

**Training Manual for
Pro Bono Bankruptcy Training Program**

MODULE 5 –

**REPRESENTING DEBTORS IN STUDENT
LOAN HARDSHIP DISCHARGE CASES**

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MODULE 5 - REPRESENTING DEBTORS IN STUDENT LOAN HARDSHIP DISCHARGE CASES

This module covers the representation of consumer debtors who are seeking a discharge of student loans based on undue hardship under section 523(a)(8) of the Bankruptcy Code. Many consumer debtors who bring undue hardship dischargeability actions do so without attorneys. One goal of this module is to encourage attorneys to take on these cases so that more debtors will have the benefit of attorney representation.

Student loan discharge cases provide an excellent opportunity for inexperienced attorneys to gain litigation and trial experience. Because the legal and factual issues in these cases are narrow in scope and brought in an adversary proceeding within the bankruptcy case, they also present a unique opportunity for business bankruptcy attorneys to take on pro bono representation without extensive knowledge of consumer bankruptcy law or the need to represent the debtor in the underlying bankruptcy case. Regardless of the motivation, this manual provides a step-by-step guide to handling such cases, from the initial case evaluation through to trial.

1. GETTING STARTED

1.1 First Steps

The first step in advising a client about possible options for dealing with student loan debt is to gain an understanding of the client's specific financial situation. Module 2 discusses the necessary information that an attorney will need in order to advise a client about a possible bankruptcy filing. Much of this same information will help in determining whether the client is a good candidate for seeking a bankruptcy discharge of student loans under section 523(a)(8). However, certain specific information related to the client's student loans is needed.

As with representation in the underlying bankruptcy case, it is often helpful to have prospective clients fill out responses to a written questionnaire. A sample student loan intake form is attached as Appendix A. It may be provided to prospective clients early so that it may be filled out before the initial interview. The form can also be used by the attorney as a checklist of possible questions for the client during the interview.

The process of reviewing a client for a possible student loan discharge may occur before a bankruptcy is filed, particularly if the primary reason for filing the bankruptcy is to seek an undue hardship determination under section 523(a)(8). In this situation, the bankruptcy filing and specific student loan information can be obtained at the same time. In other cases the client may not consider seeking a student loan discharge, or the attorney may not have undertaken representation of the client, until after the bankruptcy has been filed or concluded. If a bankruptcy case is reopened for the purpose of filing a section 523(a)(8) action, the attorney will need to consider whether there have been any changes in the debtor's financial

situation since the case was filed as reflected in the bankruptcy schedules, especially the income and expenses listed on Schedules I and J.

Before advising the client about a possible section 523(a)(8) action, the attorney will want to get the following information about the client's student loans:

- The type of student loans and when they were made;
- The outstanding balance for each loan and the monthly payment amount;
- The total amount of any payments made on the loans;
- Whether the loans are in default status;
- Whether any collection proceedings have been initiated (*i.e.*, administrative wage garnishment, income tax refund intercept, court action); and
- Whether the client has ever applied for or participated in any income-driven repayment plans, and if so, the status of those plans.

1.2 The National Student Loan Data System (NSLDS)

Much of the information about the client's federal student loans can be obtained from the Department of Education's central database for student aid, the National Student Loan Data System (NSLDS). The NSLDS receives data from schools, guaranty agencies, the Direct Loan program, and other Department of Education programs. Clients should be asked to use the NSLDS website at www.nsls.ed.gov to obtain a complete list of their federal student loans.

The NSLDS site displays information on the type of loan or grant (*e.g.*, Stafford Subsidized, Federal Perkins), loan amount, loan disbursements, outstanding principal balance, outstanding interest balance, and the loan status (*e.g.*, defaulted, in repayment). Clients may use the "MyStudentDataDownload" button within NSLDS to download their NSLDS data into a plain text, readable file. To access student loan and grant information in the NSLDS, clients must use their FSA ID. This is a login username and password that student and parents can create in order to access Federal Student Aid websites.

The NSLDS provides information only on federal student loans, and there is no similar system or database for private student loans. Clients may attempt to obtain information about private student loans directly from the servicer of the loan.

1.3 The Department of Education's "Repayment Estimator"

Many bankruptcy courts consider the availability of the Department of Education's income-driven repayment plans in determining whether the debtor is eligible for a section 523(a)(8) discharge. Even if the debtor intends to argue that the availability of such plans should not be a controlling factor in the undue hardship dischargeability analysis, it is important for attorneys to know whether their clients are eligible for certain plans and what the potential repayment terms would be under each plan. Debtors should be advised to access information about repayment options on the Federal Student Aid website, www.studentaid.gov. Attorneys can also use the Department of Education's online calculator, the "Repayment Estimator," to obtain

an estimate of the client's repayment terms under the various plans using the basic information obtained at the client interview.¹ Eligibility for these programs has changed over time, so a plan that the client considered years earlier may no longer be available.

1.4 Types of Federal Student Loans

The Federal Family Education Loan Program (FFELP) was created in the Higher Education Act of 1965. The 1965 legislation also created the Federal Insured Student Loan (FISL) program, which provided federal insurance for loans. The FISL was eventually phased out. The Higher Education Act Amendments of 1992 created a new generic name, Federal Family Education Loans (FFELs), for the major forms of federal student loans. Although the FFEL student loan program was a federal program, it was mostly administered through state or private non-profit agencies called guaranty agencies.

In 1993, legislation was enacted that created the Federal Direct Loan Program. In the Direct Loan Program, the government through the Department of Education directly originates student loans. In 2010, the FFEL Program was eliminated as part of the Health Care and Education Reconciliation Act of 2010. As of this date, nearly all federal student loan lending is through the Direct Loan Program (the Perkins Loan Program was not affected by this legislation, though the Perkins program has grown smaller over time). Although the FFEL Program ended in July 2010, there are many existing FFEL loans that will be held, serviced, and collected by FFEL lenders, servicers, and guaranty agencies for many more years.

Stafford Loans. Stafford loans are available to both undergraduate and graduate students. As of July 1, 2010, federal Stafford loans are made to students through the Direct Loan Program only (and are often referred to simply as "Direct subsidized loans" and "Direct unsubsidized loans"). Prior to July 2010, there were FFEL Stafford loans as well. Direct Stafford and FFEL Stafford loans have identical loan limits and identical deferment and cancellation provisions.

Stafford loans are either subsidized or unsubsidized. A subsidized Stafford loan is awarded on the basis of financial need. For subsidized loans, borrowers are not charged any interest before the repayment period begins or during authorized periods of deferment. Unsubsidized loans are not awarded on the basis of financial need, and interest is charged from the time the loan is disbursed until it is paid in full.

PLUS Loans. As of July 1, 2010, PLUS loans are available only through the Direct Loan Program. Prior to that time, there were also FFEL PLUS loans. There are both parent PLUS and graduate/professional student PLUS loans. A graduate or professional student's maximum annual Stafford loan eligibility is determined before the student applies for a PLUS loan. PLUS loan borrowers can have high balances because there are no numerical loan limits. The yearly limit on PLUS loans is equal to the student's cost of attendance minus any other financial aid received. Parent PLUS loans allow parents to borrow to pay for the education of dependent

¹ The "Repayment Estimator" is available at: <https://studentaid.ed.gov/sa/repay-loans>.

undergraduate children enrolled in school at least half-time. There are some credit review underwriting requirements for both parent and graduate/professional PLUS loans.

Perkins Loans. The Perkins Loan Program (formerly called National Direct Student Loans and, before that, National Defense Student Loans) provides low-interest loans to both undergraduate and graduate students with exceptional financial need. Perkins loans are originated and serviced by participating schools and repaid to the school. The government does not insure the loans but instead provides initial contributions to eligible institutions to partially capitalize a loan fund. The Perkins Loan Program has gotten smaller over time, with only 2% of undergraduates participating by 2011–2012. The program expired in 2015, but was extended in a more limited form for an additional two years through September 30, 2017.

Consolidation loans. As of July 2010, Direct consolidation loans are the only type of federal consolidation loans available. All federal loan borrowers may obtain Direct consolidation loans. However, they must consolidate at least one FFEL or Direct loan. This means, for example, that a borrower who has only Perkins loans is not eligible to consolidate. Borrowers have the option to consolidate all, some, or even just one of their existing student loans. There is no minimum or maximum size for a Direct consolidation loan.

HEAL Loans. Between 1978 and 1998, the Health Education Assistance Loan Program (HEAL) provided federal insurance for educational loans made by private lenders to health professions students. New HEAL loans were discontinued on September 30, 1998. The HEAL program was transferred from the Department of Health and Human Services (HHS) to the Department of Education (DOE) on July 1, 2014. The DOE is now responsible for managing the servicing of non-defaulted HEAL program loans and collection of defaulted HEAL loans. There are also separate regulations allowing disability discharges for HEAL loan borrowers. The Secretary of HHS has the authority to discharge HEAL loans based on a finding of total and permanent disability. There is also a separate provision not found in the Bankruptcy Code that deals with the bankruptcy discharge of HEAL loans. They can be discharged only if the court finds that denial of discharge would be “unconscionable,” and the student cannot seek a bankruptcy discharge during the first seven years of the loan repayment period.²

Older Federal Loans. Prior to 1994, borrowers could receive loans under the Supplemental Loans for Students (SLS) program. Effective July 1, 1994, SLS loans were no longer issued. The SLS program was merged into the unsubsidized component of the Stafford Loan Program. Other older loans are insured directly by the federal government, with no guaranty agency acting as intermediary. These loans are called Federally Insured Student Loans (FISLs). FISLs were made from 1966 to 1984.

1.5 Private Student Loans

Many student loan borrowers have both private and federal student loans. Banks, credit unions, and other financial institutions make private student loans without any direct financial

² 42 U.S.C. § 294f(g).

backing or guarantees from the federal government. These loans are not eligible for the Department of Education discharge and income-driven repayment programs. Unlike federal loans, private student loans are subject to state statute of limitations for the collection of private loans. Another difference is that private loan terms and conditions, including interest rates and fees, are generally determined by the particular financial institution's underwriting guidelines and the borrower's or a co-signer's credit history.

A distinguishing feature of private student loan contracts is that they are typically co-signed by a parent or other family member. In fact, it is estimated that approximately 90% of private student loans have had a co-signer.³

1.6 Nonbankruptcy Options for Debt Cancellation

Before proceeding with a section 523(a)(8) undue hardship action, the debtor should consider nonbankruptcy options for cancellation of the debt. It is possible to cancel federal student loans outside of bankruptcy without full repayment in very limited circumstances. Cancellation is available in cases where the borrower has a total and permanent disability⁴ or has died.⁵ There are also cancellations available for some problems with the school, such as if the school closed when the borrower was enrolled,⁶ if the school falsely certified the borrower's eligibility,⁷ or if the school failed to refund the borrower's tuition after withdrawing from the program.⁸

It should be noted that when debt is forgiven under most of these options, the amount forgiven is treated as taxable income to the debtor.⁹ On the other hand, when a debt is discharged in bankruptcy, such as when a bankruptcy court orders the discharge of a student loan based on undue hardship under section 523(a)(8), the amount discharged is not treated as income to the debtor for tax purposes.¹⁰

³ See Consumer Financial Protection Bureau Mid-year Update on Student Loan Complaints, April, 2014.

⁴ 20 U.S.C. § 1087(a); 34 C.F.R. §§ 674.61 (Perkins Loan), 682.402(c) (FFEL), 685.213 (Direct Loan). Application information for a TPD discharge is available at: <http://www.disabilitydischarge.com/Application-Process/>

⁵ 20 U.S.C. § 1087; 34 C.F.R. §§ 674.61(a), 682.402(b), 685.212(a).

⁶ 20 U.S.C. § 1087(c)(1).

⁷ 20 U.S.C. § 1087(c), 34 C.F.R. §§ 682.402(e)(3)(ii)(A) (FFEL), 685.215(c)(1)(i) (Direct Loan)

⁸ 20 U.S.C. § 1087(c); 34 C.F.R. §§ 682.402(l) (FFEL), 685.216 (Direct Loan).

⁹ 26 U.S.C. § 61(a)(12) (gross income includes income from discharge of indebtedness); 26 C.F.R. § 1.6050P-1(b) (discharge of indebtedness reporting requirements).

¹⁰ 26 U.S.C. § 108(a)(1)(A).

2. SCOPE OF THE DISCHARGE EXCEPTION

2.1 Coverage of Section 523(a)(8)

The language in section 523(a)(8) that excepts student loans from discharge has been amended a number of times since first added to the Bankruptcy Code. The current version provides that if no undue hardship determination is made, the discharge an individual debtor receives in a bankruptcy case does not discharge the debtor from the following type of debt:

- (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.

Although the exception is broad, a parsing of the language reveals that not all student loans or educational financial arrangements are nondischargeable. Before filing an action seeking an undue hardship discharge, attorneys should first determine if the exception applies. Particular attention should be paid to private student loans.

2.2 Loans by Government Units and Non-Profits

Under subsection (A)(i) of section 523(a)(8), the undue hardship restriction on dischargeability applies to “an educational benefit overpayment or loan made, insured or guaranteed by any governmental unit, or made under any program funded in whole or in part by a government unit or a non-profit institution.”

There are two parts to the exception language contained in subsection (A)(i). First, it covers overpayments or loans made, insured, or guaranteed by a governmental unit. This provision has always covered Stafford loans, Federal Direct loans, Perkins loans, and the older Supplemental Student Loans (SLS). Although an “educational benefit overpayment” is covered by this provision, such overpayments are not common.¹¹

¹¹ The court in *In re Coole*, 202 B.R. 518, 519 (Bankr. D.N.M. 1996) described an overpayment as follows: “Educational benefit overpayment occurs in programs like the GI Bill, where students receive periodic payments upon their certification that they are attending school. When a student receives funds but is not in school, this is a educational benefit overpayment. No facts supporting an educational benefit overpayment exist.”

The second part of subsection (A)(i) addresses a loan that has been made under a “program funded in whole or in part by a governmental unit or nonprofit institution.” Determining when this language applies has sometimes been difficult.¹² Courts have had to examine the relationship between various lending entities and governmental units or non-profits that were affiliated in some way with the loan and determine that the entities acted under an existing program.¹³

Certain educational debts are not “loans” or “overpayments” for purposes of subsection (A)(i) and therefore may be dischargeable. For example, courts have held that debtors may discharge tuition debts if there is no loan involving a transfer of funds or a formal agreement specifying deferred repayment terms.¹⁴ The debtor’s decision not to pay tuition does not create a loan. However, certain deferred tuition payment agreements have been construed to be loans when they provide for specific due dates and payment terms.¹⁵

Most courts hold that it is the purpose for which the loan was made that controls for purposes of subsection (A)(i) coverage, rather than the use of the loan proceeds.¹⁶ Thus, if the borrower intended to use the borrowed funds to cover costs related to education, the fact that the borrower later used the proceeds for other purposes, such as the purchase of a vehicle, will not affect the loan’s status under subsection (A)(i).¹⁷ However, the educational-purpose test is not always conclusive and may not make certain educational debts subject to the discharge exceptions of subsections (A)(ii) and (B) of section 523(a)(8).¹⁸

¹² See, e.g., *In re O’Brien*, 419 F.3d 104 (2d Cir. 2005) (the term “funded” modifies the word “program” rather than the word “loan” and did not require non-profit institution that guaranteed debtor’s student loans to actually supply any portion of funding for the loans in order for discharge exception to apply).

¹³ See *TI Fed. Credit Union v. DelBonis*, 72 F.3d 921 (1st Cir. 1995) (federally chartered credit union is a governmental unit for purposes of exception to discharge); *In re Merchant*, 958 F.2d 738 (6th Cir. 1992) (loan guaranteed by non-profit institution was nondischargeable).

¹⁴ *In re Chambers*, 348 F.3d 650 (7th Cir. 2003); *In re Mehta*, 310 F.3d 308 (3d Cir. 2002); *Cazenovia Coll. v. Renshaw*, 222 F.3d 82 (2d Cir. 2000).

¹⁵ *Mckay v. Ingleson*, 558 F.3d 888 (9th Cir. 2009); *In re Merchant*, 958 F.2d 738, 741 (6th Cir. 1992); *In re DePasquale*, 225 B.R. 830 (B.A.P. 1st Cir. 1998).

¹⁶ *In re Busson-Sokolik*, 635 F.3d 261, 266–77 (7th Cir. 2011) (under “purpose driven test,” court does not look at actual use of funds but at whether lender’s agreement to make loan “was predicated on the borrower being a student who needed financial support to get through school”).

¹⁷ *In re Murphy*, 282 F.3d 868 (5th Cir. 2002) (student loans nondischargeable even if portion used by debtor to purchase car, housing, food, and other living expenses).

¹⁸ *In re Dufrane*, 566 B.R. 28, 32 (Bankr. C.D. Cal. 2017) (unlike for subsection (A)(i), even a clear educational purpose does not necessarily place a non-qualifying educational obligation within the scope of either subsections (A)(ii) or (a)(8)(B)).

Subsection (A)(i) applies to debts incurred to pay for primary, secondary, and post-secondary school expenses. As discussed below, however, subsection (B) incorporates the IRS student loan definition and therefore is limited to loans incurred “solely to pay for qualified higher education expenses.”¹⁹

2.3 Funds Received as an Educational Benefit, Scholarship, or Stipend

The student loan dischargeability exception was extended in 1990 to “an obligation to repay funds received as an educational benefit, scholarship, or stipend.” This provision, which is now found in subsection (A)(ii), generally applies to educational benefit grants involving funds received by the debtor or advanced on the debtor’s behalf. For example, an obligation to repay a stipend that included an agreement to teach in an “other race” institution after receiving a degree,²⁰ a scholarship grant received to finance medical training in exchange for an agreement to practice in a designated physician shortage area,²¹ the requirement of a former employee to repay funds for tuition and books received under an employer’s educational expense reimbursement program,²² and the obligation to repay funds received under a Pell grant that arose when the student withdrew from an educational program,²³ have been held to be nondischargeable under this language.

However, several recent decisions have noted that subsection (A)(ii) is not a “catch-all” provision designed to include every type of financial transaction that creates an educational benefit for a debtor.²⁴ Most importantly, these courts have held that subsection (A)(ii) does not apply to loans.²⁵ For example, the court in *In re Cambell* noted that the application of subsection (A)(ii) to loans is inconsistent with the current arrangement of the subsections in section 523(a)(8).²⁶ Both subsections (A)(i) and (B) refer expressly to loans. If subsection (A)(ii) applied so broadly as to encompass loans as well, this would render subparts (A)(i) and (B) superfluous. The 2005 amendments creating subpart (B), applicable to private loans, came well after the 1990 amendments that added the language now appearing in subpart (A)(ii). Congress would not have needed to add subpart (B) if an obligation to “repay funds received for an educational benefit, scholarship or stipend” already included all loans of any type.

¹⁹ 26 U.S.C. § 221(d)(1).

²⁰ *In re Burks*, 244 F.3d 1245 (11th Cir. 2001).

²¹ *U.S. Dep’t of Health & Human Servs. v. Smith*, 807 F.2d 122 (8th Cir. 1986).

²² *In re Baiocchi*, 389 B.R. 828 (Bankr. E.D. Wis. 2008).

²³ *In re Cross*, 2018 WL 1448669 (Bankr. E.D. Wis. Mar. 22, 2018)

²⁴ *In re Christoff*, 527 B.R. 624, 634 n. 9 (B.A.P. 9th Cir. 2015).

²⁵ *In re Christoff*, 527 B.R. 624, 634 (B.A.P. 9th Cir. 2015); *In re Crocker*, 585 B.R. 830 (Bankr. S.D. Tex. 2018); *In re Nypaver*, 581 B.R. 431 (Bankr. W.D. Pa. 2018); *In re Essangui*, 573 B.R. 614 (Bankr. D. Md. 2017); *In re Dufrane*, 566 B.R. 28 (Bankr. C.D. Cal. 2017); *In re Wiley*, 579 B.R. 1 (Bankr. D. Me. 2017); *In re Campbell*, 547 B.R. 49 (Bankr. E.D.N.Y. 2016); *In re Swenson*, 2016 WL 4480719 (Bankr. W.D. Wis. Aug. 23, 2016); *In re Meyer*, 2016 WL 3251622 (Bankr. N.D. Ohio June 6, 2016); *In re Decena*, 549 B.R. 11 (Bankr. E.D.N.Y. 2016), *rev’d on other grounds*, 2016 WL 6998677 (E.D.N.Y., Nov. 29, 2016).

²⁶ *In re Campbell*, 547 B.R. 49, 55 (Bankr. E.D.N.Y. 2016).

The *Cambell* court also applied a canon of statutory construction dealing with a list of words in a statute, and concluded that “educational benefit” should be given a similar meaning to the other words in the list, “scholarship” and “stipend,” which refer to funds that are not generally required to be repaid by the recipient.²⁷ This supported the court’s conclusion that subsection (A)(ii) does not apply to loans and that a loan for a bar review course was dischargeable. However, other courts have held that subsection (A)(ii) applies to loans.²⁸

If a court decides that subsection (A)(ii) applies to a loan, there may still be a question as to whether the loan is related to a governmental unit or non-profit. The 2005 amendments to section 523(a)(8) reorganized the placement of subsection (A)(ii). Prior to 2005, the governmental unit or non-profit requirement was included as part of the subsection (A)(ii) language. In *In re Nunez*,²⁹ the court held that the punctuation change in section 523(a)(8) did not alter the application of the subsection (A)(ii) language, and therefore found that a flight school program loan was dischargeable because the lender was not affiliated with a non-profit or governmental unit. However, other courts have held that the 2005 punctuation changes make the governmental unit or non-profit requirement no longer tethered to subsection (A)(ii).³⁰

Finally, the requirement under subpart (A)(ii) that there be “funds received” requires some transfer of funds either to the educational institution or the debtor. This limitation would exclude, for example, deferred tuition payment agreements.³¹

2.4 Private Student Loans

Subsection (B), added to section 523(a)(8) in 2005, provides that an obligation that is a qualified educational loan as defined in section 221(d)(1) of the Internal Revenue Code is nondischargeable unless undue hardship can be proven. This language covers many private student loans which qualify under the IRS definition for a taxpayer interest deduction. Still, there are limits to the scope of its coverage.

The Internal Revenue Code (“IRC”) definition of a “qualified education loan” provides:

(d) Definitions - For purposes of this section—

(1) Qualified education loan. The term “qualified education loan” means any indebtedness incurred by the taxpayer solely to pay for qualified higher

²⁷ *Id.* at 55.

²⁸ *In re Beesley*, 2013 WL 5134404 (Bankr. W.D. Pa. Sept. 13, 2013); *In re Carow*, 2011 WL 802847 (Bankr. D.N.D. Mar. 2, 2011); *In re Skipworth*, 2010 WL 1417964 (Bankr. N.D. Ala. Apr. 1, 2010).

²⁹ 527 B.R. 410 (Bankr. D. Or. 2015).

³⁰ *In re Belforte*, 2012 WL 4620987 (Bankr. D. Mass. Oct. 1, 2012); *In re Baiocchi*, 389 B.R. 828 (Bankr. E.D. Wis. 2008).

³¹ *In re Christoff*, 527 B.R. 624 (B.A.P. 9th Cir. 2015); *In re Shojayi*, 515 B.R. 329, 333 (Bankr. D. Kan. 2014); *In re Oliver*, 499 B.R. 617 (Bankr. S.D. Ind. 2013).

education expenses—

- (A) which are incurred on behalf of the taxpayer, the taxpayer’s spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,
- (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and
- (C) which are attributable to education furnished during a period during which the recipient was an eligible student.³²

This definition focuses on the types of expenses for which the loan was incurred, the timing of the loan, and the type of institution attended. These factors are considered in the next sections.

2.4.1 Qualified higher education expenses

To qualify for a tax deduction under the IRC, a student loan must be incurred solely to pay for “qualified higher education expenses.” The definition of these expenses is broad and incorporates the definition of “cost of attendance” at an educational institution from the Higher Education Act of 1965.³³

These expenses include a variety of non-tuition items such as room and board, books and supplies, and transportation (if not an online program). The IRC does not set specific limits on these costs, referring instead to the Higher Education Act and its definition of appropriate costs “as determined by the institution.”³⁴ Higher education institutions typically develop these cost

³² 26 U.S.C. § 221(d).

³³ 26 U.S.C. § 221(d)(2)(incorporating the terms of the HEA); 20 U.S.C. § 1087II.

Section 1087II defines the pertinent “cost of attendance” for a student as:

- (1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;
- (2) an allowance for books, supplies, transportation, and miscellaneous personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer, for a student attending the institution on at least a half-time basis, as determined by the institution;
- (3) an allowance (as determined by the institution) for room and board costs incurred by the student which—
 - (A) shall be an allowance determined by the institution for a student without dependents residing at home with parents;
 - (B) for students without dependents residing in institutionally owned or operated housing, shall be a standard allowance determined by the institution based on the amount normally assessed most of its residents for room and board; and
 - (C) for all other students shall be an allowance based on the expenses reasonably incurred by such students for room and board[.] . . .

³⁴ 20 U.S.C. § 1087II(1)(referenced in IRS Code at 26 U.S.C. § 221(d)(2)); *In re Maas*, 514 B.R. 866 (W.D. Mich. 2014).

estimates for use in financial aid programs and for other purposes. The creditor has the burden to show in a nondischargeability proceeding that the private loan proceeds were within the established limits for the costs of attendance at the institution during the relevant time period.³⁵

The indebtedness must be incurred “solely” to pay qualified higher education expenses.”³⁶ The Treasury Department regulations implementing IRC § 221(d)(1) explain what is meant by the “solely” limitation. Loans meeting this standard are distinguished from “mixed-use” loans:

Mixed-use loans. Student J signs a promissory note for a loan secured by Student J’s personal residence. Student J will use part of the loan proceeds to pay for certain improvements to Student J’s residence and part of the loan proceeds to pay qualified higher education expenses of Student J’s spouse. Because Student J obtains the loan not solely to pay qualified higher education expenses, the loan is not a qualified education loan.³⁷

Consistent with the above example, cash advances, revolving lines of credit, and credit card debt should not be considered qualified education loans unless the total debt consists of credit incurred solely to pay for qualifying education expenses.³⁸ Private loans that fund expenses beyond what the educational institution determines to be the reasonable costs of attendance should be considered “mixed use” loans and therefore dischargeable.

The Treasury Department regulations make clear that the “solely” limitation also applies to refinancing transactions. To qualify as an educational loan, the new indebtedness must be incurred solely to refinance a qualified education loan.³⁹ A consolidation loan will not be a “qualified education loan” unless incurred solely to refinance two or more qualified education

³⁵ *In re Wiley*, 579 B.R. 1, 10 (Bankr. D. Me. 2017)(denying summary judgment motion where creditor failed to present evidence of institutional costs of attendance); *In re Clouser*, 2016 WL 5864493 (Bankr. D. Or. Oct. 6, 2016) (creditor failed to present evidence that loan was incurred to pay “qualified higher education expenses”).

³⁶ 26 U.S.C. § 221(d)(1).

³⁷ 26 C.F.R. § 1.221-1(e)(4) ex. 6.

³⁸ See 26 C.F.R. § 1.221-1; 64 Fed. Reg. 3257, 3258 (Jan. 21, 1999)(“Explanation of Provisions” in preamble to proposed Treasury Regulations - “Accordingly, mixed use loans are not qualified education loans. Similarly, revolving lines of credit (e.g., credit card debt) generally are not qualified education loans, unless the borrower uses the line of credit solely to pay qualified higher education expenses.”).

³⁹ 26 C.F.R. § 1.221-1(e)(3)(v)(“Refinanced and consolidated indebtedness - (A) In general. A qualified education loan includes indebtedness incurred solely to refinance a qualified education loan. A qualified education loan includes a single, consolidated indebtedness incurred solely to refinance two or more qualified education loans of a borrower.”).

loans.⁴⁰

The reasonable cost of attendance information is often publicly available on the institution's website. In addition, the Higher Education Opportunity Act of 2009 requires that, as of October 2011, colleges must provide a "net price calculator" on their websites.⁴¹ The purpose of the calculator is to give potential applicants an individualized estimate of how much it will cost them to attend the school. The calculator displays the full "costs of attendance" with itemized components. It then estimates the amount of grants and scholarships the student is likely to receive. Finally, the calculator lists a net price, which is the amount the student would be expected to cover with savings, work, and loans. The availability of this tool provides some guidance in determining whether a particular private loan was incurred solely to pay qualified higher education expenses.⁴²

2.4.2 Eligible student

To be considered a qualified education loan under subsection (B), the loan must have been taken out to pay expenses for education furnished during a period in which the recipient was an eligible student.⁴³ The expenses must be paid or incurred within a reasonable period of time before or after the indebtedness is incurred.⁴⁴ The expenses must be incurred on behalf of the debtor, the debtor's spouse, or a dependent of the debtor.⁴⁵ There are circumstances under which a student may take out a loan to attend school but may not necessarily be an eligible student. For example, to enroll a student who does not have a high school diploma or its equivalent, a proprietary school must administer an "ability to benefit" test.⁴⁶ Students who are improperly enrolled based on this test should be categorized as "ineligible" students, making a private loan provided to the student dischargeable in bankruptcy.

2.4.3 Eligible education institution

Another requirement for a "qualified higher educational expense" under the IRC is that the expenses be for attendance at an "eligible education institution." Eligible institutions are defined as institutions that are eligible to participate in a Title IV program.⁴⁷ Title IV refers to the title of the Higher Education Act that governs federal financial assistance programs. If a private student loan is provided to attend a school that is not eligible to participate in the Title IV such as an unaccredited school, the loan is not subject to subsection (B) and the debtors

⁴⁰ *Id.*

⁴¹ 20 U.S.C. § 1015a(a).

⁴² The Institute for College Access and Success website has extensive information about the net price calculators.

⁴³ 26 U.S.C. § 221(d)(1)(C).

⁴⁴ U.S.C. § 221(d)(1)(B).

⁴⁵ 26 U.S.C. § 221(d)(1)(A).

⁴⁶ 20 U.S.C. § 1091(d)(1)(A).

⁴⁷ 26 U.S.C. § 221(d)(2)(referring to 26 U.S.C. § 25A(f)(2)(B)).

discharge it in bankruptcy without having to prove undue hardship.⁴⁸

A helpful tool in determining whether a school is an eligible education institution is the Department of Education's Federal School Code List, which includes all postsecondary schools that are currently eligible for Title IV aid. Schools on the list can be found by using the search function on the Department's website or by downloading the list in a searchable Excel format.⁴⁹ Several bankruptcy courts have taken judicial notice of the Federal School Code List under Federal Rule of Evidence 201 in making findings on whether a school an eligible education institution subject to subsection (B).⁵⁰

2.5 Procedure for Determining Application of Section 523(a)(8)

If there is any doubt about whether a student loan debt is dischargeable, the debtor may file a complaint in an adversary proceeding in the bankruptcy court to obtain a declaration from the court as to whether the debt is covered by section 523(a)(8). The debtor may file this action either during the initial bankruptcy case or in a reopened bankruptcy case. There is no tactical advantage to be gained by a delay of this coverage determination. Unlike the facts underlying an undue hardship claim, the status of the debt under the statutory definition will not change in the future.

The debtor in such an action may plead in the alternative and seek a determination that the debt may be discharged under the undue hardship standard. In any proceeding in which the loan's status under the statutory definition is in question, the creditor has the initial burden of proof and must establish by a preponderance of the evidence that the debt is a loan or obligation that falls within the scope of one of the subsections of section 523(a)(8).⁵¹ This initial burden of proof falls upon the creditor even if the debtor files the action.⁵² As with all claims asserting an exception to discharge, the evidence must be narrowly construed against the creditor.⁵³ The burden of proof will not shift to the debtor to establish undue hardship unless

⁴⁸ See, e.g. *In re Christoff*, 527 B.R. 624, 627 n. 3 (B.A.P. 9th Cir. 2015); *In re Decena*, 549 B.R. 11 (Bankr. E.D.N.Y. 2016)(foreign medical school not on list of eligible institutions), *rev'd on other grounds*, 2016 WL 6998677 (E.D.N.Y., Nov. 29, 2016); *In re Nunez*, 527 B.R. 410 (Bankr. D. Or. 2015)(flight school attended by debtor was not eligible institution). *But see In re Rizer*, 553 B.R. 144, 153 (Bankr. D. Alaska 2016) (foreign veterinary school program accredited by American Veterinary Medical Association is eligible institution).

⁴⁹ The Federal School Code List for the current calendar year is available at: <https://ifap.ed.gov/ifap/fedSchoolCodeList.jsp>

⁵⁰ *In re Nunez*, 527 B.R. 410, 416 (Bankr. D. Or. 2015); *In re Rumer*, 469 B.R. 553, 562 (Bankr. M.D. Pa. 2012).

⁵¹ *In re Mehta*, 310 F.3d 308, 311 (3d Cir. 2002); *In re Renshaw*, 222 F.3d 82, 86 (2d Cir. 2000); *In re Rumer*, 469 B.R. 553, 561 (M.D. Pa. 2012); *In re Davis*, 316 B.R. 610 (Bankr. S.D.N.Y. 2004); *In re McFayden*, 192 B.R. 328, 331 (Bankr. N.D.N.Y. 1995).

⁵² *In re Dudley*, 502 B.R. 259, 271 (Bankr. W.D. Va. 2013).

⁵³ *In re Chambers*, 348 F.3d 650, 654 (7th Cir. 2003); *In re Mehta*, 310 F.3d 308, 311 (3d Cir. 2002); *In re Renshaw*, 222 F.3d 82, 86 (2d Cir. 2000).

the creditor first establishes that the obligation is covered by section 523(a)(8).⁵⁴

The debtor could also assert the dischargeability of a student loan debt in a collection action brought by the creditor after the bankruptcy discharge is entered. However, given the bankruptcy court's familiarity with dischargeability issues, it is generally advisable to have the determination made in bankruptcy court rather than state court. If a collection action is brought and the debtor then files bankruptcy, the automatic stay should prevent the lawsuit from proceeding until a discharge determination can be made by the bankruptcy court (or the collection action could be removed to the bankruptcy court).

3. THE UNDUE HARDSHIP STANDARD

3.1 The Statutory Language

If an educational debt falls within the coverage of section 523(a)(8), it may be discharged only if the bankruptcy court determines that "excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents."

The phrase "undue hardship" is not defined in the Bankruptcy Code. The House and Senate Reports issued in connection with the enactment of the Bankruptcy Code do not provide any discussion of the meaning of "undue hardship." It has been observed, however, that the phrase was "lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States,"⁵⁵ and the Commission Report was relied upon by Congress in drafting certain provisions of the Bankruptcy Code.⁵⁶ 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 minimal standard of living within their management capability, as well as to pay the education debt.⁵⁷

⁵⁴ *In re Keenan*, 53 B.R. 913, 916 (Bankr. D. Conn. 1985); *In re Norman*, 25 B.R. 545 (Bankr. S.D. Cal. 1982).

⁵⁵ *ECMC v. Polleys*, 356 F.3d 1302, 1306 (10th Cir. 2004).

⁵⁶ See S. Rep. No. 95-989, at 1-2 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5787-88; Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941, 943 n.20 (1979).

⁵⁷ Report of the Comm'n on the Bankr. H.R. Doc. No. 93-137, Pt. II § 4-506 (1973).

The Commission Report focuses on the debtor's inability to maintain a minimum standard of living while repaying the student loans. It refers to a debtor maintaining this “minimal standard of living” based on “adequate” income. The Report also focuses on the debtor’s present and future condition. It does not refer to the debtor’s pre-bankruptcy past, such as whether the debtor attempted to repay the loans.

3.2 The Brunner Test

Nine of the Circuit Courts of Appeal have adopted a test for determining “undue hardship” that is very similar. It is often referred to as the “*Brunner*” test, as it was first developed by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*⁵⁸

The *Brunner* test requires the debtor to show that:

- (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the student loans;
- (2) additional circumstances exist indicating that the hardship is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) the debtor has made a good-faith effort to repay the loans.⁵⁹

The Second Circuit’s *Brunner* test has been adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.⁶⁰ The debtor must establish all three prongs of the *Brunner* test before a court can make a finding of undue hardship.

3.3 The Totality of Circumstances Test

The Eighth Circuit has adopted a “totality of circumstances” test for determining undue hardship.⁶¹ This test considers:

- (1) the debtor’s past, current, and reasonably reliable future financial resources;

⁵⁸ 831 F.2d 395 (2d Cir. 1987).

⁵⁹ *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752 (S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d Cir. 1987).

⁶⁰ *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); U.S. Dep’t. of Educ. v. *Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003); *United Student Aid Funds, Inc., v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).

⁶¹ *In re Long*, 322 F.3d 549 (8th Cir. 2003).

- (2) the debtor's and the debtor's dependents' reasonable necessary living expenses; and
- (3) any other relevant facts and circumstances applicable to the bankruptcy case.

The First Circuit has not adopted an undue hardship test, though the Bankruptcy Appellate Panel for the First Circuit has embraced the totality of circumstances test.⁶²

3.4 General Application of the Tests

Regardless of the test used, the statute compels the courts to engage in the discretionary determination of when "hardship" becomes "undue." Courts are generally in agreement that "ordinary" or "garden variety" hardship, however defined, is not sufficient.⁶³ On the other extreme, some courts have required a showing of a "certainty of hopelessness" or "extraordinary circumstances" in applying *Brunner's* second prong, which looks at additional circumstances showing that the hardship is likely to persist.⁶⁴ Some 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, disability or incapacity of a debtor or dependent. This consideration, albeit formulated differently, may also appear in the totality of the circumstance test's first and third prongs.

However, not all courts that have adopted *Brunner* agree that such an extreme showing is required. For example, the Tenth Circuit has held that bankruptcy courts need not require proof of a "certainty of hopelessness,"⁶⁵ and the Ninth Circuit has stated that *Brunner* does not require that the additional circumstances under the test's second prong be "exceptional."⁶⁶ The Seventh Circuit has also noted that it is "important not to allow judicial glosses of the statutory language, such as the language in [*Brunner*], to supersede the statute itself."⁶⁷

Another important consideration is that the standards confer considerable discretion upon bankruptcy judges in determining undue hardship, and that the judge's inquiry is essentially a fact-driven determination. This means that appellate courts generally give substantial

⁶² *In re Bronsdon*, 435 B.R. 791 (B.A.P. 1st Cir. 2010). The *Bronsdon* court "distilled [undue hardship] to its essence" by noting that it "rests on one basic question: 'Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?'" *Id.* at 800.

⁶³ *In re Brunner*, 46 B.R. 752, 753 (Bankr.S.D.N.Y.1985), *aff'd* 831 F.2d 395 (2d Cir.1987)). See also *Rifino v. United States*, 245 F.3d 1083, 1087 (9th Cir. 2001).

⁶⁴ *E.g.*, *In re Spence*, 541 F.3d 538 (4th Cir. 2008); *In re Oyler*, 397 F.3d 382 (6th Cir. 2005); *In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003).

⁶⁵ *Educational Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004).

⁶⁶ *In re Nys*, 446 F.3d 938, 946-47 (9th Cir. 2006).

⁶⁷ *Krieger v. Educ. Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).

deference to the bankruptcy court's evaluation, by applying a clear error standard upon review.⁶⁸ The Seventh Circuit has noted that in making undue hardship determinations, a "judge asked to apply a multi-factor standard interpreting an open-ended statute necessarily has latitude; the more vague the standard, the harder it is to find error in its application."⁶⁹

It is also worth considering that some courts do not view an undue hardship determination as simply about whether all of the debtor's student loans are or are not dischargeable. They believe that the debtor may be granted a partial discharge, resulting in the discharge of some number of the debtor's loans or some portion of the total loan amount. This is discussed more fully in § 7.6, *infra*.

4. CASE EVALUATION

4.1 The Debtor's Financial Condition

In evaluating the debtor's chances of obtaining an undue hardship discharge, an initial question will be whether the debtor's budget, considering reasonable household expenses, is consistent with a minimal standard of living. Under either the *Brunner* or totality of circumstances test, the debtor's current income and expenses will be carefully reviewed by the court to determine if the debtor has an ability to repay the student loans and at the same time meet necessary living expenses.

4.1.1 Minimal standard of living

Courts generally do not require a showing that the debtor is living in "abject poverty" or has an income below a certain threshold, such as the federal poverty guideline.⁷⁰ In most hardship cases, there is not a dispute over whether the debtor's income is excessive. More often the focus is on whether all of the debtor's income is being considered and how it is being used.

If the debtor has a spouse or partner and has not filed a joint bankruptcy case, most courts consider the non-filing spouse or partner's income and contributions to household expenses in conducting the minimal standard of living analysis.⁷¹ Thus, the total household income and expenses, including those of a non-debtor spouse, partner, live-in companion, and contributing roommate, should be considered as part of the initial case evaluation. In most cases this information will already be documented as part of the preparation of Schedules I and J in the

⁶⁸ Hedlund v. Educ. Resources Institute, 748 F.3d 848 (9th Cir. 2013); Krieger v. ECMC, 713 F.3d 882 (7th Cir. 2013).

⁶⁹ Krieger v. Educ. Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013).

⁷⁰ *In re Hornsby*, 144 F.3d 433 (6th Cir. 1998)(debtors did not need to be at poverty level to show undue hardship).

⁷¹ *E.g.*, *In re Walker*, 427 B.R. 471, 485 n.40 (B.A.P. 8th Cir. 2010), *aff'd*, 650 F.3d 1227 (8th Cir. 2011); *In re Davis*, 373 B.R. 241, 248 (W.D.N.Y. 2007); *In re Lorenz*, 337 B.R. 423 (B.A.P. 1st Cir. 2006).

debtor's bankruptcy filing. In some cases there are good arguments that a spouse or partner's income that is devoted to separate expenses and not those of the household, such as the spouse or partner's support payments for a child living outside the household, should not be considered for the repayment of the debtor's student loans.

The more difficult task is determining what the court will consider to be a minimal standard of living. Although this can be highly subjective, one court has described the essential elements of a minimal standard of living to 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.⁷² Collecting budget information from the debtor for these categories of expenses should be part of case evaluation.

The debtor should be questioned about whether there are special budget considerations for the household, such as unique expenses related to dependents (*e.g.*, children with a disability or medical condition). It is also good practice to inquire about whether the debtor's budget is realistic and whether certain necessary expenses are not being paid or deferred. If the debtor is able to pay current bills only by postponing necessary medical and dental care, home repairs, and car repairs, it can be argued that the debtor is not maintaining a minimal standard of living even without consideration of the student loan repayment.⁷³ It is also important to consider any changes in the debtor's financial situation that have occurred since the bankruptcy case was filed that may not be reflected in the income and expenses listed on Schedules I and J, such as additional health care costs or the need to replace a car.

It has become common practice for student loan creditors to conduct extensive discovery about the debtor's expenses. Much of this focuses on an attempt to expose certain "discretionary" expenses, such as restaurant meals, cable television, internet access, or alcohol, so as to argue that these expenses are avoidable and could free up income to pay the student loan debt. While debtor's counsel should review such expenses with the debtor as part of the case evaluation, reasonable expenses of this type should not in most cases deter the debtor from seeking an undue hardship discharge. Some courts find that these expenses are appropriate if in modest amounts and may be the debtor's only form of recreation.⁷⁴ Other courts have refused to view these expenses in isolation, where excluding them would not bring the debtor even close to being able to make payments due on the student loans.⁷⁵

⁷² *In re Ivory*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001).

⁷³ *Educational Credit Mgmt. Corp. v. Smith*, 2011 WL 4625397 (S.D. Tex. Sept. 30, 2011).

⁷⁴ *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").

⁷⁵ *In re Gubrath*, 526 B.R. 863, 869-70 (D. Colo. 2014).

4.1.2 The debtor's ability to repay student loans

The debtor's ability to maintain a minimal standard of living under the first prong of the *Brunner* test is not considered in isolation. Rather, it requires an analysis of whether the debtor can keep up with a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the student loans. Thus, debtor's counsel will need to consider the amounts for the total outstanding balance and monthly contractual payment on the student loans in order to evaluate this part of the test.⁷⁶

The debtor's contractual repayment obligations under the student loans should be determined without consideration of possible income driven repayment options. As discussed later in this manual, those options will need to be evaluated separately, as part of the good faith analysis under the *Brunner* third prong.

Figuring out the monthly payment amount on the debtor's student loans will be an easier task if the debtor has recently been making payments on the loans or receiving billing statements. It is important to obtain the monthly payment amounts for all of the debtor's student loans if they have not been consolidated.

If the debtor has not been making payments or has not selected a repayment plan, the monthly payment under the standard repayment plan for each loan should be determined. For most older student loans, borrowers are given a standard repayment plan if they fail to choose another option. The monthly payments under standard plans are based on a maximum repayment period of ten years. For more recent Direct loan consolidation borrowers with loans that entered repayment on or after July 1, 2006, the standard loan repayment period varies depending on the total amount of student loans.⁷⁷ This ranges from a ten year repayment for consolidation loans less than \$7500 to thirty years for loans equal to or greater than \$60,000.

The monthly payment amounts for standard repayment plans, based on the loan amount, can be obtained on the Federal Student Aid website, www.studentloans.gov. As mentioned earlier, the loan amount and the amount disbursed on the debtor's student loans can be obtained on the NSLDS site. See § 1.2, *supra*. For private student loans, the loan amount and monthly payment will be shown on the promissory note or any applicable modification agreement.

Once the payment obligations are known, this should be compared with the debtor's income and expenses in relation to a minimal standard of living. A debtor who has little or no ability to repay the student loans while at the same time meeting necessary living expenses will generally satisfy the *Brunner* first prong. Even if the debtor has no disposable income after paying the expenses for a minimal standard of living, it is still important to calculate the payment amounts and to present evidence of this at trial. This is because the loan repayment requirements are

⁷⁶ *In re Fecek*, 2014 WL 1329414 (Bankr. S.D. Ind. Mar. 31, 2014)(using contractual monthly payment for student loans, borrower has nothing left over to pay necessary expenses).

⁷⁷ 34 C.F.R. § 685.208(c), (j).

also relevant in determining whether the hardship is likely to persist. If an undue hardship action is later filed, the debtor should request in discovery that the student loan creditors provide the precise amounts for total unpaid balance, daily interest accrual, and monthly payment (based on applicable repayment periods) on each outstanding loan.

4.2 Is the Hardship Likely to Persist?

The second prong of the *Brunner* test considers whether additional circumstances exist indicating that the hardship is likely to persist for a significant portion of the loan repayment period. This aspect of the *Brunner* test can be challenging, as it requires debtors to prove a negative; that their future is as hopeless as their present. While this may seem like an impossible task, it can be met by demonstrating that the various factors causing the debtor's current hardship are not likely to change and that there are no reasonable prospects that the debtor will experience good fortune in the future.

4.2.1 "Significant portion" of the repayment period

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."⁷⁸ In recent cases, student loan creditors have asked courts to consider a repayment period of twenty or twenty-five years, based on the periods under the Department of Education's income-based repayment programs.

Some courts have held that this position does not comport with the original *Brunner* test or the language of section 523(a)(8), and that the period for consideration should not exceed beyond the contractual loan repayment period, which generally does not exceed ten years.⁷⁹ For example, the 2010 Master Promissory Note for the FFEL PLUS Loan program provides: "My repayment period for each loan generally lasts at least 5 years but may not exceed 10 years (except under an extended or income-based repayment plan)." In arguing that the ten year period should be used, the debtor may point out that there were no income-driven repayment programs when Congress enacted the undue hardship language 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. Any type of long-term repayment program running for twenty-five years would have been irrelevant to the undue hardship determination as

⁷⁸ *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").

⁷⁹ *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); *In re Johnson*, 2015 WL 795830 * 9 (Bankr. D. Kan. Feb. 19, 2015)(the standard student loan repayment period is ten years and the *Brunner* court could not have contemplated a longer period given the law at the time).

envisioned 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.⁸⁰

4.2.2 Future income

Any prediction of the debtor's future economic prospects requires analysis of both income and expenses. On the income side, the debtor's age can be a factor, though it is not determinative. For example, a debtor who is age 71, retired and living solely on Social Security benefits, will generally have an easier task of showing that her current hardship is likely to persist. Similarly, a debtor who is approaching retirement may show that the limited number of years remaining in the debtor's work life will not permit any significant repayment of the loans.

If the debtor's current hardship is caused by a serious illness, psychiatric problem, incapacity or disability of the debtor or a dependent, evidence of the current condition alone is generally not sufficient. The debtor will need to offer evidence that the condition will be the same or worse in five years, ten years or some significant portion of the loan repayment period. As discussed later in this manual, while expert testimony can help establish this, there may be other ways for the debtor to satisfy this burden.

In evaluating whether an employed debtor will be a good candidate for a discharge, it will be necessary to consider whether there is a reasonable likelihood for advancement in the debtor's occupation and whether the debtor has made efforts to maximize his or her earning potential. Although the standard is forward-looking, looking back at the debtor's employment history can help forecast the debtor's realistic future prospects. If the debtor has worked 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, these factors can provide the "additional circumstances" indicating that the debtor's hardship is likely to persist.⁸¹

To facilitate a review of the debtor's past employment history, it is advisable to ask the debtor to obtain a Social Security Statement from the Social Security Administration.⁸² This document provides a record of the debtor's lifetime earnings.

⁸⁰ A 1990 amendment extended the waiting period for an unconditional discharge from five to seven years. Federal Debt Collection Procedures Act of 1990, Pub.L. No. 101-647, § 3621(2), 104 Stat. 4933. Finally, in 1998, Congress eliminated the waiting period option for dischargeability. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1837 (1998).

⁸¹ *E.g., In re Blanchard*, 2014 WL 4071119 (Bankr. D. N.H. Aug. 14, 2014)(undue hardship found where 45-year old nurse had reached earnings ceiling in field and was minimizing family expenses).

⁸² The debtor can obtain a Social Security Statement online by setting up a "my Social Security account" at: <https://secure.ssa.gov/RIL/SiView.do>. Alternatively, to get the Statement by mail,

While some courts have found that a debtor who is working in a chosen profession that is low paying should consider another field of work,⁸³ other courts have recognized that this is often easier said than done and that the debtor may face other hardships and incur additional debt in trying to switch occupations.⁸⁴ This issue should be discussed with the debtor.

Any factors that limit employment opportunities should be considered. For example, the debtor may have only limited education despite receiving student loans, is unable to complete her education to obtain a degree, or has received poor quality education. If the debtor does not have usable or marketable job skills, or job skills needed for more lucrative employment, any reasons that would prevent retraining should be reviewed.

It is also important to consider any distinguishing features of the debtor's occupation or local work environment, particularly if the debtor lives in a rural community in which job opportunities may be limited. For example, a significant factor in several recent cases in which school teachers were granted discharges was that state or local law capped the debtor's pay at a low amount or provided only modest step increases, and that there were few opportunities for advancement within the school system.

4.2.3 Future expenses

On the expense side, case evaluation involves consideration of future circumstances that might lead to a reduction or increase in the debtor's necessary expenses. However, it is important to evaluate the complete impact of any foreseeable change. For example, student loan creditors often argue that the debtor's expenses will be reduced when the debtor's children turn eighteen years old. However, this may also mean a drop in income as the debtor may no longer be eligible for an Earned Income Tax Credit or other tax credits, or child support payments. Also, some courts have accepted the argument that children often do not become self-supporting once they turn eighteen, and that it is reasonable to expect that some expenses will continue.⁸⁵

the debtor can complete a "Request For Social Security Statement" (Form SSA-7004) and mail it to the address provided on the form.

⁸³ *E.g.*, *In re Oylar*, 397 F.3d 382 (6th Cir. 2005)(pastor failed *Brunner* test because he failed to maximize his earnings); *In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003) (debtor failed second *Brunner* prong by choosing to work as a cellist in the low-paying field in which he was trained).

⁸⁴ *E.g.*, *In re Avant*, 2006 WL 3782168 (Bankr. W.D. Mo. Dec. 21, 2006) (debtor with significant medical needs cannot be expected to leave low-paying government attorney position that provides health insurance when there is no evidence she can find higher-paying jobs with similar benefits).

⁸⁵ *E.g.*, *In re Innes*, 284 B.R. 496 (D. Kan. 2002).

4.3 Has the Debtor Made a Good-Faith Effort to Repay the Loans?

Brunner's third prong requires that the debtor show a good faith attempt to repay the student loans. In addition to whether the debtor has made payments on the loans, courts have considered under this prong (as well as under the third prong of the totality test) whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. This requirement looks to the debtor's past conduct.

Although the inquiry is somewhat narrow in scope, student loan creditors have attempted in some cases to argue that the debtor's good faith should extend to matters beyond payment efforts. For example, debtors in some cases have had to refute arguments that they should have avoided having too many children,⁸⁶ should not take prescription drugs to counteract the side effects of mental health medication,⁸⁷ should not have taken custody of two grandchildren, one of whom was victim of physical abuse,⁸⁸ or should not have ended studies without getting a degree despite needing to care for elderly parents.⁸⁹ Fortunately for debtors, courts generally have found that such matters are not relevant or do not reflect bad faith. Still it is advisable to consider any potential issues of a similar nature and be prepared to respond to them.

4.3.1 Payment history

In cases in which the debtor's student loans may date back many years or decades, the debtor may not have records of all past payments. The debtor should be asked to estimate the amount and timing of payments that were made. The debtor can also obtain payment records from NSLDS, as well as the outstanding amounts for principal and interest. See § 1.2, *supra*. It should not be assumed that little or no payments were made based simply on the outstanding loan balances, because a substantial portion of the debtor's payments may have been applied to interest and collection fees, and the loan balance may include a significant amount of capitalized interest.

Courts have held that involuntary payments, such as those made under a tax refund intercept or wage garnishment, count as payments that can satisfy the good faith test.⁹⁰

⁸⁶ *In re Walker*, 406 B.R. 840, 863 (Bankr. D. Minn. 2009); *In re Ivory*, 269 B.R. 890, 911 (Bankr. N.D. Ala. 2001).

⁸⁷ *In re Renville*, 2006 Bankr. LEXIS 3211 (Bankr. D. Mont. Jan. 5, 2006).

⁸⁸ *In re Mitcham*, 293 B.R. 138 (Bankr. N.D. Ohio 2003).

⁸⁹ *In re Bene*, 474 B.R. 56 (Bankr. W.D. N.Y. 2012).

⁹⁰ *In re Jolie*, 2014 WL 929703 (Bankr. D. Mont. Mar. 10, 2014)(good faith prong satisfied even though only loan payment was \$1600 disbursed by chapter 7 trustee to creditor); *In re Crawley*, 460 B.R. 421, 446–447 (Bankr. E.D. Pa. 2011)(good faith standard satisfied despite lack of any voluntary payments where debtor lacked ability to pay, kept in contact with creditor, and reduced loan balance through tax offsets and wage garnishments); *In re Naylor*, 348 B.R. 680 (Bankr. W.D. Pa. 2006)(involuntary payments by seizure of debtor's tax refunds and portions of his Social Security checks considered as loan payments for good faith determination).

It is not essential for the debtor to have actually made any payments. Debtors who clearly lacked sufficient income to make minimal payments may still qualify for a discharge.⁹¹ For purposes of case evaluation, it is important to consider whether the debtor had an ability to pay during periods when payments were not made and were required (excluding periods of loan forbearance), or whether there were justifiable reasons why the debtor did not maintain payments.

4.3.2 Participation in income-driven repayment plans

Creditors of federal student loans and the Department of Education routinely argue in hardship discharge litigation that repayment will not impose an undue hardship on debtors because the Department provides various income-driven repayment plans. These administrative plans have taken different forms over the years, such as an income-contingent repayment plan (ICRP), income-based repayment plan (IBR), and Pay as You Earn plan (PAYE). Factual issues and legal arguments relevant to the role of income-driven plans are discussed in § 7.5.2, *infra*.

Courts generally have held that the availability of administrative plans is a factor to be considered in the undue hardship evaluation.⁹² At the same time, courts agree that participation in an income-driven plan is not required to satisfy the *Brunner* “good faith” requirement.⁹³ In addition, this issue is not relevant to private student loans, as such loans are

⁹¹ *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).

⁹² *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2005)(debtor’s consideration of ICRP option is an important indicator of good faith); *In re Frushour*, 433 F.3d 393,402 (4th Cir. 2005)(important component of good faith inquiry); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005)(carries “significant weight” in evaluating good faith); *In re Tirsch*, 409 F.3d 677, 682 (6th Cir. 2005) (decision not to take advantage of ICRP probative of debtor’s intent to repay).

⁹³ *In re Mosley*, 494 F.3d 1320 (11th Cir. 2007)(rejecting a per se rule that debtor cannot show good faith if debtor did not enroll in ICRP); *In re Barrett*, 487 F.3d 353, 364 (6th Cir. 2007); *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2006); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005); *In re Frushour*, 433 F.3d 393 (4th Cir. 2005); *In re Abney*, 540 B.R. 681, 689 (Bankr. W.D. Mo. 2015); *Bene v. Educational Management Corp. (In re Bene)*, 474 B.R. 56 (Bankr. W.D. N.Y. 2012)(debtor was not required to indenture herself for 25 years under the William D. Ford repayment program).

not eligible for the Department of Education discharge and income-driven repayment programs.

For purposes of case evaluation, it is important for attorneys to know whether the debtor has ever applied for or participated in any administrative repayment plans. If the debtor is not currently enrolled in a plan, the attorney should determine whether the debtor is eligible for any plans and what the potential repayment terms would be under the plans. Debtors can access information about repayment options on the Federal Student Aid website, www.studentaid.gov. Attorneys can also use the Department of Education's online calculator, the "Repayment Estimator," to obtain an estimate of the client's repayment terms under the various plans using the basic information obtained at the client interview. *See* § 1.3, *supra*. This information will assist the attorney in determining the evidence that will be needed at trial to support arguments as to the role of such plans in the undue hardship analysis, as discussed below.

5. FILING THE ADVERSARY COMPLAINT

5.1 Procedure for Obtaining Discharge of Student Loans

Once case evaluation has been completed and a decision has been made to seek a hardship discharge of student loans, the attorney will need to begin preparing the case for filing. To obtain a discharge based on undue hardship, an adversary proceeding must be initiated in the bankruptcy court seeking a declaratory judgment that the debt is dischargeable. An adversary proceeding is a lawsuit within the bankruptcy case initiated by the filing of an adversary complaint. It is subject to Bankruptcy Rules that are almost identical to the Federal Rules of Civil Procedure, including those relating to discovery procedure.⁹⁴ Under the present fee schedule adopted by the Administrative Office of the U.S. Courts, there is no filing fee for an adversary complaint brought by a debtor in a bankruptcy case.⁹⁵

An adversary proceeding to determine dischargeability of a student loan may be filed at any time.⁹⁶ A bankruptcy case that has been closed may be reopened in order to obtain a

⁹⁴ See Fed. R. Bankr. P. 7001–7087.

⁹⁵ See Bankruptcy Court Miscellaneous Fee Schedule, available at: <http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx>.

⁹⁶ See 11 U.S.C. § 350(b); Fed. R. Bankr. P. 4007(b); *In re Smith*, 442 B.R. 550, 557 (Bankr. S.D. Tex. 2010)(there is no deadline for seeking a determination of dischargeability under § 523(a)(8)), *aff'd*, 2011 WL 4625397 (S.D. Tex. Sept. 30, 2011); *Thurman v. United Student Aid Funds, Inc.*, 2012 WL 993412 (W.D. Wash. Mar. 21, 2012) (same); *In re Watkins*, 461 B.R. 57, 59 (W.D. Mo. 2011)(Fed. R. Bankr. P. 4007 gives a bankruptcy court jurisdiction to decide a student loan dischargeability proceeding "at any time").

dischargeability determination,⁹⁷ and the discharge order entered in a prior bankruptcy case does not preclude a later adversary proceeding to determine dischargeability of a student loan debt listed in the prior case.⁹⁸ Likewise, since the denial of a hardship discharge is generally made without prejudice, courts have held that a student may renew a request for discharge relief when there has been a change in circumstances.⁹⁹ The Bankruptcy Code also provides that a student loan that was excepted from discharge in a prior bankruptcy may be discharged in a subsequent bankruptcy case if the debtor can satisfy the undue hardship test.¹⁰⁰

5.2 Drafting the Complaint

The adversary complaint should allege facts that would support findings in the debtor's favor under each of the three prongs of the *Brunner* test, or that would more generally establish undue hardship under the totality test. Unlike complaints filed in other areas of substantive law, rigid pleading requirements in which specific allegations must be asserted generally do not apply in an action under section 523(a)(8). In fact, defendants in hardship discharge litigation rarely file motions to dismiss under Rule 7012(b)(6) asserting a failure to state a claim upon which relief can be granted. Still, there can be a strategic advantage in some cases to including detailed factual allegations about the debtor's hardship. For example, if the debtor suffers from a chronic illness, a complaint that describes in detail the severity and impact of the debtor's condition may cause some or all of the defendants to stipulate to judgment in favor of the debtor. If that approach is taken, however, the allegations may raise privacy concerns for the client and counsel should consider taking steps discussed below for protecting the debtor's privacy.

⁹⁷ 11 U.S.C. § 350(a); Fed. R. Bankr. P. 5010. Although the debtor does not obtain an automatic stay upon reopening, the debtor may request in the motion seeking to reopen the case that the court stay any collection activity on the student loans, based on the court's authority under 11 USC 105(a).

⁹⁸ See, e.g., *Thurman v. United Student Aid Funds, Inc.*, 2012 WL 993412 (W.D. Wash. Mar. 21, 2012).

⁹⁹ *In re Andrews*, 661 F.2d 702 (8th Cir. 1981)(recommending that denial of hardship discharge by bankruptcy courts should be made without prejudice to permit debtor to seek relief under Rule 4007 when there has been a change in circumstances); *In re Sobh*, 61 B.R. 576 (E.D. Mich. 1986)(res judicata does not bar debtor from filing new complaint seeking a hardship discharge based on new facts); *In re Crawley*, 460 B.R. 421, 434 (Bankr. E.D. Pa. 2011)(once case re-opened, undue hardship inquiry includes consideration of debtor's circumstances since earlier bankruptcy case filed). *But see In re Zygarewicz*, 423 B.R. 909 (Bankr. E.D. Cal. 2010)(despite language in Code requiring court to evaluate debtor's current circumstances for undue hardship, court in reopened case refused to consider financial impact of post-discharge auto accident on debtor); *In re Kapsin*, 265 B.R. 778 (Bankr. N.D. Ohio 2001)(change in circumstances one-and-one-half years later did not constitute "cause" for reopening bankruptcy).

¹⁰⁰ See 11 U.S.C. § 523(b).

If there is any question that a student loan may not be covered by section 523(a)(8), such as when a private student loan is not a “qualified education loan” for purposes of section 523(a)(8)(B), the debtor should not plead facts that would be an admission that the loan is subject to section 523(a)(8).

5.2.1 Naming the proper defendants

For each of the debtor’s federal student loans, the National Student Loan Data System (NSLDS) should identify the lender, guaranty agency, or current servicer of the loan. *See* § 1.2, *supra*. All of the entities listed in NSLDS for the particular loan should be named as defendants unless it is clear that the entity no longer has an interest in the loan. However, it is important that the current holder of the loan be named as defendant.¹⁰¹ In addition, the United States Department of Education should be named as a defendant even if it is not identified as the current holder of the loan, since the Department serves as the ultimate guarantor on federal student loans.

Based on the Department of Education’s contractual relationship with Educational Credit Management Corporation (ECMC), ECMC is authorized to accept assignment of FFEL loans when a borrower on the loan has filed bankruptcy. Thus, ECMC will typically move to intervene as a student loan guarantor agency and be substituted as a party defendant for the original guaranty agency named in the complaint by the debtor.

There is no central database similar to NSLDS for private student loan information. While the original lender will be shown on the loan documents, the loan may have been assigned to another entity before the bankruptcy was filed. In fact, many private student loans have been assigned as part of the securitization process to a trust named National Collegiate Student Loan Trust. Another entity that has taken assignment of many private loans is TERI Loan Holdings, LLC. Thus, the debtor’s attorney should request that the loan servicer provide information about the current loan holder. If the debtor has been sued in a collection action on the loan, the plaintiff listed in that action should be named as a defendant unless there is clear evidence that it no longer has an interest in the loan. If there is uncertainty about the true owner or holder of the loan, it is advisable to name the original lender, the servicer, and any other entities that have taken assignment of the loan or have an interest in it.

5.2.2 Privacy concerns

A motion may be filed to protect the privacy of a debtor if it is anticipated that highly sensitive personal information, such as medical or employment records, may be disclosed in the adversary proceeding. The debtor may reasonably fear that details of the debtor’s condition could become available to potential employers and result in employment discrimination. If

¹⁰¹ *In re Kleckner*, 560 B.R. 172 (Bankr. E.D. Pa. 2016) (summary judgment entered against debtor where adversary complaint was brought against servicer of consolidation loan and not the loan holder, the Department of Education).

concern about such matters arises after the undue hardship adversary complaint has been filed, a motion may be filed in the adversary proceeding, with the appropriate case caption.

Bankruptcy Rule 9037 incorporates basic protections for parties related to electronic filings made with the court, as provided under F.R. Civ. P. 5.2. Rule 9037(d) permits a party to request a protective order in which the court may, for cause, limit or prohibit a nonparty's remote electronic access to a document filed with the court. In addition, § 107(b)(2) provides that a party in interest may request that the bankruptcy court protect a person with respect to a scandalous or defamatory matter contained in a paper filed in a case.

The motion may request that unredacted versions of documents be kept under seal. As an alternative, the court may direct that only redacted versions be available through electronic access on PACER, and that the unredacted paper versions be made available for inspection solely at the Clerk's office.¹⁰²

5.3 Serving the Adversary Complaint

If the United States Department of Education is named as a defendant, the adversary complaint should be served pursuant to Bankruptcy Rule 7004(b)(5) by mailing a copy of the summons and complaint to:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

U.S. Department Of Education
Education Department Office of General Counsel
400 Maryland Ave SW, Room 6E353
Washington DC 20202-2110

It is also advisable to mail a copy to the office of the United States Attorney for the district in which the action is brought.

Other defendants, if they are corporations or partnerships, may be served pursuant to Bankruptcy Rule 7004(b)(3) by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. If service is made on the agent authorized by statute to receive service and the statute so requires, counsel must also mail a copy to the defendant, usually at the address for the defendant's principal place of business.

Although defendants in undue hardship litigation are not often insured depository institutions, special service requirements apply if such an institution is named as a defendant. Bankruptcy

¹⁰² See *In re Traversa*, 2008 WL 1777413 (Bankr. D. Conn. April 16, 2008).

Rule 7004(h) requires that service of process on an insured depository institution in a contested matter or adversary proceeding be made by certified mail addressed to an officer of the institution. The rule applies only to an insured depository institution “as defined in section 3 of the Federal Deposit Insurance Act.”¹⁰³ Thus, the institution must have deposits that are insured by the FDIC under the Federal Deposit Insurance Act.¹⁰⁴ The summons and complaint should be sent by certified mail to a specific named officer of the institution.¹⁰⁵

6. PRETRIAL DISCOVERY

6.1 Discovery by the Debtor

Unlike typical consumer litigation, many of the factual matters the debtor will need to prove in an undue hardship trial are personal to the debtor and relate to information in the debtor’s control, not the defendants. Still, discovery provides an opportunity for counsel to obtain information on certain factual matters that may not be available to the debtor, such as information about the debtor’s student loans and payment obligations.

In addition to the initial discovery disclosures the debtor must make under Bankruptcy Rule 7026(a)(1), the debtor must disclose to the other parties the identity of any witness it may use at trial to present expert testimony.¹⁰⁶ To reduce costs if the expert services are not provided pro bono, counsel may seek a stipulation or order from the court that would excuse the debtor from submitting with the disclosure a written report from the expert witness.¹⁰⁷ If not required to file a report, the debtor’s disclosure must state the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify.¹⁰⁸

6.1.1 Loan information

Each defendant in the adversary proceeding should be asked to provide basic information about the debtor’s student loans in response to Interrogatories and Requests for Production.

¹⁰³ Fed. R. Bankr. P. 7004(h).

¹⁰⁴ To confirm whether a party is an insured depository institution for purposes of Rule 7004(h), the attorney should use the BankFind program on the FDIC’s website at <http://research.fdic.gov/bankfind/>.

¹⁰⁵ The corporate website for the institution should be checked as it may list the officers and addresses, or that information may be contained in annual reports that may be available on the website. Corporate websites may also provide access to filings made by the institution with the U.S. Securities and Exchange Commission which contain the names and addresses of officers. The SEC’s website also provides access to these filings using the EDGAR search engine. This information can be accessed for free at: <http://www.sec.gov/edgar.shtml>.

¹⁰⁶ Fed. R. Civ. Bankr. 7026(a)(2)(A).

¹⁰⁷ Fed. R. Civ. Bankr. 7026(a)(2)(B).

¹⁰⁸ Fed. R. Civ. Bankr. 7026(a)(2)(C).

For example, defendants should be asked for each outstanding loan to state (and to produce related documents): the type of loan; the loan disbursement date and the amounts disbursed; the recipient of the loan proceeds; the identity of original lender, any guaranty agency, current holder of the loan, and current servicer; and the current status of the loan. As to the terms of the loan obligations, defendants should be asked to state and produce documents for each outstanding loan: the amount owing as of the date of filing of the adversary complaint; an itemization of the amount owing as between principal, interest, and fees or other charges; the contractual interest rate and the amount of per diem interest; and the monthly payment amount under the standard repayment plan.

6.1.2 Good faith

Addressing the good faith inquiry of the *Brunner* test, defendants should be asked in Interrogatories to state the amount and date of all payments they have received on the loans. The request should include information about involuntary payments, such as those received by the defendant through a tax refund intercept or wage garnishment. Documents evidencing payments should be sought in a Request for Production. Discovery requests should also seek information about forbearances the debtor sought or was granted.

Depending upon the circumstances of the debtor's case, discovery requests may also seek information about the debtor's attempt to enroll in repayment plans or any participation in such plans. Once the per diem interest amount is obtained on each loan, a Request for Admission might be used to establish the amount of unpaid interest that will accrue each month if the debtor makes payments under an income driven repayment plan.

6.1.3 Authentication of documents

A written request for admission under Bankruptcy Rule 7036 can be used to obtain admissions as to the genuineness of documents intended as exhibits at trial. This request must attach a copy of the document, unless it is otherwise furnished or made available to the opposing party.¹⁰⁹ This procedure can be helpful in getting medical records authenticated before trial.

6.1.4 General information

The debtor's discovery requests should also include items that are regularly sought in litigation, such as requests for the defendants to identify all individuals they intend to call as witnesses in the case, the subject matter to which each witness is expected to testify, and each document they may introduce into evidence or that contains information about the debtor's loans. Contention interrogatories can also be a useful tool to identify the theories of the defendant's defense. However, advocates should check local rules and practice because contention interrogatories are not permitted in some districts.

¹⁰⁹ Fed. R. Civ. P. 36(a)(2).

6.2 Discovery by the Defendant

It should be expected that defendants will make full use of discovery tools. Advising the client in advance of what will likely be sought can help the client comply with discovery and make the attorney's job easier. The process of responding to discovery can also help the attorney evaluate the evidence that will need to be introduced at trial and assess the strengths and weaknesses of the debtor's case. Time spent preparing the client for a deposition can have the same result and will also give the client a sense of what to expect at trial.

6.2.1 Financial information

The debtor will be asked to produce records, and respond to interrogatories, that relate to the plaintiff's financial situation. An advantage of bringing the undue hardship action shortly after the bankruptcy case is filed is that the debtor can use the substantial information that has already been compiled and disclosed in the bankruptcy schedules about her income and expenses to comply with discovery. However, the scope of the defendant's discovery will be broader. For example, the debtor will likely be asked to produce tax returns or other evidence of income going back further than what is needed for bankruptcy purposes, such as for a period of five or six years before the adversary proceeding is filed.

Document production will also be more extensive as the debtor will be asked to produce records of income and expenses that are not required to be filed with the bankruptcy schedules or produced under Bankruptcy Rule 4002. For example, it should be expected that defendants will ask the debtor to produce copies of recent credit card and bank statements. Defendants will review these for signs of any extravagant spending or "discretionary" expenses that are not consistent with a minimal standard of living. *See* § 4.1.1, *supra*.

If the debtor is unemployed currently or during significant periods of the repayment period, defendants will conduct discovery on the extent of the debtor's employment history and job search efforts. For example, the debtor may be asked to produce copies of resumes used and any records of contacts with potential employees or employment agencies. Similar discovery will be conducted if the debtor is "underemployed" by working in marginal jobs or those not in her field or profession. On the positive side, responding to this discovery can be an opportunity for the debtor to collect information that can be offered as evidence at trial on good faith and whether the debtor's hardship is likely to persist.

6.2.2 Medical information

If the debtor has alleged that physical or mental health problems contribute to the claim of undue hardship, this will be a major focus of the defendant's discovery. The debtor will be asked about all relevant information related to her condition, treatment and prognosis. Medical records from physicians, therapists and hospitals will be sought. This area of discovery will also request information about the debtor's expenses related to her medical condition.

Even if the defendant does not seek medical records through discovery, the debtor will often need to assemble medical records in preparation for trial. These documents are helpful in evaluating the case and can be introduced at trial to prove undue hardship. The debtor should be asked early to begin the process for obtaining such records from health care providers. Federal regulations generally give patients the right of access to obtain copies of health information, subject to a “reasonable, cost-based fee.”¹¹⁰

7. THE UNDUE HARDSHIP TRIAL

7.1 Pretrial Considerations

As with any evidentiary hearing or trial in an adversary proceeding, attorneys should become familiar with local rules that deal with pretrial procedure. Some courts require counsel for the parties to confer and prepare a joint pretrial statement, which is typically filed after the close of discovery or before the scheduled trial date. The statement generally contains the facts that the parties agree are admitted, the issues of fact remaining to be litigated, a list of proposed witnesses, and a list of proposed exhibits including any agreements on admissibility. Even if a pretrial statement is not required under local rules, debtor’s counsel should explore whether agreements can be reached on the admissibility of certain documents and other evidentiary issues.

In negotiations leading up to a statement of agreed facts or other elements of a pretrial statement or order, it may be possible to narrow the legal issues for trial. In fact, student loan creditors in some cases have been willing to stipulate before or at trial that they do not contest that the debtor has satisfied one or more elements of the *Brunner* test.¹¹¹ Counsel should ensure that any such admission or waiver is clearly expressed in the pretrial statement or made part of the record at trial.

By the time of the trial or evidentiary hearing, counsel should have a firm understanding of the evidence that will need to be introduced to prove each element of the *Brunner* or totality test. The debtor should be prepared to offer testimony on each element. If corroborating testimony from family members or an expert witness will be introduced, counsel should take steps to

¹¹⁰ 45 C.F.R. § 164.524(c)(4).

¹¹¹ *E.g.*, *In re Price*, 573 B.R. 579, 592 (Bankr. E.D. Pa. 2017)(Department of Education stated at trial that it would contest that debtor had satisfied the first prong of *Brunner* test), *rev’d on other grounds*, *DeVos v. Price*, 2018 WL 558464 (E.D. Pa. Jan. 24, 2018); *In re Kelsey*, 287 B.R. 132, 143 (Bankr. D. Vt. 2001)(parties stipulated that debtor satisfied the first prong of the *Brunner* test).

ensure the availability of such witnesses. Counsel should also have a plan for the introduction into evidence of any exhibits that are not subject to an agreement on admissibility.

7.2 Evidence of Minimal Standard of Living

If no stipulation is obtained on the first prong of the *Brunner* test, the debtor's testimony should review in detail the debtor's financial situation, including information about the debtor's household and dependents. The debtor's current income should be established through testimony of the debtor and income records. If the debtor is working, a recent pay stub can be introduced to show the debtor's gross income, deductions, and take-home pay. The debtor should explain if any of the income is not received on a regular basis, such as child support and seasonal work. The goal of the debtor's testimony should be to provide the court with enough information so that it can reliably determine the amount of monthly income that is available for the payment of living expenses.

It may be necessary for the debtor to provide testimony about her employment history, though some courts may consider this under the good faith prong of the *Brunner* test. For example, if the debtor is currently employed part-time or in a low paying job in which she is not using her education or degree, the debtor should discuss her efforts to obtain a higher paying job or full-time employment, or any obstacles that have prevented this from happening (*e.g.*, failure to complete education and obtain degree, lack of job skills, child care responsibilities).

Evidence of the debtor's expenses will also need to be introduced in order to establish that they fall within a minimal standard of living. The debtor should be prepared to explain whether there have been any changes to the expenses listed on Schedule J that was filed in the bankruptcy case. If the debtor or debtor's dependents have any unusually high expenses, such as the cost of prescription drugs or child care, exhibits showing the actual costs should be introduced. Any uncommon or mandatory expenses should be documented. For example, if the debtor is required to contribute to an employee-sponsored pension plan, the debtor should offer into evidence a copy of the plan or summary showing that participation in the plan is mandatory.

As discussed earlier, it is likely that student loan creditors will focus on particular "non-essential" expenses in the debtor's budget, such as entertainment. The debtor should be prepared to testify about how such expenses fit within the overall household budget and whether they may be offset by cost-cutting measures on other expenses.¹¹²

¹¹² *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"); *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.").

7.3 Evidence of Repayment Ability

The debtor must also prove that she is unable to make payments on the student loans and maintain a reasonable, minimal standard of living for herself and her dependents. Thus, evidence of the student loan payment obligations should be introduced. This will include the amortizing monthly loan payment amount for each of the outstanding student loans, derived from the amount due, the current interest rate, and the applicable loan repayment term. Ideally, this information will have been obtained in discovery, including requests for admissions (and included in an agreed statement of facts). It is critical that debtor's counsel ensure that evidence of the monthly payment amounts is introduced at trial as student loan creditors may make a tactical decision to avoid presenting this evidence.¹¹³

7.4 Evidence of Additional Circumstances that Hardship is Likely to Persist

Once evidence of the debtor's hardship has been introduced, it will be necessary to satisfy the second prong of the *Brunner* test, by showing that the hardship is likely to persist throughout the loan repayment period. The focus of this inquiry will be on whether the debtor's financial situation is likely to improve, remain the same, or deteriorate, and whether there are factors that will support this prediction. The debtor should be prepared to introduce evidence of any additional circumstances that demonstrate her present hardship is persistent. Since this prong of the *Brunner* test is often the most challenging, careful planning on a trial strategy should be undertaken in advance of trial. As discussed in § 4.2.1, *supra*, the debtor should request that the court limit the inquiry under this prong, and any related offer of proof, to the near foreseeable future based on the remaining loan term as opposed to a lifetime inquiry.

In some cases it may be possible for the debtor to satisfy the "additional circumstances" requirement based on evidence of the debtor's education, job skills, and employment history, indicating that the debtor's financial condition will not improve. In other cases the primary focus will be on a physical or mental impairment that the debtor claims will make the hardship persist. The next sections will discuss evidentiary issues under both scenarios.

7.4.1 Testimony of the debtor

If the additional circumstances center on the debtor's health, counsel will need to determine before trial whether corroborating evidence from an expert witness will be introduced. Even if expert testimony is not used, the debtor will almost certainly want to provide testimony about her condition. This should include a detailed account of her history of health problems, any diagnosis of specific conditions, and her current state of health. For chronic conditions, the debtor should note the onset of the condition and describe how it has progressed over time. In

¹¹³ *In re Acosta-Conniff*, 536 B.R. 326, n. 2 (Bankr. M.D. Ala. Mar. 25, 2015)(noting ECMC's tactical decision to present evidence only of a potential ICRP monthly payment, the court nevertheless calculates the current amortizing payment for pro se debtor and uses the debtor's likely remaining years of active employment as teacher as the outer limit on repayment period), *vacated and remanded on other grounds*, 2017 WL 1396164 (11th Cir. Apr. 19, 2017).

cases in which the debtor has a condition that is debilitating, it may be helpful for the debtor to recount her activities in a typical day and describe how her condition prevents her from performing certain basic life functions.

While the court may preclude the debtor from testifying about her prognosis or the cause of her current condition, the debtor is usually permitted to explain how the condition affects her health and prevents her from working or doing other activities.¹¹⁴ For example, the debtor can testify that she has a limited range of motion due to a particular disorder or as a result of extreme, chronic pain. If the debtor is receiving ongoing treatment or is taking prescription drugs for a condition, she can testify about their impact and any negative side effects. To the extent a defendant may object that some of this testimony delves into matters of opinion, the court may allow it if the conditions of Federal Rule of Evidence 701 are met, which deals with the opinion testimony of lay witnesses.¹¹⁵ Regardless, the debtor can always testify about her personal experiences with the condition.

Medical records, including hospital reports, bills for treatment, and correspondence from health care providers, should be introduced into evidence. Counsel should review the relevant exceptions to the hearsay rule in Federal Rule of Evidence 803 in preparation for trial. For example, Rule 803(4) provides an exception for statements made for purposes of a medical diagnosis or treatment and which describe the medical history, or past or present symptoms, pain, or sensations, or their general cause if pertinent to a diagnosis or treatment. Rule 803(6) provides an exception for reports and records that are kept in the course of a regularly conducted business activity, and this exception specifically covers records of “diagnoses.”

In cases in which the debtor is healthy, the “additional circumstances” will relate to facts affecting her future financial status. Although this prong of the *Brunner* test is forward-looking, the debtor’s past employment history may be the best indicator of her future prospects and the likelihood her financial circumstances will change for the better. For example, if the debtor has achieved only modest pay increases over a long career, this evidence should help the court evaluate her future earning potential. On this point it may be helpful to introduce into evidence a Social Security Statement obtained from the Social Security Administration as a

¹¹⁴ *E.g., In re Barrett*, 487 F.3d 353, 362 (6th Cir. 2007)(concluding that bankruptcy court properly permitted debtor testify about the diagnosis of his condition and “how his health affects his life and limits his ability to work”).

¹¹⁵ Federal Rule of Evidence 701 – Opinion Testimony of Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness’s perception;
- (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

record of the debtor's lifetime earnings. Information on obtaining the Statement is provided in § 4.2.2, *supra*.

The debtor should testify about the compensation she can expect to receive over time at her current job based on her knowledge of the employer's pay structure. She can also describe whether there are any realistic opportunities for advancement given her education, experience and job skills. The debtor should testify about any factors that limit employment opportunities (*e.g.*, age, lack of college degree), or that prevent retraining or relocation. Any efforts to obtain more gainful employment should be discussed.

7.4.2 Testimony of family and friends

Testimony of family members and friends based on their observations of and experiences with the debtor may help to support and corroborate the debtor's testimony. This can be helpful if the future hardship is based on a serious illness, psychiatric problems, incapacity or disability of a debtor or dependent. These individuals can testify about how the condition affects the debtor. In particular, the testimony of a spouse or someone with a close relationship to the debtor may be critical if the debtor is not good at communicating her own experience with a physical or mental health problem.

7.4.3 Judicial notice of professional journals

In cases in which the debtor may not be able to obtain the testimony of an expert witness, or has decided not to offer it, it may still be possible for the court to take judicial notice of facts related to the debtor's condition and prognosis. A critical first step for this process is to establish the debtor's diagnosed condition through admissible evidence. This can be done through a stipulation of the parties, the debtor's testimony, or medical records. Debtor's counsel can then request in pre- or post-trial briefing that the court consider specific excerpts from professional journals or other resources that discuss the condition and any long-term prognosis. Some courts have been willing to take judicial notice of such publications and refer to them in making findings of fact.¹¹⁶

¹¹⁶ See *In re Walker*, 406 B.R. 840 (Bankr. D. Minn. 2009), *aff'd*, 427 B.R. 471 (B.A.P. 8th Cir. 2010)(referring to treatises on autism to determine limits parent of autistic child faces in sustaining employment outside home), *aff'd*, 650 F.3d 1227 (8th Cir. 2011); *In re Hertz*, 329 B.R. 221 (B.A.P. 6th Cir. 2005)(court takes judicial notice of well-known medical facts about debtor's condition of multiple sclerosis); *In re Denittis*, 362 B.R. 57 (Bankr. D. Mass. 2007)(after parties stipulated to debtor's diagnosis of multiple sclerosis, court took judicial notice of published resources on long-term effects of condition); *In re Jara*, 2006 WL 2806556 (Bankr. D.N.J. Sept. 27, 2006)(taking judicial notice of National Institute of Mental Health publication describing chronic nature of bi-polar disorder); *In re Gobin*, 2006 WL 3885136 (Bankr. E.D. Ky. May 15, 2006)(taking judicial notice of National Institute of Mental Health publication on symptoms of depression); *In re Pobiner*, 309 B.R. 405, 419–20 (Bankr. E.D.N.Y. 2004)(consulting a publication of the National Institute of Mental Health regarding the career prospects for

7.4.4 Judicial notice of government publications

In cases in which the debtor may not be able to obtain the testimony of a vocational expert about future employment opportunities in a particular field or occupation, the debtor may request that the court take judicial notice of government publications, such as those published by the Bureau of Labor Statistics. The Bureau provides detailed information and data about employment projections for many occupations. One table available on its website lists numerous professions, showing the median income and number of jobs for each occupation both currently and as projected in ten years.¹¹⁷ For example, this table shows that the Bureau estimates there will 20.5 percent fewer jobs for machine tool operators in year 2024. The Bureau also publishes an Occupational Outlook Handbook that contains information on duties, education, training, pay, and outlook for hundreds of occupations.¹¹⁸ Another chart published by the Bureau shows the numbers of workers in particular occupations broken down by age.¹¹⁹

7.4.5 Role of expert witness

Most courts have not required the introduction of expert testimony to prove the existence of a medical condition or establish that a debtor's earning potential is impaired by a physical or psychological problem.¹²⁰ In many cases, the debtor's testimony alone may be sufficient to

persons suffering with Attention Deficit Hyperactivity Disorder); *In re Doherty*, 219 B.R. 665 (Bankr. W.D.N.Y. 1998)(same).

¹¹⁷ U.S. Department of Labor, Bureau of Labor Statistics, Employment Projections, available at: <https://data.bls.gov/projections/occupationProj>.

¹¹⁸ U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, available at: <https://www.bls.gov/ooh/>.

¹¹⁹ U.S. Department of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, available at: <https://www.bls.gov/cps/cpsaat11b.htm>.

¹²⁰ See *In re Mosley*, 494 F.3d 1320 (11th Cir. 2007)(debtor not required to submit independent medical evidence to corroborate his testimony about impact of psychiatric disorder on ability to work); *In re Barrett*, 487 F.3d 353 (6th Cir. 2007)(expert medical evidence is not necessary to corroborate claim of "additional circumstances" based on the debtor's health); *In re Brightful*, 267 F.3d 324 (3d Cir. 2001)(bankruptcy judge may make reasonable conclusions concerning debtor's emotional state without expert testimony); *In re Pena*, 155 F.3d 1108 (9th Cir. 1998) (debtor's testimony about mental impairment, combined with evidence of her Social Security disability award related to condition, are sufficient evidence to establish medical condition); *In re Cline*, 248 B.R. 347 (B.A.P. 8th Cir. 2000)(court's findings were not unreliable simply because no expert testimony was presented that debtor was clinically disabled); *In re Crawley*, 460 B.R. 421, 440–441 (Bankr. E.D. Pa. 2011)(summarizing case law on evidence of medical conditions under second *Brunner* prong). *But see In re Burton*, 339 B.R. 856 (Bankr. E.D. Va. 2006) (collecting cases on use of medical evidence in dischargeability cases; declining to give corroborating weight to Social Security disability determination); *In re Pobiner*, 309 B.R. 405 (Bankr. E.D.N.Y. 2004)(debtor must provide corroborating evidence from his physician or psychotherapist to support claim on second *Brunner* prong).

carry the debtor's burden of proof on the existence of the condition and its impact on the debtor.¹²¹

However, on the issue of the debtor's prognosis and the likely persistence of the health condition, courts generally expect that some evidence will be offered to corroborate the debtor's claim of future hardship, though not necessarily in the form of expert testimony.¹²² In addition to testimony of family and friends as mentioned earlier, medical records and correspondence from health care providers can in some cases be enough.¹²³ This is particularly true if the debtor has a type of physical impairment that the court can observe is likely to be permanent, such as a debtor who is confined to a wheelchair due to a spinal cord injury. As discussed earlier, reliance on medical journals may also be possible.

These forms of corroborating testimony may not be sufficient, though, if the long-term effects of the debtor's condition are not well established or are manifested only in certain individuals under specific conditions. The persuasive testimony of a treating physician, psychiatrist or

¹²¹ *In re O'Donohoe*, 2013 WL 2905275 (Bankr. S.D. Tex. June 13, 2013)(debtor not required to present expert testimony to corroborate his own testimony about his health); *In re Ackley*, 463 B.R. 146 (Bankr. D. Me. 2011) debtors' testimony about their medical conditions and evidence of accrued medical expenses demonstrated that health problems limited their employment opportunities); *In re Cekic-Torres*, 431 B.R. 785 (Bankr. N.D. Ohio 2010)(while court expressed concern about not receiving expert corroborating testimony or medical records, it relied upon debtor's testimony, observation of her morbid obesity, and photos of visible leg wounds in finding that her medical condition limited employment prospects); *In re Cheney*, 280 B.R. 648 (N.D. Iowa 2002)(debtor not required to submit expert evidence of clinical diagnoses of depression or mental disability, particularly when debtor's testimony about her condition was not rebutted).

¹²² *In re Greene*, 484 B.R. 98, 123 (Bankr.E.D.Va.2012) ("The need for corroborating evidence is especially acute when a debtor alleges some type of medical or mental issue is so persistent in nature that she is prevented from retiring a student loan.), *aff'd*, 2013 WL 5503086 (E.D. Va. Oct. 2, 2013), *aff'd*, 573 Fed. Appx. 300 (4th Cir. 2014); *In re Norasteh*, 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004); *In re Burkhead*, 304 B.R. 560 (Bankr. D. Mass. 2004) (although debtor documented through medical records that her medical condition was serious, she failed to testify or provide expert testimony that her condition would persist).

¹²³ *In re Barrett*, 487 F.3d 353, 361 (6th Cir. 2007)("In any event, we note that other forms of corroborating evidence may suffice-and, in this case, do suffice-to corroborate a debtor's claim of undue hardship based on illness. Medical bills, letters from treating physicians, and other indicia of medical treatment aside from medical records or expert medical testimony may corroborate a debtor's claim of undue hardship based on the debtor's health."); *In re Nightingale*, 543 B.R. 538, 548 (Bankr. M.D.N.C. 2016)(court reopened the evidence to permit debtor to introduce corroborating evidence such as medical records of treatment); *In re Burton*, 339 B.R. 856, 879 (Bankr. E.D. Va. 2006)(letters from a treating physician, if properly authenticated and admitted into evidence, can be sufficient corroborating evidence in some cases).

psychologist in such cases may be needed to convince the court that the condition will persist.¹²⁴

7.4.6 Using expert testimony

If the debtor intends to present expert testimony and a stipulation cannot be obtained from opposing counsel as to the witness' qualification as an expert, counsel will need to conduct an examination of the witness' knowledge, skill, experience, training, or education.¹²⁵ Counsel should become familiar with Federal Rule of Evidence 702, which deals with the testimony of expert witnesses.

Once the witness is qualified and has testified about the debtor's condition, symptoms and treatment, counsel will want to seek an opinion from the witness about the debtor's prognosis and whether it is more likely than not that the debtor's condition and its effects will persist for a significant portion of loan repayment period. If the witness is a vocational expert and has testified about the debtor's lack of marketable job skills or the declining relevance of the debtor's job skills, for example, counsel may seek an opinion about the debtor's potential earning capacity in her occupation or profession in the foreseeable future.

Counsel should be prepared to respond to objections as to the admissibility of the expert testimony.¹²⁶ However, such objections often are not sustained in a bench trial where the bankruptcy judge does not serve as a gatekeeper for a jury and can independently assess the weight to give the testimony in determining a fact at issue. Moreover, in cases in which the court believes that corroborating evidence is needed, there is less likely to be a successful challenge to the admissibility of the expert's testimony.

7.5 Evidence of Debtor's Good Faith

Brunner's third prong requires that the debtor show a good faith attempt to repay the student loans, or that there was no ability to repay. Courts have also considered under this prong (as well as under the third prong of the totality test) whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. Federal student loan creditors routinely argue that the debtor lacks good faith by failing to participate in the Department of Education's long-term income-driven repayment plans.

¹²⁴ See, e.g., *In re Nash*, 446 F.3d 188 (1st Cir. 2006)(bankruptcy court properly held debtor needed opinion of qualified expert to show expected duration of her psychological disorders).

¹²⁵ See *In re Benjumen*, 408 B.R. 9 (Bankr. E.D.N.Y. 2009)(applying Federal Rule of Evidence 702 in rejecting creditor's attempt to exclude testimony of licensed psychologist/certified rehabilitation counselor regarding effect of debtor's bipolar disorder on likely future employment).

¹²⁶ See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co, Ltd. V. Carmichael*, 526 U.S. 137 (1999).

7.5.1 Testimony about repayment efforts

Evidence of the debtor's actual payments on the student loans will in most cases be offered by stipulation or with admissible documents. This should include not only the debtor's voluntary payments but also those made under a tax refund intercept or wage garnishment.

The debtor should also provide testimony about all favorable facts that help explain why payments were not made. This may require the debtor to testify about her financial condition over much of the past repayment period, in order to establish that the debtor did not have an ability to pay during periods of nonpayment. The debtor should testify about any non-economic reasons why payments were not maintained. Evidence should be introduced about periods in which payments were not required, such as when the debtor was granted a deferment or forbearance. If not offered earlier in relation to *Brunner's* first prong, the debtor should testify about any efforts made to improve her financial situation.

In some cases debtors have had to respond to extreme arguments by certain student loan creditors that relate to their life choices, such as a contention that the debtor should have avoided having too many children.¹²⁷ While these arguments may be addressed in post-trial legal briefing, counsel should anticipate whether there are facts that should be elicited in the debtor's testimony that will refute such arguments.

7.5.2 Testimony about income-driven repayment plans

Student loan creditors routinely oppose undue hardship discharges by highlighting the potential availability of income-driven repayment plans. The borrower's monthly payment under these plans is calculated using the borrower's income. If the borrower recertifies eligibility annually and makes all required payments for a period of twenty or twenty-five years, and is still unable to repay the loan, the current versions of the programs provide that any remaining balance is forgiven.

Prior to 2009, courts generally focused on one type of plan, the income-contingent repayment plan (ICR). This plan is still available, but only in the Direct Loan Program. As of July 1, 2009, different types of income-based repayment plans have become available in both the Direct Loan Program and FFEL Program.¹²⁸ As of the release of this manual, there are five separate

¹²⁷ *E.g.*, *In re Walker*, 406 B.R. 840, 863 (Bankr. D. Minn. 2009); *In re Ivory*, 269 B.R. 890, 911 (Bankr. N.D. Ala. 2001). *See also In re Bene*, 474 B.R. 56 (Bankr. W.D. N.Y. 2012)(arguing that debtor should not have ended studies without getting a degree so as to care for elderly parents); *In re Renville*, 2006 Bankr. LEXIS 3211 (Bankr. D. Mont. Jan. 5, 2006)(arguing that debtor should not take prescription drugs to counteract the side effects of mental health medication); *In re Mitcham*, 293 B.R. 138 (Bankr. N.D. Ohio 2003)(arguing that debtor should not have taken custody of two grandchildren, one of whom was victim of physical abuse).

¹²⁸ 20 U.S.C. §§ 1087e(d)(1)(E), 1098e (FFEL). *See* 34 C.F.R. §§ 682.215 (FFEL), 685.221 (Direct Loan).

repayment plans tied to a borrower's income: the income-based repayment plan (IBR), income-contingent repayment plan (ICR), pay as you earn plan (PAYE), revised pay as you earn plan (REPAYE), and income-sensitive repayment plan (ISR). This section refers collectively to these as income-driven repayment plans.

While the debtor's response to arguments based on these plans will largely focus on legal issues that may be addressed in oral argument or post-trial legal briefing, there are certain factual matters that can support the debtor's legal arguments. If relevant, the following matters should be covered by the debtor in testimony or used in cross-examination of defendant's witnesses:

- **Debtor's loans are not eligible.** It should not be assumed that the debtor's student loans qualify for income-driven repayment plans. For example, borrowers may have Perkins loans, which may not be eligible for repayment plans or loan consolidation through the Direct Loan Program. Income-driven repayment plans are also generally not available for "Parent PLUS" loans that have not been consolidated into a Direct loan.¹²⁹ Of course debtors with private loans do not have access to the government income-based repayment plans or consolidation.¹³⁰
- **Debtor is not eligible.** 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 against whom a judgment has entered.¹³¹ They must first get out of default, usually through rehabilitation or consolidation, in order to qualify. However, not all borrowers will be eligible to rehabilitate or consolidate out of default. Borrowers who have previously rehabilitated their loans in most cases cannot do so again. Borrowers who are in default on a Direct consolidation loan may not "re-consolidate" unless they have another federal loan.¹³² Any evidence of the debtor's ineligibility based on these factors should be introduced. While the debtor likely has the burden to offer evidence establishing such factors that would limit participation, some courts have rejected general arguments made by student loan creditors about the availability of payment programs without some proof by the creditor

¹²⁹ 34 C.F.R. §§ 685.221(a)(2), 685.209(a)(ii); 682.215(a)(2).

¹³⁰ See, e.g., *In re Fecek*, 2014 WL 1329414 (Bankr. S.D. Ind. Mar. 31, 2014) (noting that private lender rejected requests for IBR-type relief).

¹³¹ 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).

¹³² See 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).

that the debtor would in fact be eligible for such programs.¹³³

- **Enrollment problems.** The debtor should present evidence of any obstacles she has faced in attempting to negotiate and enroll in an income-driven repayment plan. For example, some borrowers have been given incorrect information from student loan servicers about the availability of repayment options and the procedure for enrolling.¹³⁴ Testimony that the student loan creditor failed to assist the debtor and ultimately demanded payments in excess of the debtor's ability to pay, or incorrectly told the debtor that affordable payment plans do not exist, can defeat the creditor's argument that the debtor failed to demonstrate good faith.¹³⁵
- **Plan may not be affordable.** The income-driven plans do not work for all borrowers because, among other reasons, they do not consider expenses. The income-based formulas look only at the borrower's income. Borrowers with high medical expenses for themselves or dependents, for example, may be unable to afford the income-based payment. Courts in undue hardship discharge cases have recognized that some debtors may not benefit from such programs and their refusal to participate in such plans does not show a lack of good faith.¹³⁶ If the debtor reviewed income-based repayment

¹³³ *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).

¹³⁴ The Consumer Financial Protection Bureau has issued several reports highlighting borrower complaints about the mishandling of repayment options by student loan servicers. See https://www.consumerfinance.gov/data-research/research-reports/?filter2_topics=student-loans.

¹³⁵ *In re Cheney*, 280 B.R. 648 (N.D. Iowa 2002)(student loan creditor failed to prove that it had properly advised debtor of availability of repayment programs or to assist debtor in pursuing them); *In re Lee*, 345 B.R. 911, 918 (Bankr. W.D. Ark. 2006)(court will not fault debtor who was never advised of various repayment options), *aff'd*, 352 B.R. 91 (B.A.P. 9th Cir. 2006); *In re McMullin*, 316 B.R. 70 (Bankr. E.D. La. 2004)(no evidence debtor was ever actually informed of repayment options); *In re Carlson*, 273 B.R. 481 (Bankr. D.S.C. 2001)(no evidence debtor was advised of Income Contingent Repayment Plan); *In re Thomsen*, 234 B.R. 506, 514 (Bankr. D. Mont. 1999)(debtor made three separate requests for affordable payment plans, but Dept. of Education never sent application and instead demanded excessive payments contrary to rule for "satisfactory payment arrangements").

¹³⁶ *In re Price*, 573 B.R. 579, 594 (Bankr. E.D. Pa. 2017)("Simply put, it is not bad faith to investigate the terms of a payment plan, but to abandon further consideration of the plan when it is obvious that the plan will not permit the debtor to comply with its terms."), *rev'd on other grounds*, *DeVos v. Price*, 2018 WL 558464 (E.D. Pa. Jan. 24, 2018); *Educ. Credit Mgmt. Corp. v. Smith*, 2011 WL 4625397 (S.D. Tex. Sept. 30, 2011)(even when payments under William D. Ford program would be only \$64 monthly, debtor with unmet expenses for necessary medical and dental needs and home and car repairs could not be expected to make such payments); *In re Jorgensen*, 2012 WL 171599 (Bankr. D. Haw. Jan. 20, 2012) (debtor's likely future expenses for

options before trial and concluded that they were unaffordable, testimony from the debtor should be presented about this at trial. The debtor should present evidence that making the required payments, even if the amount is relatively low, will prevent the debtor from maintaining a minimal standard of living.¹³⁷

- **Problems with annual recertifications.** Recertification has been a problem for the income-driven plans. Data released by the Department of Education in 2015 indicates that many borrowers miss the deadline to recertify and thus may experience payment amount changes and 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.¹³⁸
- **Debtor may never obtain loan forgiveness.** Unlike a bankruptcy discharge which is immediate, student loans are forgiven under administrative plans only after many years of continuous eligibility and ongoing payments. Borrowers who default while in an income-driven program lose eligibility.¹³⁹ As mentioned, re-defaults can occur because the income-based plans do not take expenses into account. The programs do not look at medical expenses, high housing costs, or expenses for any short-term emergency the borrower may encounter. Borrowers may also lose eligibility due to paperwork problems that can (and often do) occur during the decades of recertification procedures required to maintain participation. Once in default under a plan, the borrower can lose eligibility to participate in another income-based plan. Defaults under plans can be irreparable because the options for removing a loan from default (consolidation, rehabilitation) may be one-time only or burdensome. 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

cancer treatment justify her refusal to consider long-term income-based repayment plans), *aff'd*, 479 B.R. 79 (B.A.P. 9th Cir. 2012).

¹³⁷ *In re Lee*, 352 B.R. 91 (B.A.P. 9th Cir. 2006)(ICRP payments of \$13.03 monthly not an option for debtor whose expenses for necessities already exceeded income); *In re Myhre*, 503 B.R. 698, 705 (Bankr. W.D. Wis. 2013)(wheelchair-bound debtor could not afford even modest payment under any plan); *In re Neeson*, 2008 WL 379699 (Bankr. W.D. Mo. Feb. 12, 2008)(ICRP not option for debtor who lacks funds to purchase car and who has been using credit cards to pay for clothes, utilities, and home repairs); *In re Greenwood*, 349 B.R. 795 (Bankr. D. Ariz. 2006)(no lack of good faith when debtor rejected ICRP requiring \$260 monthly payments that he could not afford); *In re Bray*, 332 B.R. 186, 198 (Bankr. W.D. Mo. 2005)(ICRP with monthly payments of \$200 “not a viable option” for debtor who met undue hardship test).

¹³⁸ 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.

¹³⁹ 34 C.F.R. §§ 685.209(a)(5)(iii), 685.221(e)(3).

within 24 months, and over 40 percent of borrowers re-defaulted within three years.”¹⁴⁰ Any facts relevant to the debtor’s potential for default under a plan should be introduced at trial.¹⁴¹

- **Programs may cease operation.** There is no guarantee that the Department of Education or Congress will authorize income-driven plans in the future or that current programs will remain in place for the full twenty or twenty-five years needed to obtain forgiveness.
- **Increase in debt burden.** Rather than removing a debt burden, the income-based programs in most cases increase the burden as unpaid interest continues to accrue and is capitalized.¹⁴² Doubling or tripling of the indebtedness while under a long-term plan, even with payments being made, is not unusual. This impact on debt burden should be established through testimony from the debtor or through cross-examination of witnesses for the student loan creditor. As several courts have noted, this significant increase in debt burden from participation in income-driven plans is the opposite of a “fresh start.”¹⁴³ Rather than rebuilding credit, the debtor’s credit may be permanently damaged. This has a drastic impact not only on the individual’s future access to credit, but also on employment opportunities and access to housing.¹⁴⁴ Decades of mounting

¹⁴⁰ Consumer Financial Protection Bureau, “Update from the CFPB Student Loan Ombudsman,” May 16, 2017.

¹⁴¹ *In re Abney*, 540 B.R. 681, 689 (Bankr. W.D. Mo. 2015)(“For someone with the Debtor’s income, and of his age, an inability to make one month’s payment over a 25–year period is highly likely, given the possibility of medical conditions leading to additional expenses and loss of income, as well as other short-term financial emergencies encountered by those with nothing to fall back on.”).

¹⁴² *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).

¹⁴³ *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).

¹⁴⁴ *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).

indebtedness can impose a substantial emotional burden on the debtor as well.¹⁴⁵

- **Potential for cancelation of debt taxable income.** Discharge of student loan debt in bankruptcy is not a taxable event.¹⁴⁶ However, forgiveness of a student loan debt at the end of an income-driven plan is taxable.¹⁴⁷ It can be argued that successful completion of an income-driven plan may simply replace the Department of Education with the Internal Revenue Service as the creditor pursuing the debtor for another nondischargeable debt.¹⁴⁸ Some courts have suggested that the debtor may not suffer harmful tax consequences of nonbankruptcy loan forgiveness decades in the future because the debtor can claim an insolvency exception to the tax liability. Thus, evidence of any factors that limit the debtor's potential eligibility for an insolvency exception, such as equity in a homestead or pension plan, should be presented at trial.

7.6 Consideration of Partial Discharge

Consistent with the statutory language in section 523(a)(8), the debtor may argue in post-trial briefing that the court should determine simply whether the student loan debt is or is not dischargeable. In fact, some courts have held that the Bankruptcy Code does not give authority for granting a partial discharge.¹⁴⁹ However, other courts have concluded that a partial

¹⁴⁵ *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).

¹⁴⁶ 26 U.S.C. § 108(a)(1)(A).

¹⁴⁷ 26 U.S.C. § 61(a)(12)(gross income includes income from discharge of indebtedness); 26 C.F.R. § 1.6050P-1(b)(discharge of indebtedness reporting requirements).

¹⁴⁸ *In re Barrett*, 487 F. 3d 353, 364 (6th Cir. 2007); *In re Coco*, 335 Fed. Appx. 224, 2009 WL 1426757, at *4 (3d Cir. May 22, 2009)(*unpublished decision*)(reversing finding of nondischargeability and ruling, inter alia, that lower court gave too much weight to debtor's refusal to enroll in income contingent repayment plan, noting "her participation in the ICRP could ultimately result in her simply trading a student loan debt for an IRS debt"); *In re Durrani*, 311 B.R. 496, 508 (Bankr. N.D. Ill. 2005), *aff'd* 320 B.R. 357 (N.D. Ill. 2005)(court must take into account considerable tax burden debtor will face at end of twenty-five-year repayment period). *But see* Educational Credit Mgmt. Corp. v. Jespersion, 571 F.3d 775, 782 (8th Cir. 2009)(tax liability from possible future debt forgiveness is speculative); Educational Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918 (W.D. Wash. 2012)(minimizing debtor's concerns over tax consequences, noting that cancellation of debt at end of long-term repayment plan only results in tax liability if borrower's assets exceed liabilities at time of cancellation).

¹⁴⁹ *Conway v. Nat'l Collegiate Tr. (In re Conway)*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013) ("[T]here is no case law in this circuit that would authorize the court to 'partially discharge' a student loan."); *Educ. Credit Mgmt. Corp. v. Carter*, 279 B.R. 872 (M.D. Ga. 2002) (bankruptcy court lacks authority under §§ 523(a)(8) and 105(a) to grant partial discharge); *In re Roach*, 288

discharge is a possible outcome for undue hardship litigation.¹⁵⁰ Partial discharges have been more commonly considered in cases in which the debtor has staggering amounts of student loan debt. If the debtor has some future earning potential but the amount of debt is excessive, courts have discharged part of the debt and required the balance to be paid over time.¹⁵¹

Courts that allow partial discharges generally require the debtor to show undue hardship for the portion of the loans to be discharged.¹⁵² Another approach is for the court to discharge some, but not all, of a debtor's individual student loans. This approach rejects a pro rata reduction but still offers the debtor some relief by applying the hardship test on a loan-by-loan basis.¹⁵³ Other courts have restructured the loans, reducing the amount owed and establishing a modified repayment schedule. For example, courts have reduced the loan balance,

B.R. 437 (Bankr. E.D. La. 2003)(finding no support for partial discharge in plain language of Code).

¹⁵⁰ *In re Hornsby*, 144 F.3d 433 (6th Cir. 1998)(partial discharge is permitted under court's equitable powers); *In re Saxman*, 325 F.3d 1168 (9th Cir. 2003)(bankruptcy court may exercise equitable powers to partially discharge student loan if debtor satisfies undue hardship test as to portion of debt to be discharged); *In re Nary*, 253 B.R. 752 (N.D. Tex. 2000); *In re Kapinos*, 243 B.R. 271 (W.D. Va. 2000); *In re Brown*, 239 B.R. 204 (S.D. Cal. 1999); *In re Ammirati*, 187 B.R. 902 (D.S.C. 1995), *aff'd with unpublished op.*, 85 F.3d 615 (4th Cir. 1996).

¹⁵¹ *In re Carnduff*, 367 B.R. 120 (9th Cir. B.A.P. 2007)(bankruptcy court erred in failing to consider partial discharge despite finding that the only way debtors could ever repay their \$350,000 student loan debt would be if one of them won the lottery); *In re Thompson*, 2012 WL 2064509 (Bankr. D. Mont. June 7, 2012)(student loan debt in excess of \$100,000 discharged for fifty-one-year old debtor, with exception of her admitted ability to pay \$50 monthly until her planned retirement at age 67).

¹⁵² *See, e.g., In re Alderete*, 412 F.3d 1200 (10th Cir. 2005); *In re Miller*, 377 F.3d 616 (6th Cir. 2004); *In re Cox*, 338 F.3d 1238 (11th Cir. 2003); *In re Whitman*, 2012 WL 1085473 (E.D. Cal. Mar. 29, 2012)(reversing bankruptcy court's grant of partial discharge when bankruptcy court found debtor failed to meet first prong of *Brunner* test); *In re Davis*, 373 B.R. 241 (W.D.N.Y. 2007)(court may consider partial discharge only upon finding that undue hardship would result if debtor required to repay entire obligation). *See also In re Cardnuff*, 367 B.R. 120 (B.A.P. 9th Cir. 2007)(burden of demonstrating right to partial discharge is on the debtor).

¹⁵³ *In re Conway*, 495 B.R. 416 (B.A.P. 8th Cir. 2013), *aff'd*, 559 Fed. Appx. 610 (8th Cir. 2014) (*per curiam*)(although partial discharge of student loan not available in circuit, § 523(a)(8) application to each of multiple loans separately not only allowed but required); *Educ. Credit Mgmt. Corp. v. Kelly*, 312 B.R. 200 (B.A.P. 1st Cir. 2004)(adopting "hybrid approach" based on "such debt" language in § 523(a)(8), which provides that undue hardship test should be applied independently as to each loan if loans were not consolidated); *In re Lavy*, 2008 WL 4964721 (Bankr. W.D. Wash. Nov. 14, 2008)(debtor's combined student loans totaling \$121,000 reduced by partial discharge, leaving one loan with principal of \$38,563, with accrued interest on remaining loan also discharged); *In re Gharavi* 335 B.R. 492 (Bankr. D. Mass. 2006)(discharging three of four loans of debtor who whose work hours were limited by her multiple sclerosis).

discharged collection fees and accrued interest, and delayed payment for several years, with the goal of making payments affordable.¹⁵⁴

Depending upon the facts of a particular case and the evidence presented at trial, counsel may wish to confer with the debtor about the possibility of requesting that the court consider some form of partial discharge.

¹⁵⁴ *In re Evans*, 2013 WL 6330951 (Bankr. D. Haw. Dec. 5, 2013)(65-year old debtor deemed able to make partial payments to age 70, remaining debt discharged); *In re Carlson-Callow*, 2008 WL 2357012 (Bankr. D. Idaho June 6, 2008)(calculating affordable student loan payment for 60-year-old debtor at \$447 monthly, setting payments at this amount until debtor's anticipated retirement in five years, with remainder of \$88,000 student loan debt discharged); *In re Gobin*, 2006 WL 3885136 (Bankr. E.D. Ky. May 15, 2006)(granting hardship discharge as to collection costs, future interest, and any tax liability incurred at end of ICRP period); *In re Grove*, 323 B.R. 216 (Bankr. N.D. Ohio 2005)(any student loan debt still owing at end of twenty-five-year ICRP is discharged in order to avoid potential tax assessment).

Appendix A

Student Loan Intake Form

I. Information About You

Name:

Address:

Phone:

E-mail:

Preferred method of contact:

SSN:

Date of birth:

Number in household:

Number of children or other dependents:

Total current income:

Type of employment:

Name of employer(s):

Earnings from employment:

Are you working full-time? Yes _____ No _____ Part-time? Yes _____ No _____

Public assistance:

Other income:

Are you a veteran? Yes _____ No _____

II. Basic Loan Information

Do you have federal student loans? Yes _____ No _____

If yes, were you able to obtain your loan information from NSLDS? Yes _____ No _____

(If yes, get copy of NSLDS information and fill in federal loan information below, including whether in default, balance, loan holder etc.)

Do you have private loan(s)? Yes _____ No _____

(If yes, gather information about private loans)

Do you know of any upcoming court hearing or other deadlines? Yes _____ No _____

If yes, describe:

What schools did you attend? (List all)

School 1: _____

Check each that applies: Federal student loans _____ Private student loans _____

Dates attended:

Did you complete? Yes _____ No _____

If yes, what credential did you obtain?

School 2: _____

Check each that applies: Federal student loans _____ Private student loans _____

Dates attended:

Did you complete? Yes _____ No _____

If yes, what credential did you obtain?

School 3: _____

Check each that applies: Federal student loans _____ Private student loans _____

Dates attended:

Did you complete? Yes _____ No _____

If yes, what credential did you obtain?

What are your goals with respect to your student loan(s)?

III. Cancellation/Bankruptcy Evaluation for Federal and Private Loans

Are you disabled? Yes _____ No _____

If yes, describe, including whether you are able to work:

Did you experience problems with the school(s) you attended? Yes _____ No _____

If yes, did the school close while you were attending (or around that time)? Yes _____ No _____

Did you have a high school diploma or GED when you enrolled? Yes _____ No _____

If no, were you given an admission test? Yes _____ No _____

If yes, describe:

Do you have reason to believe any of these loans are not your loans or that you did not sign for them?

Yes _____ No _____

If yes, describe:

Did you withdraw from school prior to completion? Yes _____ No _____

If yes, did you receive a refund? Yes _____ No _____ Don't know _____

Have you previously filed for bankruptcy? Yes _____ No _____

If yes, were student loans listed on the prior bankruptcy petition? Yes _____ No _____

Don't know _____

IV. Federal Loan Section

A. If you are not in default (if in default, skip to section B)

What is your current repayment plan?

Can you afford these payments? Yes _____ No _____

Have you requested other repayment plans? Yes _____ No _____

If yes, describe:

Have you received a deferment or forbearance? Yes _____ No _____

If yes, describe:

B. If federal loans are in default

Are you currently facing wage garnishment? Yes _____ No _____

Are you currently facing a tax refund offset? Yes _____ No _____

Social Security offset? Yes _____ No _____

Other federal benefit offset? Yes _____ No _____

Other collection? Yes _____ No _____

If yes, describe:

Have you been sued for student loan collection? Yes _____ No _____

If yes, is there a judgment? Yes _____ No _____ Don't know _____

(check for all court deadlines)

Are you having problems with collection agencies? Yes _____ No _____

If yes, describe:

Can you afford to make any payments to get out of default? Yes _____ No _____

If yes, how much?

V. Private Loan Section

(Gather information separately for each private loan, including institutional loans)

Who is your loan holder?

Are you making payments? Yes _____ No _____

If no, have you requested any relief? Yes _____ No _____

If yes, describe

Is there a co-signer on your loans? Yes _____ No _____

If yes, who is the co-signer?

Are you a co-signer on someone else's loans? Yes _____ No _____

If yes, who is the primary obligor:

Do you have copies of your loan agreements? Yes _____ No _____

If no, have you requested copies? Yes _____ No _____

If yes, describe:

Do you have online accounts to view your account information? Yes _____ No _____

Were you at least 18 years old when you signed the loan documents? Yes _____ No _____

Don't know _____