree, Rosenberg served in the U.S. Navy on active duty for five years. Thereafter, he attended Cardozo School of Law in New York and graduated in 2005. When he graduated from law school in April of 2005, he consolidated his debts with a non-profit corporation, Educational Credit Management Corp (ECMC), owing \$116,464 in principle on the loan amount before interest. By November of 2019, the 3.38% interest rate expanded the loan debt to \$221,385.

- C. ECMC, a nonprofit lender organization, argued that Rosenberg did not meet the undue hardship standard. Specifically, the Debtor was 45 years old, in good health, no dependents, two degrees and law licenses in New York and New Jersey.
- D. Debtor's position: he disliked practicing law, he did not like working in an office, and he did not find the work interesting. But the hardship, per Rosenberg, was caused by the collapse in the brick-and-mortar retail industry in 2017 when a shop he owned in Brooklyn failed because consumers made their purchases online. The Bankruptcy Court for the Southern District of New York found that the debtor met his burden of establishing that repaying his student loan debt would impose an undue hardship on him. The court held that the total amount of the debtor's student loan debt, over \$220,000, was discharged.
- E. The court found that the debtor established all three prongs of the Brunner test.
  - 1. Prong 1: That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the loans. According to the debtor's Schedules I and J, his monthly expenses far exceeded his monthly income. His budget demonstrated that he was unable to repay his student loan debt and maintain a minimum standard of living.
  - 2. Prong 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. The court determined that the repayment period had already ended, the student loan creditor accelerated the loan thereby making the total amount due in full. This led the court to conclude that since the repayment period had already ended, the debtor's state of affairs was certain to persist for the duration of repayment period.
  - 3. Prong 3: That the debtor has made good faith efforts to repay the loans. The court found that the debtor demonstrated good faith by regularly contacting ECMC, requesting forbearances, making some payments during periods of forbearance and making 40% of the payments that came due while the student loan debt was not in forbearance or deferment.
- F. On appeal, the U.S. District Court for the Southern District of New York reversed the bankruptcy court's decision and remanded the case to the bankruptcy court for further proceedings. As of September 30, 2022, the adversary case was still pending.

2. Randall vs. Navient Solutions, Adv. Proc. No. 19-00368-mmh, 628 B.R. 772 (Bankr. D. Md. June 21, 2021).
  - A. Debtor was entitled to an undue discharge of her student loan debt.
  - B. Background: A 68 year old individual owed more than \$500,000 of student loans, including \$190,000 to Navient Solutions. Despite having several degrees, Randall had been working for the past several years in a job that pays \$13 per hour. According to Randall, after paying her living expenses and even working overtime, she doesn't have enough money to pay her student loans.
  - C. The Bankruptcy Court found that Randall satisfied all three prongs of the Brunner test.
    1. Prong 1: That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the loans. Judge Harner described Randall's monthly income and expenses as "razor-thin" and asserted that directing Randall to pay all of her student loan debt would prevent Randall from maintaining a minimal standard of living.
    2. Prong 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. Judge Harner considered the fact that Randall was 68 years old and only two years away from retirement. Should Randall retire, her income would drastically decrease.
    3. Prong 3: That the debtor has made good faith efforts to repay the loans. Randall made payments to Navient and other lenders over the years, requested forbearances, and even contacted student loan lenders pre-petition regarding payment structures.
  - D. Notwithstanding the above, the court granted a discharge of all except \$12,000 of the debtor's student loan debt. The court found that the debtor could afford to pay \$100 per month toward her student loan debt over the following ten years.
3. Bukovics vs. Navient (In re Bukovics), 17-00186 (Bankr. N.D. Ill. Feb. 25, 2020).
  - A. Must a debtor be destitute before discharging student loans? The Debtor's student loans were discharged.

- B. Background: The debtor received about \$21,000 in student loans to graduate from college in 1990. Over the ensuing years, she made almost 100 monthly payments totaling some \$30,000. In other words, she had paid about 140% of the original principal balance of the loans. With interest, though, the outstanding balance had grown to about \$73,000 by the time she filed a chapter 7 petition and discharged about \$145,000 in debt, not including student loans. Bankruptcy Judge Jack B. Schmetterer from the 7<sup>th</sup> Circuit discharged the \$73,000 of student loan debt
- C. The Bankruptcy Court found that the Debtor satisfied all three prongs of the Brunner test.
1. Prong 1: That the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for the debtor and the debtor’s dependents if forced to repay the loans. Debtor was destitute, unemployed for 16 months, had no income, was not eligible for unemployment compensation, had given up her car, was living rent free with a friend and fed herself with food stamps.
  2. Prong 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. Judge Schmetterer declared that the debtor’s unsuccessful “sixteen month search without finding work is enough to determine that the circumstances are likely to persist for a significant period of the repayment period.”
  3. Prong 3: That the debtor has made good faith efforts to repay the loans. The debtor had paid about 140% of the original principal balance of the loans.



## BANKRUPTCY REMEDY OVERVIEW

### KURT O'KEEFE

You have seen this material before because  
NOTHING CHANGES!!!  
Maybe above is a slight exaggeration.

When the Bankruptcy Code was first enacted in 1978, student loan debt could be discharged either after the passage of five years since the repayment obligation began or if repayment would impose an undue hardship on the debtor or his/her dependents.

The five-year waiting period was upped to seven years in 1990 and in 1998, the Bankruptcy Code was amended to eliminate the waiting period altogether.

This left the only means to discharge student loan debt as the debtor having to prove undue hardship.

11 USC 523(a)(8) defines exactly which student loan debt is not discharged unless undue hardship is proven.

The lender has the burden of proof on whether the debt qualifies as a student loan as there defined.

I took 9 years for the long nightmare to begin.

And we have been stuck there since the 1980s.

- A. The notorious three part Brunner Test.
- B. (*Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). )  
Gifted to us by the Second Circuit and applicable everywhere except 1<sup>st</sup>, 8<sup>th</sup> and 10<sup>th</sup> Circuits.

The Test (from the holding):

(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 Sixth Circuit, in 2005, in *Oyler v. ECMC (In re Oyler)*, officially adopted the three-pronged analysis from *Brunner*.

Going way beyond the actual statute, the 6<sup>th</sup> Circuit *In re Barrett*, 487 F.3d 353 (6<sup>th</sup> Cir. 2007), added the phrase I bolded below:

“that circumstances indicate a **certainty of hopelessness**, not merely a present inability to fulfill financial commitment ... such circumstances may include but are not limited to illness, disability, a lack of useable job skills, or the existence of a large number of dependents ... [but] ultimately the most important factor is that the additional circumstances must be beyond debtor’s control, not born of free choice.” (p. 359)

At least the 6<sup>th</sup> Circuit is not all or nothing but is one of the Circuits that allows partial discharge as to the amount of student loan debt found to work and undue hardship.

*In re Miller*, 377 F.3d 616 (6<sup>th</sup> Cir. 2004);

*Graves v. Myrvang (In re Myrvang)*, 232 F.3d 1116 (9<sup>th</sup> Cir. 2000);

*Alderete v. Educational Credit Management Corp. (In re Alderete)*, 412 F.3d 1200 (10<sup>th</sup> Cir. 2005);

*Hemar Ins. Corp. of America, v. Cox (In re Cox)*, 338 F.3d 1238 (11<sup>th</sup> Cir. 2003).

Do not get excited when a bankruptcy Judge does the right thing and looks at the actual intent of the statute.

<http://www.nysb.uscourts.gov/content/re-18-09023-cgm-rosenberg-v-ny-state-higher-education-services-corporation-et-al>

<https://www.businessinsider.com/veteran-student-loan-debt-forgiveness-revoked-bankruptcy-discharge-2021-10>

Alternative Test-totality of the circumstances-

Applicable in 8th *Conway v. Nat'l Collegiate Trust (In re Conway)*, 495 B.R. 416 (B.A.P. 8th Cir. 2013).

1st Circuit has charted its own path.

The First Circuit has declined to adopt a specific test. *Nash v. Connecticut Student Loan Foundation*, 446 F.3d 188 (1<sup>st</sup> Cir. 2006). The Supreme Court has thus far declined opportunities to resolve arguable Circuit split because they choose to deal with so many much more interesting issues. The Brunner Test is fact intensive. Try to find facts that will give a Court a reason(s) to apply Brunner in the debtor's favor.

See *In Re Good*, 16-54035 Ed. MI, *Good v. Educational Credit Management Corporation*, AP # [17-04451-pjs](#) and re-filed as # [20-04176-pjs](#).

Complicated facts and lots of pleadings.

The Defendant's Summary Judgment Motion [17-04451-pjs](#) (Docket #19-31) accompanying pleadings have a lot of meat.

## BANKRUPTCY PROCEDURE AND STRATEGY

Discharge determination under 523(a)(8) requires that the Debtor file an adversary proceeding.

**(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;

Creditor has the burden to establish loan as within 523(a)(8) exceptions from discharge.

The burden then shifts to Debtor to prove undue hardship)

So, in your complaint, Count I, contend that the loans are NOT subject to exception from discharge.

If true, you did not need to file the Adversary.

But this is a situation crying out for a comfort order.

Count II will be, hopefully, some other substantive grounds under Brunner.

#### WHAT TYPES OF LOANS ARE SUBJECT TO 11 USC 523 (a)(8)?

Some creative arguments on the Debtor side have met with the approval of some Courts.

<https://www.govinfo.gov/app/details/USCOURTS-ca10-18-00090>

<https://www.govinfo.gov/content/pkg/USCOURTS-ca2-20-01981/pdf/USCOURTS-ca2-20-01981-0.pdf>

In this case, the disputed term—“educational benefit”—is undefined and potentially ambiguous. *Noscitur* therefore instructs us to cabin it such that its scope aligns with that of its listed companions—“scholarship” and “stipend.” See *T.W. v. N.Y. State Bd. of L. Examiners*, 996 F.3d 87, 98 (2d Cir. 2021) (relying on *noscitur* to avoid an interpretation that would “define the word much more broadly than its statutory neighbors”). Both “scholarship” and “stipend” describe conditional grant payments “which are not generally required to be repaid by the recipient.” *Campbell v. Citibank, N.A.* (In re Campbell), 547 B.R. here. Moreover, post-Graham, the Supreme Court has utilized *noscitur* when interpreting a term in a list of three items. See *Yates v. United States*, 574 U.S. 528, 544–45 (2015). Case 20-1981, Document 136-1, 07/15/2021, 3138128, Page19 of 21 20 49, 55 (Bankr. E.D.N.Y. 2016). For example, a “scholarship” for a student-athlete need not be repaid if the recipient remains on the team; similarly, a “stipend” is a payment that is conditioned on the recipient’s performance of services and generally need not be repaid. The defining characteristic of a loan, by contrast, is an unconditional obligation to pay it back. Interpreting “educational benefit” to cover all private student loans when the two terms listed in tandem describe “specific and quite limited kinds of payments that . . . do not usually require repayment,” In re Crocker, 941 F.3d at 220, would improperly broaden § 523(a)(8)(A)(ii)’s scope. “Educational benefit” is therefore best read to refer to con-

ditional grant payments similar to scholarships and stipends. The Reserve Officer Training Corps and the National Health Service Corps, for example, pay tuition in exchange for a promise to serve in the military after graduation or to practice medicine in an underserved region. See Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 292 (2019). A recipient who breaks that promise incurs an “obligation to repay [the] funds” that they previously received “as an educational benefit.” Per Case 20-1981, Document 136-1, 07/15/2021, 3138128, Page20 of 21 21 § 523(a)(8)(A)(ii), that obligation cannot be discharged in bankruptcy.

Why and when do you file a 523(a)(8) Adversary?

How do you know who proper parties are – you cannot just name the servicers.

Debtors can get the information on their government loans from the government website.

You have to add the Justice Department for notice on government loans.

There also may be private guaranty agencies.

If the loan is not on the government site, it is a private loan, and might be anywhere as they are bought and sold same as any other debt.

Clients will never have original loan documents.

If all else fails, sue whoever did have the loan, at some point in time, according to the information you have.

If it is the wrong party, they will tell you, and, tell you which entity bought the student loans from them.

#### GOVERNMENT V. PRIVATE STUDENT LOANS

Private loan owners are dealing with their own money so can be much more flexible.

Can be.

Especially debt buyers, like the National Collegiate Trust (NCT) entities and others.

Because they bought the loans at a discount they can cut the balance and still make money.

Do NOT assume that the debt buyers can prove they own your client’s loan

However, you have potential statutes of limitation defenses that are not available with government loans.

The government has, on occasion, been more flexible in modifying student loan terms as part of settling an adversary case.

Such as lower interest rate and not starting payments until some months after the order settling the Adversary is signed.

What are the prospects of settlement in a 523(a)(8) AP?

So far, for me, one hundred percent of cases have settled.

#### Case Law Developments under 523(a)(8?)

Private student loan case: e.g. *Homaidan v. Sallie Mae*,

3 F.3d 595 (2d Cir. 2021) Private loans that exceed cost of attendance and enforcement of discharge injunction against their collection.

DOE Borrower Defense: *Parvizi v. USA*, 641 B.R. 729 (1st Cir. B.A.P. 7/29/22) Debtor argues

\$650,000 in student loans worthless because she washed out of residency programs so an undue hardship. (1) Can't raise unless exhausted DOE admin remedies (2) even if no DOE exhaustion remedy. That only applies on basis of misconduct by educational institution not alleged misconduct by later employers.

#### ARE PRIVATE STUDENT LOANS DISCHARGEABLE?

523(a)(8)(B) "(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend;"

*In re Page*, 592 B.R. 334 (8th Cir BAP 2018)

Here, the bankruptcy court's broad construction of the term "**funded**" is inconsistent with Congress' intent that exceptions to discharge be narrowly construed. The evidence on which the bankruptcy court's conclusion that TERI funded the Loan is based is scanty. It was not established that TERI guaranteed the loans, processed the loans, or even received all the loans. TERI merely provided an address to which applications could be delivered, and that is not sufficient to support the inference that TERI "funded" this loan program. Further, that inference was drawn in favor of NCSLT, the movant, rather than the Debtor as legally required.

We are not in a position to make a factual finding on the issue of TERI's guarantee of the Loan since the bankruptcy court declined to make that finding. We, therefore, remand this issue to the court for that determination and its legal significance to the Loan's dischargeability.

TERI, the straw man "guarantor" of private student loans, that was its entire business, was brought in specifically to escape discharge before 523(a)(8)(B) was enacted.

Here's a fun study – try to find a private loan from before BAPCPA that does not have a non-profit tied in.

I don't think you'll find many if any.

True private loans with no non-profit didn't start until after 523(a)(8)(B) arrived.

Look at Sallie Mae.

Prior to 2006 they used Gemini funding as a non-profit to escape discharge.

After 2006 they stopped using Gemini because they thought 523(a)(8)(B) was their protection.

- Joshua Cohen, The Student Loan Lawyer

#### CHAPTER 13

Courts – and Chapter 13 Trustees – differ on separate Plan classification of Student Loans.

Here is some language from a Chicago debtor attorney that might work:

Debtor currently has two student loans owned by the U.S. Department of Education, the Title IV Loan Holder, as set forth in paragraph 5.2 above. The Fedloan Servicing Account no. is (redacted), which includes both loans. Debtor will continue to make the IDR payments as set forth in paragraph 5.2 above. The Debtor will renew the IDR each year in a timely fashion. The Debtor shall participate in IDR plans in which Debtor participated pre-petition and for which Debtor is otherwise qualified as determined by the Title IV Loan Holder. The Debtor waives application of the automatic stay provisions of 11 U.S.C. 362(a) as to all loan servicing, administrative actions and communications concerning the IDR plan by the Title IV loan holder, or its agents and assigns, to the extent necessary to facilitate the IDR program and its requirements for continued participation by the Debtor. Debtor waives any and all causes of

action and claims against the Title IV loan holder, or its agents and assigns, for any alleged violation of the automatic stay under 11 U.S.C. 362(a) with respect to the Debtor's continued enrollment and participation in an IDR plan. Debtor acknowledges that his eligibility for, and his monthly payments under, any IDR plan may change based on applicable law and regulations.

And From North Carolina:

- The Debtor is not seeking nor does this Order provide for any discharge, in whole or in part, of her student loan obligations.
- The Debtor shall be allowed to seek enrollment in any applicable income-driven repayment ("IDR") plan with the U. S. Department of Education and/or other student loan servicers, guarantors, etc. (Collectively referred to hereafter as "Ed"), without disqualification due to her bankruptcy.
- Ed shall not be required to allow enrollment in any IDR unless the Debtor otherwise qualifies for such plan.
- The Debtor may, if necessary and desired, seek a consolidation of her student loans by separate motion and subject to subsequent court order.
- Upon determination by Ed of her qualification for enrollment in an IDR and calculation of any payment required under such by the Debtor, the Debtor shall, within 30 days, notify the Chapter 13 Trustee of the amount of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 Plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- The Debtor shall re-enroll in the applicable IDR annually or as otherwise required and shall, within 30 days following a determination of her updated payment, notify the Chapter 13 Trustee of such payment. At such time, the Trustee or the Debtor may, if necessary, file a Motion to Modify the Chapter 13 plan to allow such direct payment of the student loan(s) and adjust the payment to other general unsecured claims as necessary to avoid any unfair discrimination.
- During the pendency of any application by the Debtor to consolidate her student loans, to enroll in an IDR, direct payment of her student loans under an IDR, or during the pendency of any default in payments of the student loans under an IDR, it shall not be a violation of the stay or other State or Federal Laws for Ed to send the Debtor normal monthly statements regarding payments due and any other communications including, without limitation, notices of late payments or delinquency. These communications may expressly include telephone calls and e-mails.
- In the event of any direct payments that are more than 30 days delinquent, the Debtor shall notify her attorney, who will in turn notify the Chapter 13 Trustee, and such parties will take appropriate action to rectify the delinquency.
- The Debtor's attorney may seek additional compensation by separate applications and court order for services provided in connection with the enrollment and performance under an IDR.

Some Debtor Attorneys file serial Chapter 13 cases for the same Debtor, to keep kicking the can down the road and hold off collection.

Indefinitely.

Or wait until there are some substantive changes in the law.

The Department of Education has been instructed to back off being so aggressive in Adversary Proceedings.

However, in their part of the swamp, the Department of Justice has yet to comply.

#### BIDEN EXECUTIVE ORDER

Exceptions:

1. DOES NOT APPLY TO PRIVATE STUDENT LOANS.
2. Until Thursday, borrowers with privately held federal student loans [qualified for relief](#) if they consolidated their loans into the Direct Loan program. According to the new guidance, however, borrowers with FFEL or Perkins loans not held by the department can no longer obtain one-time debt relief through consolidation, and will only qualify for forgiveness if they applied for consolidation before September 29, 2002.

3. When can someone apply?

The official website is being Beta tested now.

<https://studentaid.gov/welcome/?redirectTo=%2F>

"Those borrowers will not need to reapply if they submit their application during the beta test, but no applications will be processed until the site officially launches later this month," an administration official [told](#) CNN. "This testing period will allow the Department to monitor site performance through real-world use, test the site ahead of the official application launch, refine processes, and uncover any possible bugs prior to official launch."

<https://www.businessinsider.in/policy/economy/news/student-loan-borrowers-can-now-apply-for-bidens-debt-cancellation-during-a-beta-testing-period-reports-say/articleshow/94870937.cms>

President Joe Biden's announcement that he will cancel up to \$20,000 in federal student loans for qualified borrowers is leaving many borrowers facing challenges related to its implementation, Bloomberg News reported. Many borrowers are likely to treat the process with urgency given that a pandemic-era freeze in student loan repayments is set to expire in January. More than half of those who qualified for forbearance haven't made a student loan payment in nearly three years after the Trump administration first paused them in March 2020. Biden opted to extend the policy several times amid economic uncertainty. Education Secretary Miguel Cardona acknowledged the uphill battle on Sept. 7, saying the department is trying to "simplify" processes so people aren't overwhelmed when they apply. "We have a dedicated team at the Department of Education that is working closely with the White House, leveraging the expertise gained from past implementation efforts, and meeting daily to implement the student debt relief plan," a Department of Education spokesperson said in a statement. The majority of the roughly 43 million borrowers who qualify for relief will need to fill out an online application form beginning

in early October to verify their incomes to prove their eligibility. Once complete, those applications will take four to six weeks to process, the Department of Education has said. (The department already has income information for some 8 million borrowers, whose relief will be automatic.) That makes for something of a race against time for the government to spread the word about the program and for consumers to take advantage of it: Borrowers should complete forms by November 15 so they are processed before loan payments resume in January, according to an infographic tweeted by Cardona.

4. Will it stand up in Court?

Stay tuned.

Six states sued in federal court in Missouri arguing the President has no authority to forgive student loan debt by executive.