Comments of the
National Consumer Law Center
(on behalf of its low-income clients)

to the

Department of Education

Regarding the Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings

Office of Postsecondary Education,
U.S. Department of Education

Docket ID ED-2017-OPE-0085

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The National Consumer Law Center,[1] on behalf of its low-income clients, submits the following comments in response to the Department of Education's request for information on evaluating undue hardship claims in bankruptcy. We thank the Department for this opportunity, and we are hopeful that the Department will develop helpful guidance on the appropriate factors to consider in deciding when not to oppose a debtor's request for an undue hardship discharge.

We urge the Department to take a fresh look at this issue and ignore or completely reformulate the "Dear Colleague Letter Gen.-15-13" issued in 2015.[2] The letter purported to offer guidance on when a student loan holder should not object to an undue hardship discharge. Instead, it encouraged student loan holders to assert litigation positions that are at odds with an appropriate undue hardship standard. The letter stressed use of the long-term income driven plans and administrative disability discharges as a means to restrict undue hardship discharges. Loan holders were encouraged to consider various irrelevant factors such as the relative size of

[1] The **National Consumer Law Center, Inc.** (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws, unfair and deceptive practices, and student loan law. NCLC attorneys regularly testify in Congress and provide comprehensive comments to the federal agencies on consumer regulations. These comments were written by John Rao and Geoff Walsh.

[2] U.S. Dep't of Educ., Dear Colleague Letter Gen.-15-13, Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings (July 7, 2015).

student loan debt as compared to the debtor's other obligations and whether the debtor reaffirmed any debts. The Department encouraged loan holders to oppose consideration of the debtor's age as a factor that would favor the finding of undue hardship. Rather than provide helpful guidance on factors that favor settlement, the Department's letter simply listed the litigation strategies the Department endorsed as means to oppose undue hardship discharges in bankruptcy.

The Department's 2015 guidance letter also failed to address the overly aggressive litigation tactics that have been used in undue hardship cases, which have imposed far greater barriers to justice on debtors than those facing litigants in other civil litigation. While data on undue hardship cases is scarce, one study has shown that student loan creditors are far less likely to resolve litigation through settlement than other civil litigants.[3] This study reveals that only 36 percent of the debtors' cases in the study were settled or had other pre-trial dispositions. Generally about 97 percent of all cases in state and federal courts are resolved by means other than by trial.[4]

A far greater percentage of debtors are forced to go to trial to get a verdict in their undue hardship cases as compared to other civil litigation. These are debtors who are far less likely to afford the expense of a multi-day trial than other civil litigants. Almost 20 percent of the debtors in the study obtained a trial verdict. Statistics compiled by the Administrative Office of the U.S. Courts show that of the federal court civil cases concluded in the period when the study was conducted (FY 2011), only 1.1 percent were concluded by a trial verdict.[5]

In issuing new guidance on undue hardship, we urge the Department to consider the following matters.

1. The Department's consideration of the debtor's present financial circumstances should be done without costly and unnecessary pre-trial discovery.

Consideration of the debtor's present financial circumstances is at the core of the undue hardship standard. Under either the *Brunner* or totality of circumstances test, the debtor's current income and expenses are reviewed to determine if the debtor has an ability to repay the student loans and at the same time meet necessary living expenses. In the vast majority of cases decided by bankruptcy courts, the debtor is able to satisfy this first prong of the *Brunner* test. However, this comes only after costly and unnecessary litigation, including extensive pre-trial discovery about the debtor's expenses, because the Department and the Educational Credit Management Corporation (ECMC) refuse to stipulate to the obvious.[6]

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[3] Iuliano, Jason, "An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard," 86 American Bankruptcy Law Journal 495 (2012).
[4] Court Review: The Journal of the American Judges Association Volume 42, Issue 3-4 - A Profile of Settlement, Dec. 1 2006.
[5] Table C-4, Annual Report of the Director: Judicial Business of the United States Courts.
[6] As an example of the extensive discovery requested by the Department, *see In re* Dorsey, 2015 WL 4873123 (Bankr. E.D. La. Aug. 13, 2015).

Far more troubling is that it has become common practice for the Department and ECMC to argue in court cases that certain "discretionary" or "non-essential" expenses, such as restaurant meals, cable television, Internet access, or casual alcohol consumption, are avoidable and could free up income to pay the student loan debt. Certain individual expenses are highlighted without consideration of the debtor's overall budget or attempts to reduce expenses, in order to portray the debtor as irresponsible. This is done even in cases in which the debtor's income may be below the poverty level.

The story of Karen Lynn Schaffer, as reported in a New York Times article, is an example that is unfortunately not unique.[7] Ms. Schaffer, age 54, took out a student loan for her son to attend college at a time when her husband was employed. Her husband later could not work due to severe medical problems from hepatitis C, diabetes and liver cancer. Ms. Schaffer took a number of steps to reduce expenses. She also became employed in a full-time job in a security position, waking up at 4:00am every morning to care for her husband before leaving for work. ECMC argued that Ms. Schaffer was spending too much on food by eating at restaurants. This turned out to be the $12 she was spending at McDonald's, where Ms. Schaffer and her husband normally split a "value meal." Ms. Schaffer said: "I was taking care of Ron and working a full-time job, so lots of times I didn't have time to fix dinner, or I was just too darn tired."

Many courts have appropriately responded to these arguments by refusing to view "discretionary" expenses in isolation, particularly where excluding them would not bring the debtor even close to being able to make payments due on the student loans.[8] Other courts have found that these expenses to be appropriate when in modest amounts, as they may be the debtor's only form of recreation.[9]

It is appropriate for the Department to consider whether the debtor's expenses are commensurate with a reasonable, not extraordinary, standard of living. However, the focus should be on whether the debtor can pay for basic necessities. Rather than becoming mired in

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[7] Natalie Kitroeff, "Loan Monitor Is Accused of Ruthless Tactics on Student Debt," New York Times, Jan. 1, 2014.

[8] *See, e.g., In re* Gubrath, 526 B.R. 863, 869-70 (D. Colo. 2014); *In re* Carnduff, 367 B.R. 120, 128 (B.A.P. 9th Cir. 2007) ("Even with every adjustment in the Government's favor there would be only a few hundred dollars left over every month after deducting Debtors' current expenses from their current income"); *In re* Zook, 2009 WL 512436, at *9 (Bankr. D.D.C. Feb. 27, 2009) ("The *Brunner* test ought not be turned in that fashion into a game of 'gotcha' based on viewing certain expenditures in isolation, wearing blinders that disregard the debtor's needs in a global fashion.").

[9] *In re* Nightingale, 543 B.R. 538, 546 (Bankr. M.D.N.C. 2016)(where internet and cable were included in an overall meager budget, "it is reasonable for the Plaintiff, who is mostly homebound due to lack of transportation and illness, to have some mode of communicating and accessing the internet at home"); *In re* McLaney, 375 B.R. 666, 674 (M.D. Ala. 2007)("[e]ven under the minimal standard of living test, people must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet").

arguments over whether a particular expense is excessive in relation to various shifting standards, a better approach is to focus on certain basic needs of the debtor's family.

The bankruptcy court's analysis in *In re Ivory*[10] serves as a useful example of this approach. The court listed what it considered to be the elements of a minimal standard of living. These include decent shelter and utilities, communication services, food and personal hygiene products, vehicles (maintained, insured, and registered), health insurance or the ability to pay for medical and dental expenses when they arise, some small amount of life insurance, and some funds for recreation.

When a borrower's monthly income falls hundreds of dollars below the level at which the debtor could afford to pay for these necessities, the Department and ECMC should not expend litigation resources conducting discovery and presenting arguments over much smaller expenditures for items such as cable television and Internet access. The basic purpose of this inquiry is to ensure that, after debtors have first provided for their basic needs, they do not allocate discretionary income to the detriment of the student loan creditor.

In the vast majority of cases, this inquiry can be satisfied by simply reviewing the income and expense schedules filed by the debtor in the bankruptcy case. These schedules include Official Forms B106I (Schedule I), B106J (Schedule J), B122A-1 or B122C-1)(Statement of Current Monthly Income) filed by all debtors, and B122A-2 (Chapter 7 Means Test Calculation) and B122C-2 (Chapter 13 Calculation of Your Disposable Income) filed by above-median income debtors. These schedules filed with the bankruptcy court include detailed information about the debtor's financial situation and are executed by the debtor under oath. If these schedules show that the debtor has no disposable income to repay the student loans, the loan holder should stipulate that a hardship exists under the *Brunner* first prong.

We urge the Department to include these specific recommendations in any revised guidance:

- Attorneys representing the Department, ECMC, and other loan holders should treat Schedules I and J and the other financial disclosures filed in the debtor's bankruptcy case as sufficient probative evidence of the debtor's income and expenses for purposes of determining whether the debtor is maintaining a minimal standard of living under the first prong of the *Brunner* test and any similar inquiry under the totality test. No pre-trial discovery should be conducted about these matters. The only exception should be if the loan holder has substantial, credible evidence that the information contained in the documents is not accurate or no longer current. If the loan holder believes the information is no longer current, discovery should be limited to inquiries about changed circumstances.

- If the debtor's household income is below the median family income for the state in which the bankruptcy case is filed (which can be easily determined by reviewing Official Forms B122A-1 or B122C-1 filed by the debtor), and the debtor's Schedules

[10] 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001).

I and J show that the debtor has no disposable income, the loan holder should stipulate that the debtor is maintaining a minimal standard of living under the first prong of the *Brunner* test and any similar inquiry under the totality test. This stipulation should be included in any statement of agreed facts or other elements of a pre-trial statement or order filed with the bankruptcy court.

2. A zero or nominal dollar payment requirement under an income-driven repayment plan should not preclude the debtor from obtaining an undue hardship discharge.

Another consideration under the first prong of the *Brunner* test is the role of income-driven repayment (IDR) plans. While we also address IDRs below in the context of good faith (*Brunner* third prong), we urge the Department to reconsider its position on IDRs with respect to repayment ability.

In the 2015 Guidance, the Department stated: "if the monthly repayment under any available income-driven plan is within the debtor's means, the ability to prove undue hardship should be correspondingly more difficult, though not impossible."[11] However, the Department has adopted an even more restrictive position in litigation by routinely arguing that anyone with a $0 per month IDR payment should be categorically deprived of a bankruptcy discharge, contending that all debtors can afford a $0 payment. For example, the Department has argued in recent cases that the debtor cannot satisfy the first prong of the *Brunner* test if the debtor would have a $0 per month IDR payment.[12] This effectively ends the hardship analysis for the borrower because failing any single step in the *Brunner* test results in denial of the hardship discharge.

We urge the Department to reconsider its evaluation of the role of IDRs in undue hardship litigation for the following reasons.

a. The Department's position on zero or nominal dollar IDR payments does not benefit the Federal government and taxpayers.

The Department and ECMC often oppose a bankruptcy discharge for a debtor who could make minimal IDR payments even when there is no likelihood that the debtor's financial situation will improve or that there will be any meaningful repayment of the student loans. Even when faced with clear evidence that the debtor's situation is not likely to change, the Department's position has been that the debtor should wait twenty or twenty-five years in the future to obtain loan forgiveness rather than a present bankruptcy discharge. This position is fiscally irresponsible as it fails to consider the administrative costs to the Federal government and ultimately taxpayers in keeping the debtor on an IDR plan when there is no anticipated loan repayment.

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[11] Dear Colleague Letter Gen.-15-13, p. 6.

[12] *In re* West, 2018 WL 846539 (Bankr. W.D. Tenn. Feb. 6, 2018); *In re* Coplin, 2017 WL 6061580, at *8 (Bankr. W.D. Wash. Dec. 6, 2017) (Defendants ECMC and DOE argue that the debtor "cannot pass the first *Brunner* prong because the loans impose no payment obligation whatsoever" as a result of the debtor's eligibility for an IDR plan).

This is illustrated by the Department's actions in *In re West*.[13] The debtor is 60 years old and unemployed. He lives rent-free in his aunt's home and his only income is $194 per month in Supplemental Nutrition Assistance Program ("SNAP") benefits. The bankruptcy court found the debtor's testimony to be credible that his criminal background, combined with his age and race, have made it impossible for him to find work. Despite this bleak future, the Department argued that the debtor should not receive a bankruptcy discharge and instead should enroll in an IDR with a $0 payment.

Simply put, the Department's policy amounts to throwing good money after bad. The fact that the debtor's IDR payment is $0 or some minimal dollar amount is confirmation that the debt is not recoverable. Efforts to keep the debtor on an IDR for twenty or twenty-five years, including the administrative costs of annual recertifications and collection costs if the debtor re-defaults, impose a real cost on the student loan system and taxpayers that is not offset by future recoveries. Neither the government nor the debtor benefits from this outcome.

Moreover, the whole purpose of making student loans nondischargeable in bankruptcy is to protect the financial integrity of the student loan program by ensuring that student loans are repaid. Denying a debtor such as Mr. West a bankruptcy discharge and forcing him to stay on a $0 payment IDR until he is age 85 does not further this purpose. Far worse, it imposes additional non-recoverable costs on the student loan system.

The Office of Inspector General recently found that the Department should provide more detailed cost information about IDR plans and loan forgiveness programs.[14] In discussing the program costs, the report noted that decision makers and others "may not be aware of the risk that . . . the Federal government and taxpayers may lend more money overall than is repaid from borrowers."[15] This docket provides an opportunity for the Department to follow the OIG recommendation and quantify the net administrative and servicing costs related to a borrower who is making nominal IDR payments. We urge the Department to use this information to engage in a rigorous cost-benefit analysis of its current position to oppose undue hardship discharges for cases in which there is no reasonable prospect that the debtor's nominal IDR payment obligation will change or provide any significant loan repayment.

b. Congress did not intend for income-driven repayment plans to be a substitute for a bankruptcy discharge.

Both *Brunner* and the totality test require that a court evaluate the debtor's hardship based on the payment obligations under the student loans. In determining the monthly payment amount for the undue hardship assessment, the appropriate place to begin is with Congress's

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[13] *In re* West, 2018 WL 846539 (Bankr. W.D. Tenn. Feb. 6, 2018). The Department has appealed the decision in this case granting a discharge to the debtor.
[14] Final Audit Report, "The Department's Communication Regarding the Costs of Income-Driven Repayment Plans and Loan Forgiveness Programs," Control Number ED-OIG/A09Q0003, January 31, 2018.
[15] *Id*. at p. 1.

enactment of the operative Code provision in 1978. There were no income-driven payment programs in 1978. Congress could not have intended that courts evaluate undue hardship using payment figures derived from programs that did not exist at the time. Given the clear, absolute five-year discharge option that existed in 1978,[16] any type of long-term repayment program running for twenty-five years would have been irrelevant to the undue hardship determination as envisioned by Congress at the time. Congress has not revisited the undue hardship standard since 1978.

The first IDR program, the Income Contingent Repayment Plan, was developed in 1993. After Congress removed the time-based automatic bankruptcy discharge option in 1998, the undue hardship standard was left as the only bankruptcy discharge option.[17] The legislative history indicates that in 1998 Congress was aware that the long-term payment plans and other options could serve as fallbacks for borrowers who did not qualify for an undue hardship discharge.[18] However, Congress did not repeal the bankruptcy hardship provision. As the Sixth Circuit Court of Appeals has noted: "Had Congress intended participation in the ICRP—implemented in 1994—to effectively repeal discharge under § 523(a)(8), it could have done so."[19]

Indeed, Congress expressly stated that it did not intend that the Department's payment alternatives should displace or in any way change the undue hardship discharge available under the Code. According to the relevant 1998 Conference Report addressing the elimination of the time-based automatic discharge, "[t]he conferees note that this change does not affect the current provisions allowing any student borrower to discharge a student loan during bankruptcy if they can prove undue economic hardship."[20]

Finally, among the substantial revisions to the Code made in 2005, Congress added section 523(a)(8)(b) to extend the nondischargeability exception to cover private student loans. Here again, Congress did not alter the 1978 language related to the discharge for undue hardship. By this time, the income driven plans had been available for more than a decade.

Hardship should therefore be evaluated in terms of the impact upon the debtor of having to make payments due under the original note terms based on a fully amortizing payment schedule. This is consistent with the 1973 Report of the Commission on the Bankruptcy Laws of the United States, which as discussed more fully below was relied upon by Congress in adopting

[16] Amendments in 1990 extended the waiting period for an unconditional discharge from five to seven years. *See* Federal Debt Collection Procedures Act of 1990, Pub.L. No. 101–647, § 3621(2), 104 Stat. 4933.
[17] In 1998, Congress eliminated the then-applicable seven year waiting period option for dischargeability. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1837 (1998).
[18] Higher Education Amendments of 1998, Conference Report 105-750 (Sept. 25, 1998); 1998 U.S. Code Cong. & Admin. News 404.
[19] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 364 (6th Cir. 2007).
[20] Higher Education Amendments of 1998, Conference Report 105-750 (Sept. 25, 1998); 1998 U.S. Code Cong. & Admin. News 404.

the undue hardship provision in section 523(a)(8). The Commission's Report states that a determination of undue hardship should consider: "The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents, at a minimal standard of living within their management capability, **as well as to pay the education debt**."[21] A $0 or minimal IDR payment, which does not pay the education debt and in fact makes it grow larger, is not the appropriate measure for evaluating undue hardship.[22]

The Department's 2015 guidance letter states that "if the monthly payment under any income-driven plan is within the debtor's means, the ability to prove undue hardship should be correspondingly more difficult, though not impossible." The effect of the Department's actual litigation strategy, however, is to make it impossible, since the Department argues that a $0 IDR payment will always be within the debtor's means.[23] The Department's policy, effectively writing section 523(a)(8) out of the Bankruptcy Code for the most financially vulnerable debtors, should be changed to reflect the intent of Congress in retaining the undue hardship discharge. New guidance issued by the Department should instruct that a $0 or nominal IDR payment that the debtor may be eligible for shall not be used to oppose an undue hardship discharge in bankruptcy.

c. The Department's review under the *Brunner* first prong should consider factors affecting hardship that extend beyond the debtor's monthly payment.

Income-driven repayment plans provide important options for many borrowers dealing with student loan debt. However, any future guidance developed by the Department should recognize the significant differences between the potential for loan forgiveness under an IDR and the immediate right to a discharge provided under the Bankruptcy Code. The possibility of

[21] Report of the Comm'n on the Bankr. H.R. Doc. No. 93-137, Pt. II § 4-506 (1973) (*emphasis added*).

[22] *In re* Nightingale, 529 B.R. 641, 650 (Bankr. M.D.N.C. 2015) ("This Court refuses to jump the logical chasm necessary to conclude that no payment constitutes repayment, regardless of the title that the lenders choose to give to a program that excuses the debtor from repaying her loans. The *Brunner* test specifically requires that the Court determine whether the debtor would be able to maintain a minimal standard of living if forced to 'repay' her student loans."). *See also In re* Fern, 563 B.R. 1, 5 (B.A.P. 8th Cir. 2017) (concluding that a monthly payment obligation in the amount of zero does not "automatically constitute[] an ability to pay").

[23] *In re* Coplin, 2017 WL 6061580, at *9 (Bankr. W.D. Wash. Dec. 6, 2017) ("using the IBR payment program results in most low income debtors, such as the Plaintiff, failing to pass the first prong, because if the debtor's financial circumstances are dire enough the payment is often $0.00"); *In re* Morrison, 2014 WL 739838, at *4 (Bankr. E.D. Wash. Feb. 26, 2014) ("By the very nature of bankruptcy, the majority of debtors will have a nominal IBR payment. Thus, using the monthly IBR amount would dictate the outcome of the prong one and would render an absurd result—the more destitute the debtor the less likely the discharge").

forgiveness of debt after twenty or twenty-five years if the debtor complies with all requirements of an IDR plan does not remotely resemble a discharge under the Code.[24]

Rather than removing a debt burden, for low-income borrowers, IDR plans almost invariably increase the burden. Unlike a loan modification involving a permanent and immediate restructuring of the debt with a reduced payment amount, a borrower under an IDR remains legally obligated for the full student loan debt based on the contractual terms until the loan is forgiven, if at all, after twenty or twenty-five years. For a debtor with a $0 or nominal IDR payment, doubling, tripling, or quadrupling of the loan indebtedness is all but certain as unpaid interest continues to accrue and is capitalized.[25] This is the opposite of a "fresh start."[26]

Decades of mounting student loan indebtedness can have a drastic impact on an individual's future access to credit, employment opportunities, and housing.[27] It can impose a substantial emotional burden on the debtor as well.[28]

While the bankruptcy discharge provides clear relief from this burden, the IDR plans offer no certainty of relief. Borrowers only obtain forgiveness of debt if they adhere rigorously to all program requirements for the full twenty to twenty-five year duration. Borrowers who default while in a program lose eligibility.[29]

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[24] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 364 (6th Cir. 2007) ("requiring enrollment in the ICRP runs counter to the Bankruptcy Code's aim in providing debtors a 'fresh start.'"); *In re* Booth, 410 B.R. 672, 676 (Bankr. E.D. Wash. 2009).
[25] *In re* Wolfe, 501 B.R. 436, 439 (Bankr. M.D. Fla. 2013). *See also In re* Martish, 2015 WL 167154 (Bankr. E.D. N.C. Jan 12, 2015) (after making approximately $39,835 in payments on a consolidation student loan in the original amount of $11,202, debtor still owed $27,021 at time her chapter 13 case was filed).
[26] *In re* Dufresne, 341 B.R. 391 (Bankr. D. Mass. 2006) (rejecting ICRP alternative and noting that lender ignored "the indefinite and perhaps decades-long duration of the forbearance, the ongoing accruals of interest added to current debt, the public credit reporting of a large and growing debt in a perpetual default status, the tax consequences of a debt forgiven many years hence"); *In re* Brooks, 406 B.R. 382, 393 (Bankr. D Minn. 2009).
[27] *In re* Jolie, 2014 WL 929703, at *9 (Bankr. D. Mont. Mar. 10, 2014)("The evidence is uncontroverted, and it shows that [debtor's] student loan debt prevents her, because of its effect on her credit score, from increasing her income, and this predicament will persist while the student loan debt remains."); *In re* Mathieu, 495 B.R. 882 (Bankr. D. Minn. 2013) (47-year-old debtor would continue paying under ICRP until age 72 and never have access to reasonable credit); *In re* Strand, 298 B.R. 367 (Bankr. D. Minn. 2003) (interest accruing over twenty-five-year period under ICRP will leave debtor "hamstrung into poverty for the rest of his life" and prevent him from obtaining credit or approval of rental applications).
[28] *In re* Barrett, 337 B.R. 896, 903-904 (B.A.P. 6th Cir. 2006) (lender's emphasis on ICRP "fails to take account of the additional worry and anxiety that the Debtor is likely to suffer if he is compelled to watch his debt steadily increase knowing that he does not have the ability to repay it for reasons beyond his control"), *aff'd* 487 F.3d 353 (6th Cir. 2007); *In re* Marshall, 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010).
[29] 34 C.F.R. §§ 685.221(a)(2), 685.209(a)(ii), 682.215(a)(2).

Borrowers may also lose eligibility due to paperwork problems and servicer errors that can (and often do) occur during the decades of annual recertifications required to maintain participation.[30] Data released by the Department in 2015 indicates that many borrowers miss the deadline to recertify and thus may experience payment amount changes and further capitalization of accrued interest. The Department reported that nearly 57% of borrowers whose income-driven plan recertification was due in a twelve-month period ending in late 2014 did not recertify on time.[31]

When borrowers are required to make even small IDR payments, re-defaults can occur because the income driven plans do not take expenses into account. The formulas that set payments based solely on income do not look at medical expenses, high housing costs, or expenses for any short-term emergency the borrower may encounter. For twenty to twenty-five years a borrower is one sickness or accident away from permanently losing the "discharge" ostensibly available under a long-term repayment plan.

Once in default under a plan, the borrower can lose eligibility to participate in another income-driven plan. Defaults under plans can be irreparable because the options for removing a loan from default (consolidation, rehabilitation) may be one-time only or (like rehabilitation) burdensome.[32] Getting out of default through rehabilitation also does not ensure that the borrower will avoid financial troubles. In fact, the Consumer Financial Protection Bureau recently reported that "nearly one in three borrowers who exited default through rehabilitation defaulted for a second time within 24 months, and over 40 percent of borrowers re-defaulted within three years."[33]

Discharge of a debt in bankruptcy is not a taxable event. However, forgiveness of a student loan debt at the end of an IDR may result in cancellation of indebtedness income that is taxable.[34] This *tax* debt is generally not dischargeable in bankruptcy.[35] Therefore, successful completion of a long-term plan may simply see the Internal Revenue Service replace the Department as the powerful creditor pursuing the borrower for several more decades.[36]

Some courts have minimized the tax consequences of non-bankruptcy discharge of student loan debt by pointing out the collection of a tax debt may not flow inevitably from IDR

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[30] 34 C.F.R. §§ 685.209(a)(5)(iii), 685.221(e)(3).
[31] These data were released in materials for the Department's March 2015 negotiated rulemaking. U.S. Dep't of Educ., Sample Data on IDR Recertification Rates for ED-Held Loans, available at www.ed.gov.
[32] *See, e.g.* 34 C.F.R. § 685.220(d) (if all the borrower's direct loans have been consolidated, the borrower cannot re-consolidate the same loans to get out of default).
[33] Consumer Financial Protection Bureau, "Update from the CFPB Student Loan Ombudsman," May 16, 2017.
[34] 26 U.S.C. § 61(a)(12).
[35] 11 U.S.C. § 523(a)(1).
[36] *In re* Barrett, 487 F. 3d 353, 364 (6th Cir. 2007); *In re* Durrani, 311 B.R. 496, 508 (Bankr. N.D. Ill. 2005), *aff'd* 320 B.R. 357 (N.D. Ill. 2005).

forgiveness.[37] These courts opine that the debtor will not suffer harmful tax consequences from the IDR discharge decades in the future because the borrower can claim an insolvency exception to the tax liability. Assuming that this option becomes possible for the perpetually insolvent debtor (considering debtor's equity even in exempt assets), one can only wonder what sense it makes to postpone a discharge for twenty-five years.

We urge the Department to include these specific recommendations in any revised guidance:

- Loan holders should not oppose a bankruptcy discharge for a debtor who can afford to make $0 or nominal IDR payments if there is no reliable evidence that the debtor's financial situation will improve or that there will be any significant repayment of the student loans.

- In evaluating whether there may be any significant repayment of the student loans by a debtor who would make nominal payments under an IDR, the Department and loan holders should consider the cost of program administration and loan forgiveness for that debtor over the projected twenty or twenty-five year repayment period.

- Loan holders should consider the impact of an IDR on the debtor's present and future hardship from factors in addition to the loan payment amount, such as the potential tax liability for loan forgiveness and the impact of accumulating loan indebtedness. The likelihood that the debtor will avoid long-term tax consequences from debt forgiveness because of insolvency should be treated as a factor in favor of agreement to a bankruptcy undue hardship discharge.

3. In evaluating whether hardship is likely to persist, the relevant time period should not exceed ten years.

The second prong of the *Brunner* test considers whether additional circumstances exist indicating that the debtor's hardship is likely to persist. In predicting the debtor's future, the *Brunner* court described the relevant time frame for consideration to be "a significant portion of the repayment period of the student loans."[38] Given that extended IDR plans did not exist when *Brunner* was decided, this meant that courts should determine whether the debtor's hardship would extend for the remaining time of the standard ten-year loan repayment period. However, the Department and ECMC often argue in undue hardship litigation that the window for review should be much longer, often the twenty or twenty-five years that a debtor could be on an IDR plan.[39]

[37] *In re* Brondson, 421 B.R. 27, 35-36 (D. Mass. 2009) (collecting cases).
[38] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). *See also* Educational Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004) (under second *Brunner* prong, "inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan").
[39] *See, e.g.*, *In re* Price, 573 B.R. 579, 597 (Bankr. E.D. Pa. 2017) ("The DOE asks this court to consider a repayment period of twenty-five (25) years, the longest repayment plan the Debtor

Courts have correctly held that the Department's position does not comport with the original *Brunner* test or the language of section 523(a)(8).[40] Again, there were no IDR programs when Congress enacted the undue hardship language in 1978. Any type of long-term repayment program running for twenty years would have been irrelevant to the undue hardship determination as contemplated by Congress, particularly since student loans were also dischargeable at that time without even proving undue hardship after a five (and later seven) year waiting period. In fact, any undue hardship cases that were litigated before 1998 necessarily involved a debtor who was seeking a discharge within a short period of five or seven years after the loans first became due, so Congress clearly did not envision that courts would be considering the duration of hardship over an extended period.

The Department's position requires the court to engage in the impossible task of predicting a debtor's fate twenty-five years into the future. Predictions of future hardship under the *Brunner* second prong are difficult enough, even when a shorter, maximum ten-year period is used. It also imposes a daunting evidentiary burden upon the debtor to prove that her current financial circumstances and resulting hardship will persist decades into the future.

In responding to the Department's request to use a twenty-five year IDR term for the repayment period, the court in *In re Price* observed:

> In many cases, such determinations will be nothing more than mere guesswork, without any reasonable degree of certitude. Such a failure to engage in a grounded, realistic analysis not only creates the danger of an overly-strict application of *Brunner*, but also raises legitimate concerns about both the integrity of the judicial decision making process, as well as the public's perception of the process.[41]

The Department's position in advocating for a twenty-five year review period appears designed to deny bankruptcy discharges to all debtors other than those with the most debilitating, permanent disabilities. We urge the Department to abandon this position and include these specific recommendations in any revised guidance:

- The Department's guidance should instruct loan holders to evaluate hardship based on the impact that making payments due under the original note terms, which generally does not exceed ten years, will have upon the debtor.

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may have under an available income contingent repayment programs."), *rev'd on other grounds*, DeVos v. Price, 2018 WL 558464 (E.D. Pa. Jan. 24, 2018).

[40] *In re* Coplin, 2017 WL 6061580, at *9 (Bankr. W.D. Wash. Dec. 6, 2017); *In re* Price, 573 B.R. 579 (Bankr. E.D. Pa. 2017), *rev'd on other grounds*, DeVos v. Price, 2018 WL 558464 (E.D. Pa. Jan. 24, 2018).

[41] 573 B.R. 579, 605 (Bankr. E.D. Pa. 2017), *rev'd on other grounds*, DeVos v. Price, 2018 WL 558464 (E.D. Pa. Jan. 24, 2018).

- The period for consideration should not exceed the time remaining under the contractual loan repayment period, without regard to any IDR programs.

4. For settlement purposes, the Department should not require the debtor to prove additional circumstances that would amount to a "certainty of hopelessness" or "total incapacity."

In developing tests to determine undue hardship, the courts have strayed too far from the plain language of section 523(a)(8) and have considered matters not contemplated by the words of the statute. This is most evident in the formulation of the *Brunner* second prong and its consideration of additional circumstances indicating the hardship is likely to persist. Some courts have required, for example, that the debtor must prove a "certainty of hopelessness" or "total incapacity."[42]

It may be appropriate for the Department and ECMC to make use of the more extreme elements of these tests and related case law in litigation once a determination has been made to litigate rather than settle an undue hardship case. However, for purposes of initially determining whether to oppose a debtor's request for a bankruptcy discharge, the Department and loan holders should apply an interpretation of "undue hardship" that is consistent with the statutory language and the intent of Congress.

Numerous courts have commented that Congress said little about "undue hardship" in the Code's legislative history.[43] The Tenth Circuit noted that "[t]he phrase 'undue hardship' was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States."[44] The district court in *Brunner* commented that the Commission Report provided a description of undue hardship that Congress likely relied upon in enacting section 523(a)(8).[45] The Commission Report describes "undue hardship" as follows:

> In order to determine whether nondischargeability of the debt will impose an "undue hardship" on the debtor, the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents, at a

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[42] *In re* Randall, 255 B.R. 570, 577 (Bankr. D. N.D. 2000) (applying totality of circumstances test and noting that standard involves a "total incapacity both at the time of filing and on into the future to pay one's debts"); *In re* Brunner, 46 B.R. 752, 755 (S.D. N.Y. 1985) ("dischargeability of student loans should be based upon the certainty of hopelessness").

[43] *E.g., In re Kopf*, 245 B.R. 731, 736, n.10 (Bankr. D. Me. 2000).

[44] ECMC v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004).

[45] *In re* Brunner, 46 B.R. 752, 754 (S.D. N.Y. 1985) ("The Commission's report provides some inkling of its intent in creating the exception, intent which in the absence of any contrary indication courts have imputed to Congress.").

> minimal standard of living within their management capability, as well as to pay the education debt.[46]

Importantly, the Commission Report focuses on the debtor's inability to maintain a minimum standard of living while repaying the loans. It is devoid of stringent terms such as "certainty of hopelessness" or "total incapacity." The Report refers to a debtor maintaining a "minimal standard of living" based on "adequate" income, rather than suggesting the debtor must endure extreme poverty and demonstrate extraordinary circumstances.[47] The Report also focuses on the debtor's present and future condition. It does not refer to any of the debtor's pre-bankruptcy past, such as the debtor's reasons for obtaining the student loans or attempts to repay them.

Courts that require a "certainty of hopelessness," "total incapacity," or virtual absence of any expectation of loan repayment by the debtor have strayed too far from the statute's plain meaning and its legislative history.[48] Many of these courts have required that the exceptional circumstances must be something beyond the likely persistence of the debtor's financial problems, and may require proof of serious illness, psychiatric problems, incapacity or disability of a debtor or dependent. This consideration, albeit formulated differently, may appear in the totality test's first and third prongs.

The requirement to show something akin to a "certainty of hopelessness" requires debtors to prove a negative; that a virtually unpredictable course of events will not result in good fortune for the debtor. The requirement also suggests a burden of proof much stricter than the preponderance of the evidence standard that applies to hardship determination cases. Such a proof requirement eviscerates the "fresh start" potential inherent in section 523(a)(8)'s allowance for discharge in certain circumstances.[49]

Rather than require some degree of certainty that is simply beyond proof in most cases, loan holders should consider whether it is more likely than not that the debtor's financial difficulties causing undue hardship will continue into the immediate, foreseeable future. The likely persistence of hardship may be due to health problems or physical or mental disability of the debtor or a dependent. But it may also stem from more mundane causes, such as financial barriers that the borrower faces in his or her economic environment.[50] The Department and loan

[46] Report of the Comm'n on the Bankr. H.R. Doc. No. 93-137, Pt. II § 4-506 (1973).
[47] Extreme decisions such as *In re* Courtney, 79 B.R. 1004, 1010 (Bankr. N.D. Ind. 1987) suggest that a debtor must show that an effort to repay would "strip[] himself of all that makes life worth living."
[48] Krieger v. Educ. Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013) (noting "it is important not to allow judicial glosses, such as the language found in *Roberson* and *Brunner*, to supersede the statute itself"); *In re* Kopf, 245 B.R. 731, 741 (Bankr. D. Me. 2000) (*Brunner* and other similar approaches "test too much").
[49] ECMC v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004) (courts need not require a "certainty of hopelessness").
[50] *In re* Murray, 563 B.R. 52, 61 (Bankr. D. Kan. 2016) (additional circumstances shown when debtors were in late forties, not likely to see any salary increases, and their loans were twenty

holders should evaluate only realistic expectations rather than speculate concerning improved future prospects. In far too many cases, the Department and ECMC have opposed discharge simply because the debtor is employed and in good health.

Consideration of the debtor's employment history can help forecast the debtor's realistic future prospects. If the debtor has been stuck in low or modest paying jobs for the past ten or fifteen years, achieved only modest pay increases over that time, maximized her income potential in her field based on education, experience and skills, and there are no more lucrative jobs available to the debtor, only some highly unusual circumstance would suggest that the condition is not likely to persist.

Debtors who despite being in good health and working hard, do not earn enough to pay for basic necessities for their family, should be not be denied a hardship discharge because they cannot show they are disabled or that some additional circumstances exist. Age of the debtor or other factors that limit employment opportunities, or prevent retraining or relocation, are significant factors to be weighed.

We urge the Department to include these specific recommendations in any revised guidance:

- The Department's guidance should require loan holders to evaluate undue hardship based on a standard that is consistent with the plain language of the Bankruptcy Code and the intent of Congress.

- In considering for purposes of settlement whether the debtor's hardship is likely to persist, the Department's guidance should instruct loan holders that undue hardship can be established without the existence of additional circumstances that would amount to a "certainty of hopelessness" or "total incapacity." Additional circumstances need not be exceptional, and can include factors such as the debtor's advanced age, the need to provide for children or disabled family members, or the likely persistence of the debtor's financial problems.

- The Department's guidance should instruct loan holders that they should not oppose an undue hardship discharge simply because a debtor is employed and in good health. Loan

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years old), *aff'd*, 2017 WL 4222980 (D. Kan. Sept. 22, 2017); *In re* McCafferty, 2015 WL 6445185, at *8 (Bankr. E.D. Wash. Oct. 23, 2015) (additional circumstances shown when debtor is thirty-three years old, has no physical or mental limitations but has very limited savings and minimal assets, few marketable skills, and not likely to obtain significantly more lucrative earnings in the future; but debtor denied discharge on third prong); *In re* Lamento, 520 B.R. 676–677 (Bankr. N.D. Ohio 2014) (for thirty-five-year-old debtor who had worked at minimum wage jobs for past five years and supported two children ages seven and eight, any change for the better at children's emancipation was only speculative); *In re* Jolie, 2014 WL 929703, at *8 (Bankr. D. Mont. Mar. 10, 2014) (discharge granted where debtor met second *Brunner* prong with maximized income, lack of assets, advanced age (57), and need to care for disabled dependent).

holders should evaluate only realistic expectations rather than speculate concerning improved the debtor's future prospects.

5. The Department's determination of whether a debtor's current hardship will continue should be forward-looking and not consider matters in the debtor's past.

In evaluating whether a debtor's current hardship will continue under the *Brunner* second prong, the Department and ECMC have argued that the court should consider the debtor's past career choices or reasons for obtaining the student loans.

For example, the bankruptcy court in *In re Acosta-Conniff*, found that the debtor, a special education teacher, had established additional circumstances because she had reached the top of her school system's pay scale, was still unable to afford to pay her student loans, and that she would not be able to find a higher-paying job in her area.[51] On appeal, ECMC argued that this was not sufficient and questioned her reasoning for obtaining advanced education degrees. The district court ruled that the debtor must bear the consequences of her decision to incur loans to enter a field that did not pay well.[52] In the district court's view, the low pay in the field was not an "additional circumstance" pointing to persistence of her inability to pay back the loans. The district court concluded that the debtor had simply made a bad investment choice and the student, not taxpayers, must bear the consequences of the bad choice.

In vacating the district court's ruling and remanding, the Eleventh Circuit held that this retrospective approach was inappropriate under the second *Brunner* prong, which looks only to the debtor's likely future financial condition. The court stated:

> As noted, the second prong is a forward-looking test that focuses on whether a debtor has shown her inability to repay the loan during a significant portion of the repayment period. It does not look backward to assess blame for the student debtor's financial circumstances.[53]

The Eleventh Circuit suggested that there could be "extreme" situations in which a debtor "unnecessarily and unreasonably amasses substantial additional debt," which might be considered under the *Brunner* good faith third prong. However, a debtor should not be denied an undue hardship discharge based on past choices and decisions that later simply prove to be unwise or fail to fulfill educational goals.[54]

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[51] *In re* Acosta-Conniff, 536 B.R. 326 (Bankr. M.D. Ala. 2015), *rev'd sub nom.* ECMC v. Acosta-Conniff, 550 B.R. 557 (M.D. Ala. 2016), *and vacated sub nom. In re* Acosta-Conniff, 686 F. App'x 647 (11th Cir. 2017).
[52] ECMC v. Acosta-Conniff, 550 B.R. 557 (M.D. Ala. 2016), *and vacated sub nom. In re* Acosta-Conniff, 686 F. App'x 647 (11th Cir. 2017).
[53] *In re* Acosta-Conniff, 686 F. App'x 647, 650 (11th Cir. 2017).
[54] *See, e.g.*, *In re* Nys, 446 F.3d 938, 946 (9th Cir. 2006) (debtor should not be considered at fault "for having made reasonable choices that now inhibit her ability to substantially increase her income for the future").

Student loan holders have also raised a kind of "pre-existing condition" challenge to undue hardship discharges. According to this argument, if the debtor knew he or she had a medical impairment or similar limitation on future employment when the debtor took out the student loans, the courts should disregard the condition as contributing to an ongoing hardship. The courts have routinely rejected this argument, finding that it has no basis under the *Brunner* undue hardship standard or the Bankruptcy Code.[55]

In its 2015 guidance letter, the Department stated that for a debtor who is approaching retirement, loan holders should consider the "debtor's age at the time student loans were incurred" and whether the debtor "chose to incur student loan at an older age."[56] The obvious implication of this inquiry is that debtors should be penalized for pre-bankruptcy decisions to incur debt later in life. Again, this is inconsistent with the *Brunner* second prong as a forward-looking test.

Rather than use the debtor's age to negatively impact a discharge outcome, any future guidance should encourage loan holders to give considerable weight to advanced age as a factor favoring consent to an undue hardship discharge.

A recent Consumer Financial Protection Bureau report describes the increasing student loan debt that older consumers are carrying, as well as how the increased debt burden is impacting borrowers' later life financial security.[57] According to the CFPB, the number of consumers age 60 and older with student loan debt has quadrupled over the last decade. Older borrowers who carry student debt later into their lives often struggle to repay or have defaulted on their loans. Nearly 40 percent of federal student loan borrowers age 65 and older are in default.

The CFPB found that a large portion of older student loan borrowers struggle to afford basic needs. Older borrowers are more likely than those without outstanding student loans to report that they have skipped necessary health care needs such as prescription medicines,

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[55] *In re* Mason, 464 F.3d 878 (9th Cir. 2006) (debtor's learning disability that pre-dated her decision to take out student loans may be considered in assessing likely persistence of undue hardship); *In re* Myhre, 503 B.R. 698, 704 (Bankr. W.D. Wis. 2013) (fact that debtor sought out student loans after became wheelchair-bound quadriplegic was of no significance); *In re* Walrond-Rogers, 2008 WL 2478389 (Bankr. D. Mass. June 17, 2008) (applying "totality of circumstances" standard and rejecting creditor's preexisting-condition argument related to debtor's prior knowledge of her daughter's severe disability); *In re* Wilkinson-Bell, 2007 WL 1021969 (Bankr. C.D. Ill. Apr. 2, 2007) (debtor met good faith standard although her blindness pre-dated her decision to take out student loan for daughter); Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22 (Bankr. D. Conn. 2006) (no basis under *Brunner* for excluding debtor's preexisting mental impairment as "additional circumstance" indicating continuation of financial hardship).

[56] Dear Colleague Letter Gen.-15-13, p. 7.

[57] Consumer Financial Protection Bureau, Office for Older Americans & Office for Students and Young Consumers, "Snapshot of older consumers and student loan debt," Jan,, 2017, available at: https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf.

doctors' visits, and dental care because they could not afford it. These are factors that should be considered by loan holders in evaluating undue hardship claims.

We urge the Department to include these specific recommendations in any revised guidance:

- The Department's guidance should instruct that in evaluating whether a debtor's current hardship is likely to continue, loan holders should not consider the debtor's past career choices or reasons for obtaining the student loans. All inquiries under the *Brunner* second prong should be forward-looking.

- Loan holders should not consider the debtor's age at the time the loans were incurred. Loan holders should be directed to give considerable weight to advanced age at the time of bankruptcy filing as a factor favoring consent to an undue hardship discharge.

6. The debtor's lack of school completion should be a significant factor weighing in favor of an undue hardship discharge.

A glaring omission from the Department's 2015 guidance letter is consideration of the debtor's lack of school completion as a factor under the undue hardship analysis. Similarly, the 2015 guidance letter does not consider whether the debtor has benefited from the educational program or whether the debtor has incurred student loans for ineffective educational and vocational programs.

A general consensus among researchers is that the lack of school completion is a significant risk factor for loan default.[58] The Department has stated that of the borrowers who defaulted on their Direct Loan Program loans, 70 percent withdrew before completing their educational program.[59] Students who do not complete are more likely to come from low-income backgrounds than those who complete, and their parents are more likely to have lower levels of education.[60] Borrowers who fail to complete also have higher unemployment rates and lower incomes.

For low-income borrowers who are in default and have failed to complete, their attempt to better themselves through education instead often leads them into a trap of endless debt. Student loan debt from the past keeps them from going back to school and moving into higher-

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[58] *See, e.g.*, Mary Nguyen, Educ. Sector, Degreeless in Debt: What Happens to Borrowers Who Drop Out (Feb. 2012); Lawrence Gladieux & Laura Perna, Nat'l Ctr. for Pub. Policy & Higher Educ., Borrowers Who Drop Out: A Neglected Aspect of the College Student Loan Trend (May 2005); Matt Steiner & Natali Teszler, TG Research and Analytical Services, Multivariate Analysis of Student Loan Defaulters at Texas A&M University (Jan. 2005) (finding correlation between borrowers' college success and default).
[59] John Pierson & Mark Walsh, U.S. Dep't of Educ., Promote Student Success, Manage Delinquency and Prevent Defaults, Slide 31 (2008).
[60] *See, e.g.*, Lawrence Gladieux & Laura Perna, Nat'l Ctr. for Pub. Policy & Higher Educ., Borrowers Who Drop Out: A Neglected Aspect of the College Student Loan Trend (May 2005).

paying jobs. And most cannot afford to go back to school to get additional training without some type of financial assistance.

The lack of school completion is a factor that bears heavily on the evaluation of the first and second prongs of the *Brunner* test, and most certainly is a factor that should be considered under the totality of circumstances test.

The Department's focus should be on stricter regulation of schools that have high non-completion and loan default rates. This will save the loan programs more money than fighting bankruptcy discharge for individual debtors who are unable to repay.

We urge the Department to include this specific recommendation in any revised guidance:

- Loan holders should consider the debtor's lack of school completion as a factor in evaluating undue hardship. This factor should be given considerable weight when evaluating whether the debtor's hardship is likely to persist for a significant portion of the repayment period.

7. Consideration of the debtor's past decision-making and life-style choices should not be part of the good faith inquiry.

Brunner's third prong requires that the debtor show a good faith attempt to repay the student loans. Courts have considered under this prong (as well as under the third prong of the totality of circumstances test) whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. However, far too many debtors have been denied a discharge for reasons that do not relate to their past efforts to repay their student loans (or their present and future inability to repay their loans).

While initially somewhat narrow in scope, the Department and ECMC have urged courts in litigation to inappropriately extend the good faith inquiry to matters beyond payment efforts, and to all prongs of *Brunner* and the third catch-all prong of the totality test. It has been used by loan holders as a morality test in which the debtor's life choices and past conduct are called into question. ECMC in particular has forced debtors to respond to extensive discovery that has probed into intimate details of their personal lives. ECMC then attempts to exploit these details in order to discredit debtors' testimony about hardship, regardless of how irrelevant the matters may be to an undue hardship determination.

For example, in one case ECMC questioned the debtor about why she had five children (a daughter and two sets of twin boys) after obtaining her student loans. In finding this inquiry and the related argument to be "audacious" and "beyond the pale," the bankruptcy court described ECMC's tactics as follows:

> ECMC brought out one other circumstance oriented toward the Debtor's past acts and conduct, but only late in the process. In cross-examining the Debtor, its counsel got her to acknowledge that she had borne all of her children "after

> [she] took out the student loans," and that she had understood at those times that she owed the associated debt. He then asked her if her children had been "planned"; to which she responded, curtly, that she was of the Roman Catholic faith. Counsel then dropped the subject until closing argument. At that time, referring to "her religious choice," ECMC's counsel abjured that "you have to make the decision to have a family in light of what you can afford ..."[61]

Debtors in other cases have been forced to refute arguments by the Department or ECMC that they should not have taken prescription drugs to counteract the side effects of mental health medication,[62] should not have taken custody of two grandchildren, one of whom was victim of physical abuse,[63] or should not have ended studies without getting a degree so as to care for elderly parents.[64]

A good faith consideration lacks foundation in the words of the section 523(a)(8). It is also significant that other provisions of section 523 do in fact make certain debts nondischargeable based on the debtor's past bad conduct, such as obtaining a debt by fraud or without any intention to repay.[65] Except when Congress has expressly provided otherwise in section 523 or in some other Bankruptcy Code section, debts are discharged in bankruptcy even when debtors have made mistakes, exercised bad judgment, and engaged in immoral actions. Congress did not make student loan dischargeability turn on questions of good faith or morality, as it did for other debts under section 523.

The Department should not engage in an open-ended inquiry into decisions the debtor made in the past when deciding whether to oppose an undue hardship discharge. Good faith should not provide the means for the Department or loan holders to impose their own values on a debtor's decisions and life choices. To the extent there is some role for a good faith inquiry in the undue hardship evaluation, it should be limited to questions about the debtor's present honesty in relation to the claimed hardship, such as whether the debtor is fabricating or fraudulently portraying a hardship.

Any issues related to the debtor's good faith in filing bankruptcy can be addressed by the bankruptcy court under Bankruptcy Code sections 707(b) or 1325(a)(7). Other options under the Code to punish bad debtors are also available. For example, a debtor who has fraudulently transferred property, concealed or falsified information, or made false oaths related to the bankruptcy case will be denied a discharge under Code section 727(a), and could be prosecuted for a federal crime.

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[61] *In re* Walker, 406 B.R. 840, 863 (Bankr. D. Minn. 2009), *aff'd*, 427 B.R. 471 (B.A.P. 8th Cir. 2010), *aff'd*, 650 F.3d 1227 (8th Cir. 2011).
[62] *In re* Renville, 2006 Bankr. LEXIS 3211 (Bankr. D. Mont. Jan. 5, 2006).
[63] *In re* Mitcham, 293 B.R. 138 (Bankr. N.D. Ohio 2003).
[64] *In re* Bene, 474 B.R. 56 (Bankr. W.D. N.Y. 2012).
[65] *See, e.g.*, § 523(a)(2)(A)(debts obtained by false pretenses or representations, or actual fraud); § 523(a)(6)(debts based on willful and malicious injury of another or property of another); § 523(a)(9)(debts based on death or injury caused by debtor's operation of a motor vehicle while intoxicated).

With respect to past repayment efforts, we believe that the debtor's past behavior and actions in filing bankruptcy are adequately addressed by the Bankruptcy Code and need not be part of the undue hardship analysis. However, if the debtor's past efforts to repay student loans is a factor reviewed by loan holders, it should not be considered in isolation. Before contending that the debtor has not shown good faith due to insufficient payments, loan holders should consider whether the debtor had an ability to pay during periods when payments were not made, or whether there were justifiable reasons why the debtor did not maintain payments. Most courts have held that debtors who clearly lacked sufficient income to make minimal payments still qualify for a discharge.[66]

We urge the Department to include this recommendation in any revised guidance:

- The Department should instruct loan holders that they should not conduct pre-trial discovery, or advance arguments in litigation, about sensitive private matters of the debtor's personal life that do not directly relate to the debtor's efforts to repay the student loans.

- The Department should instruct loan holders not to consider past repayment conduct in evaluating undue hardship unless there are legitimate issues about fraud and dishonesty that should be addressed under Bankruptcy Code provisions other than section 523(a)(8).

8. The availability of income-driven repayment plans should be considered only after the loan holder has determined after careful review that the debtor's student loans and the debtor are in fact eligible.

As discussed earlier, loan holders routinely oppose undue hardship discharges by highlighting the potential availability of income-driven repayment plans. The debtor's failure to enroll in IDR plans is often presented as the debtor's lack of good faith under the *Brunner* third prong. We believe that the availability of IDR plans is often used inappropriately without careful consideration of whether the debtor or the debtor's loans even qualify for an IDR plan, and without disclosure of the potential impediments to eligibility.

Based on their individual circumstances, some debtors whose loans are potentially eligible for income-driven repayment plans are nevertheless precluded from participating. These include borrowers currently in default, borrowers subject to wage garnishment, and borrowers

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[66] *In re* Mosley, 494 F.3d 1320, 1327 (11th Cir. 2007) (failure to make any payments, by itself, does not establish lack of good faith); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004) (same); *In re* Roth, 490 B.R. 908, 918 (B.A.P. 9th Cir. 2013) ("[L]ack of even minimal voluntary payments is not lack of good faith if the debtor did not have the financial wherewithal to make them."); *In re* Innes, 284 B.R. 496 (D. Kan. 2002) (finding of good faith effort not precluded as debtor lacked sufficient income to make minimum monthly payments); *In re* Nary, 253 B.R. 752 (N.D. Tex. 2000) (good faith measured by efforts to obtain employment and maximize income, and absence of payments does not preclude discharge); *In re* Ivory, 269 B.R. 890 (Bankr. N.D. Ala. 2001) (no bad faith when debtor never had ability to repay loan).

against whom a judgment has entered.[67] One of these disqualifying circumstances is likely to apply to most debtors who seek an undue hardship discharge in bankruptcy.

To overcome these bars to eligibility, a debtor must first get out of default, usually through rehabilitation or consolidation. However, not all borrowers will be eligible to rehabilitate or consolidate out of default. A judgment disqualifies borrowers from consolidating or rehabilitating their loans. Borrowers who have previously rehabilitated their loans in most cases cannot do so again. The existence of a garnishment also bars consolidation. Borrowers who are in default on a Direct consolidation loan may not "re-consolidate" unless they have another federal loan.

Loan holders often argue that the debtor would be eligible for IDR without conducting an analysis of whether the debtor has qualifying loans. For example, borrowers may have Perkins loans, which may not be eligible for IDR plans or loan consolidation through the Direct Loan Program. IDR plans are generally not available for Parent PLUS loans that have not been consolidated into a Direct loan.[68]

Loan holders rarely inform courts or debtors (many of whom are *pro se*) of potential impediments to IDR eligibility. In most cases eligibility details are glossed over and general claims are made without proof or analysis. Some courts have appropriately rejected general arguments made by loan holders about the availability of payment programs without some proof by the creditor that the debtor would in fact be eligible for such programs.[69]

While we believe that potential eligibility for IDR should not be a factor considered under the *Brunner* third-prong, we nevertheless urge the Department to include these specific recommendations in any revised guidance:

- Loan holders should use potential eligibility for IDR as a consideration only after they have conclusively determined that the debtor would be eligible for an IDR, and they disclose the eligibility calculation to the debtor and the court.

- If the debtor or the debtor's loans are subject to a disqualifying condition for IDR eligibility, loan holders should disclose that to the debtor and the court.

9. The Department should initiate a separate request for information docket to address the cost assessment of opposing an undue hardship discharge.

In its 2015 guidance letter, the Department noted that applicable regulations permit loan holders to consent to or not oppose a debtor's request for an undue hardship discharge if they

[67] *See, e.g., In re* Harvey, 2013 WL 4478926 (Bankr. D. Colo. Aug. 20, 2013) (student loan debt held dischargeable; noting borrower had been told not eligible for IBR because in default).
[68] 34 C.F.R. §§ 685.221(a)(2), 685.209(a)(ii); 682.215(a)(2).
[69] Educ. Credit Mgmt. Corp. v. Porrazzo, 307 B.R. 345 (Bankr. D. Conn. 2004)(student loan creditor failed to prove that debtor was eligible for Ford Program); *In re* Strand, 298 B.R. 367 (Bankr. D. Minn. 2003).

follow a two-step process. While most of the guidance letter addresses the first step of the analysis regarding whether loan repayment will cause an undue hardship, only two sentences of the letter dealt with the second step of the analysis.[70]

The Department's current regulations provide that if the loan holder determines that repayment will not impose an undue hardship, it must then conduct a cost assessment of opposing the discharge. A formula is used in the regulations to assist the analysis. If the expected costs of opposing the discharge exceeds one-third of the total student loan debt, the loan holder may consent to the discharge.[71]

We believe the cost assessment under the second step is critically important and that the Department should issue clear guidance to loan holders on this analysis. However, we do not believe it can be done in this docket because the Department has not provided sufficient information and data on expected costs. Interested parties are not able to provide meaningful comments on this topic because they do not have access to information about the costs to the government in opposing an undue hardship discharge. For example, data has not been made available about how ECMC is compensated for defending undue hardship adversary proceedings, for appealing decisions in which a discharge was granted in the court below, or how much the Department pays ECMC for undue hardship litigation cases that go to trial. In cases in which the Department is represented by attorneys at the Department of Justice, information should be collected and made available on the time spent and related costs incurred by DOJ in representing the Department in these cases.

We also believe that the formula used in the Department's current regulations should be revised to include an additional factor – the expected recovery from the debtor if the discharge is denied. We believe that in many cases in which loan holders have prevented the debtor from obtaining an undue hardship discharge, the debtors' loans have remained in default after conclusion of the bankruptcy. The Department should conduct a review of post-bankruptcy loan repayment following discharge denials.

The Department apparently construes the cost assessment regulations as not being applicable to decisions by loan holders to appeal an undue hardship judgment, even if the loan holder is appealing a judgment favorable to the debtor.[72] We do not read the applicable regulations to include this restriction. If the goal of these regulations is to save taxpayers from bearing the cost of litigation that does not protect the fiscal integrity of the student loan program, than the costs of appeals should be considered. The cost assessment should be conducted at every significant stage of the litigation, including appeals, taking into consideration the actual costs expended since the initial assessment.

We also believe that the formula used in the Department's current regulations should be changed to avoid penalizing debtors based on the capitalization of interest and excessive collection costs that are added to the total debt amount. The formula should consider whether

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[70] Dear Colleague Letter Gen.-15-13, p. 7-8.

[71] 34 CFR § 682.402(i)(1); 34 CFR § 674.49(c)(5).

[72] Dear Colleague Letter Gen.-15-13, p. 8, note 5.

the expected costs of opposing the discharge exceed one-third of the original amount of the student loan debt rather than the current total loan amount. Alternatively, the formula should use the current total amount of student loan debt based on the original amortization (eliminating the impact of interest capitalization), less any lump-sum collection fees.

Several recent bankruptcy cases highlight the problem of using the highly inflated total loan amount in the cost assessment formula. For example, in *In re Martish*,[73] the consumer had a federal consolidation student loan in the amount of $11,202.95, with a 9% interest rate. This was her only student loan debt. In 1998, the consumer filed a Chapter 7 case, which was later converted to a Chapter 13 case and concluded in 2001. Still unable to manage her growing student loan debt despite significant payments, the consumer filed a second Chapter 13 case in 2014. By the time this second case was filed, the consumer had made approximately $39,835 in payments on the student loan. The student loan holder, ECMC, filed a proof of claim in this case asserting that the debtor still owed $27,021.57. Included in the alleged amount due was the assessment of a lump-sum charge for collection costs in the amount of $5,289.57. This penalty for collection costs represented 25% of the principal amount owed at that time. Although not discussed in the decision, it is likely that a similar lump-sum charge for collection costs was included in the proof of claim filed by ECMC in the earlier Chapter 13 case.

In *In re Harris,*[74] the consumer filed a Chapter 7 case seeking a discharge based on undue hardship of her student loan, which was initially in the amount of $10,804.20, with an 8% interest rate. Her request for a discharge was denied by the court. Prior to filing bankruptcy, she had paid approximately $14,017 on the loan, through wage garnishments and voluntary payments. When the consumer initiated the undue hardship proceeding, the student loan was transferred to ECMC. At the time of trial, ECMC claimed that the total amount due on the loan, including principal, interest, and fees, was $32,643.73. When ECMC took assignment of the loan, it assessed and recalculated collection costs and added $6,085.52 to the loan balance. This penalty for collection costs represented 25% of the principal amount owed at that time.

We urge the Department to:

- Release information and data on the costs of opposing undue hardship discharges, and then initiate a separate request for information docket to address the cost assessment analysis.

- Instruct loan holders that the cost-assessment should be conducted at every significant stage of the litigation, including appeals, taking into consideration the actual costs expended since the initial assessment.

- Revise the cost assessment formula used in the Department's current regulations to be based on the original amount of the debtor's student loans and to include as a factor the expected recovery from the debtor if the discharge is denied.

[73] 2015 WL 167154 (Bankr. E.D. N.C. Jan 12, 2015).
[74] 2015 WL 128139 (Bankr. D. Neb. Jan 8, 2015).

10. The Department should establish certain presumptive qualifications for cases in which loan holders will not oppose a debtor's undue hardship claim.

The Department's 2015 guidance letter instructs loan holders that if they have any basis to believe that a debtor would qualify for a Total and Permanent Disability Discharge (TPD), they must advise the debtor to apply for such relief rather than seek an undue hardship discharge.[75] Loan holders are instructed to oppose an undue hardship discharge even as to debtors who would automatically qualify for a TPD discharge, such as debtors who have been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability and certain debtors who are receiving disability benefits under the Social Security Act.

Most debtors who seek an undue hardship discharge do not file bankruptcy solely for that reason. They file bankruptcy for a variety of reasons and are seeking relief from their overall debt burden. If a debtor has already filed bankruptcy and would be eligible for an undue hardship discharge, it makes no sense to force them to initiate a separate administrative procedure to obtain a TPD discharge. We urge the Department to eliminate this requirement in any revised guidance.

We also urge the Department to establish certain presumptive qualifications for cases in which loan holders will not oppose an undue hardship discharge. This would set objective criteria for loan holders to apply in the undue hardship analysis. For example, loan holders would consider repayment of a student loan debt to be an undue hardship if any of the following are applicable to the debtor–

a) the debtor is receiving disability benefits under the Social Security Act;

b) the debtor has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability;

c) the debtor's income is derived from retirement benefits under the Social Security Act or a retirement fund or account, and the annual household income for the debtor is less than 200 percent of the official poverty guideline (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981);

d) the debtor provides for the care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and the annual household income for the debtor is less than 200 percent of the official poverty guideline (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981); or

[75] Dear Colleague Letter Gen.-15-13, p. 5.

e) during the five year period before the filing of the petition, the annual household income for the debtor has been less than 175 percent of the official poverty guideline (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981).

Under this process, the loan holder would accept from the debtor proof of undue hardship based on the above criteria without engaging in formal discovery or otherwise expending litigation costs in the adversary proceeding. If the debtor submits satisfactory proof to the loan holder that the debtor falls within one of the categories listed above, and the loan holder has no information that would rebut the presumption than an undue hardship exists, the loan holder shall enter into with the debtor, and submit to the bankruptcy court, a settlement agreement or consent order providing for the discharge of the student loan debt.

We urge the Department to include these specific recommendations in any revised guidance:

- The Department should not include in any revised guidance a requirement that loan holders oppose an undue hardship discharge for debtors who would qualify for a Total and Permanent Disability Discharge (TPD).
- The Department should establish criteria for certain categories of cases in which loan holders will not oppose a debtor's undue hardship claim.