
Jonathan L. Marsh

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Issues in the Third Circuit


I. INTRODUCTION

Prior to 1977, there was no official provision regarding the dischargeability of educational loans, and as a result, the generally accepted rule was that such loans were dischargeable in bankruptcy.1 With its inclusion as part of the Bankruptcy Code of 1978, however, section 523(a)(8) put to rest the perception that educational loans were typically dischargeable.2 Under section 523(a)(8), an educational loan is not dischargeable

1. Darrell Dunham & Ronald A. Buch, Educational Debts Under the Bankruptcy Code, 22 MEMPHIS ST. U. L. REV. 679, 680 (1992) (citing Lee v. Board of Higher Educ., 1 B.R. 781, 783 (Bankr. S.D.N.Y. 1979)). As there had been no provision regarding the dischargeability of educational debt, the widely held view was that educational loans fell within the category of debt that should be discharged so that debtors might "turn the corner financially without being indefinitely burdened with debt." Thad Collins, Note, Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8), 75 IOWA L. REV. 733, 733 (1990) (citing Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)). This reasoning appeared to conform with the overall policy underlying the implementation of the Bankruptcy Code, as recognized in early Supreme Court decisions. See Hunt, 292 U.S. at 244 ("[T]he purpose of the [Bankruptcy Code] is] of public as well as private interest, in that it gives the honest but unfortunate debtor who surrenders for distribution property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."); Williams v. United States Fidelity & Guar. Co., 296 U.S. 549, 554-55 (1915) (stating that Bankruptcy Code existed to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes"). Congress, however, responded to a rapidly rising default rate among student borrowers by enacting section 439A of the United States Code in 1976, making student loan obligations nondischargeable. Peter B. Barlow, Note & Comment, Nondischargeability of Educational Debts Under Section 523(a)(8) of the Bankruptcy Code; Equitable Treatment of Cosigners and Guarantors?, 11 BANKR. DEV. J. 481, 488 (1994-1995). As part of the Education Amendments of 1976, Congress enacted section 439A, which was a first step toward resolving the perceived abuses committed by student debtors. Dunham & Buch, supra, at 680 & n.3 (citing 20 U.S.C. § 1087 (1976), repealed by Pub. L. No. 95-598, 92 Stat. 2549, 2678 (1978)). By its terms, section 439A applied to cases commencing on or after September 30, 1977. Id. Section 439A was repealed in 1978 and replaced by a similar provision, section 523(a)(8) of the U.S.C., as part of the Bankruptcy Reform Act of 1978. Barlow, supra, at 488. For the text of section 523(a)(8), see infra note 3.

2. Collins, supra note 1, at 733. Congress enacted section 523(a)(8) as a response to growing concerns that recent college graduates were abusing the student

(1087)
unless: (A) the loan became due more than seven years prior to the
debtor’s filing of the bankruptcy petition or (B) repayment of the debt
would cause “undue hardship” on the debtor and his or her dependents.\(^{5}\)

loan program by borrowing to receive an education and then filing for bankruptcy
shortly after graduation. *Id.* at 734; see Barlow, *supra* note 1, at 488 (stating that
enactment of section 523(a)(8) occurred “in response to the tremendous number
of abuses of the bankruptcy system by student obligors, with some eighty percent
of bankruptcy actions brought to discharge student loan liability occurring within
three years of the students leaving school”). The ability for graduates to discharge
their loans even before they began what could be lucrative careers, without ever
having to account for their ability or inability to repay their loans, had been char-
acterized as a “loophole” that Congress addressed through section 523(a)(8). Coll-
ins, *supra* note 1, at 733 & nn.7, 8; see also Caspar W. Weinberger, *Reflections on the
Seventies*, 8 J.C. & U.L. 451, 455 (1981) (stating that former Secretary of Health,
Education and Welfare perceived dischargeability of educational debt as “substan-
tial loophole” in educational loan system that needed to be rectified). Evidently,
financial advisors educate counselling students actively to take advantage of the loop-
hole by filing for bankruptcy. Collins, *supra* note 1, at 734 n.7. Comments to the
Commission on the Bankruptcy Laws’ Model Bankruptcy Code, presented to Con-
gress in 1973, revealed that the Commission believed nondischargeability of educa-
tional loans was necessary to protect the public image of the student loan program.
Kurt Wiese, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of
MISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DO. NO. 93-137, pl. I,
at 170 (1973)); see also Douglass G. Boshkoff, *Debtor Protection at the Close of the Twen-
tieth Century*, 23 Cap. U. L. Rev. 379, 384 (1994) (noting that many members of
Congress favored complete nondischargeability of educational loans).


(a) A discharge under section 727 . . . of this title does not discharge an
individual debtor from any debt

. . . .

(8) for an educational benefit overpayment or loan made, insured, or
guaranteed by a governmental unit, or made under any program funded
in whole or in part by a governmental unit or nonprofit institution, or for
an obligation to repay funds received as an educational benefit, scholar-
ship or stipend, unless . . .

(A) such loan, benefit, scholarship, or stipend overpayment first became
due more than 7 years (exclusive of any applicable suspension of the re-
payment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will im-
pose an undue hardship on the debtor and the debtor’s dependents.

*Id.* When Congress originally drafted section 523(a)(8), the time period for allow-
ance of discharge under section 523(a)(8)(A) was five years, but Congress
amended the subsection in 1991, requiring the debt to be seven years old before
permitting a debtor to petition for discharge of his or her educational debt. Dun-
ham & Buch, *supra* note 1, at 692-93. Nevertheless, a debtor may not simply re-
cieve deferments for substantive portions of the seven year period and then have
his or her debt discharged. *Id.* at 694-95. Rather, when the debtor receives a
deferment or suspension of the debt, the seven year limitation period is tolled. *Id.*
Although there is significant case law regarding section 523(a)(8)(A), most litiga-
tion regarding section 523(a)(8) relates to the term “undue hardship” as used in
section 523(a)(8)(B). *Id.* at 695. For a discussion of courts’ interpretations of
what constitutes undue hardship for purposes of section 523(a)(8)(B), see infra
notes 21-138 and accompanying text.
While it is relatively simple to determine whether an educational loan became due more than seven years prior to the filing of the bankruptcy petition, courts have struggled with the issue of what constitutes "undue hardship." Nowhere in the Bankruptcy Code is the term "undue hardship" defined. Therefore, courts have been forced to rely on section 523(a)(8)(B)’s legislative history when attempting to discern the requirements that must be fulfilled to permit dischargeability.

Without a clear statutory definition of "undue hardship," courts have used legislative history to create different tests aimed at determining when exception from discharge of educational debt would impose an undue hardship on the debtor. The courts, however, have consistently inter-


6. Wiese, supra note 2, at 447.

The [undue hardship] exception is difficult to apply because the drafters of the Bankruptcy Code did not define undue hardship. The drafters said that bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor’s circumstances. Looking for guidance in undue hardship cases, the bankruptcy courts have shaped facts and circumstances tests of undue hardship by relying on the legislative history of section 523(a)(8).

Id. The Third Circuit has stated that the main legislative purpose of section 523(a)(8)(B) was “to prevent abuses in and protect the solvency of educational loan programs.” Pelkowski v. Ohio Student Loan Comm’n (In re Pelkowski), 990 F.2d 737, 743 (6th Cir. 1993) (quoting Andrews Univ. v. Merchant (In re Merchant), 958 F.2d 738, 740 (6th Cir. 1992)). The court came to this conclusion after observing that congressional debate regarding section 523(a)(8)(B) centered on “the twin goals of rescuing the student loan program from fiscal doom and preventing abuse of the bankruptcy process by undeserving debtors.” Id. For a more complete discussion of the Third Circuit’s examination in Pelkowski of section 523(a)(8)’s legislative history, see infra notes 120-21, 151 and accompanying text.

7. E.g., Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) (per curiam) (determining appropriate test to be broken into three prongs examining current inability to repay, future inability to repay, and good faith efforts to repay); Bryant, 72 B.R. at 915 (holding that educational debt may be discharged if debtor’s annual gross income is below federal poverty guidelines or upon showing of “unique” or “extraordinary” circumstances warranting discharge); Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. (CRR) 532 (Bankr. E.D. Pa. 1979) (employing tripartite test that
interpreted "undue" as signifying Congress's desire to place a heavy burden on the debtor who attempts to shake free from self-imposed educational debt. Although courts across the country have promulgated numerous tests for determining undue hardship, they have tended to apply one of three tests when dealing with a Chapter 7 debtor who seeks to have his or her loans discharged pursuant to section 523(a)(8)(B): (1) the Johnson test; (2) the Bryant test; or (3) the Brunner test.

In Pennsylvania Higher Education Assistance Agency v. Faish (In re Faish), the United States Court of Appeals for the Third Circuit faced a situation in which a Chapter 7 debtor sought to have her educational loans discharged pursuant to section 523(a)(8)(B). Although bankruptcy courts within the Third Circuit had developed the Johnson and Bryant tests, the circuit court itself had never expressed which of the various tests for determining undue hardship it would accept as controlling within the circuit. Following a thorough discussion of the Johnson, Bryant and Brunner tests, the Third Circuit in Faish determined that the Brunner undue hardship test would govern in the circuit's bankruptcy courts.

This Casebrief discusses the various undue hardship tests applied by the circuit and bankruptcy courts regarding the discharge of educational.

8. See, e.g., Virginia State Educ. Assistance Auth. v. Dillon, 189 B.R. 382, 384 (W.D. Va. 1995) (stating that student loans are typically nondischargeable and that burden is on debtor to establish that his or her circumstances justify discharge); Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985) (acknowledging that student loans must be difficult to discharge if student loan program is to survive), aff'd, 831 F.2d 395 (2d Cir. 1987) (per curiam); see also Dunham & Buch, supra note 1, at 702 ("Congress clearly intended that most educational debt still due within seven years of graduation should be nondischargeable.").

9. See Johnson, 5 Bankr. Ct. Dec. (CRR) at 544 (discussing framework of its tripartite test). For a discussion of the tripartite Johnson test, including other courts' perceptions of the test, see infra notes 33-64 and accompanying text.

10. See Bryant, 72 B.R. at 915 (describing components of its poverty-level test). For a discussion of the Bryant test, see infra notes 65-78 and accompanying text.

11. See Brunner, 891 F.2d at 396 (laying out its three-prong analysis). For a discussion of the Brunner test, and its acceptance by other courts, see infra notes 79-103 and accompanying text.


13. Id. at 301. For a discussion of the Third Circuit's holding and analysis in Faish, see infra notes 119-38 and accompanying text.

14. Faish, 72 F.3d at 300. The District Court for the Middle District of Pennsylvania had applied a modified version of the Johnson undue hardship test and determined that Faish's educational loans were not dischargeable. Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), Ch. 7 No. 94-1353, slip op. at 4 & n.2 (M.D. Pa. Feb. 21, 1995).

15. Faish, 72 F.3d at 306. The Third Circuit determined that it had to take action and adopt a standard for reviewing the presence of undue hardship because of the considerable amount of confusion among courts within the circuit regarding the applicable legal standard. Id. at 299-300 & n.1.
II. THE DEVELOPMENT OF TESTS ACROSS THE UNITED STATES REGARDING
WHAT CONSTITUTES "UNDUE HARDSHIP"

With its requirement that educational loans are nondischargeable unless exception from discharge would result in undue hardship on the debtor and the debtor's dependents, section 523(a)(8)(B) has severely limited the ability of Chapter 7 debtors to discharge their educational debt. Although promulgation of the section clarified Congress's posi-

16. For a discussion regarding the tests for determining the existence of undue hardship and the standard applied by the Third Circuit in Faish, see infra notes 99-103, 119-38 and accompanying text.

17. For a discussion of the tests applied by bankruptcy courts across the country to determine whether repayment of student loans will constitute an undue hardship on the debtor, see infra notes 21-105 and accompanying text.

18. For a discussion of the Third Circuit's analysis and interpretation of the pre-existing undue hardship tests, see infra notes 104-38 and accompanying text.

19. For a discussion of the Third Circuit's reasons for adopting the Brunner test as the applicable legal standard in the Third Circuit, see infra notes 119-38 and accompanying text.

20. For an analysis regarding potential implications of the Third Circuit's holding and various approaches practitioners may use to carry the burden of establishing undue hardship when representing Chapter 7 debtors, see infra notes 139-84 and accompanying text.

21. See Dunham & Buch, supra note 1, at 680 (stating that Congress enacted section 523(a)(8) as response to trend of students filing for bankruptcy, even though section 523(a)(8) was criticized for its "discriminatory treatment of student loans as opposed to other loans"). Prior to the promulgation of section 523(a)(8), Congress had ruled that Guaranteed Student Loans were nondischargeable. Wiese, supra note 2, at 446 n.12; see also H.R. Rep. No. 95-595, at 133 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6094 ("[E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and rely[] for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future."); Collins, supra note 1, at 734 ("By enacting section 523(a)(8) . . . Congress intended to impair the ability of students to file for bankruptcy immediately upon leaving school."). Based on how the House of Representatives perceived educational loans, the court in Briscoe v. Bank of N.Y. (In re Briscoe),
tion that educational debt generally should not be dischargeable, the use of the term "undue hardship" has generated considerable judicial analysis in the nearly twenty years since section 523(a)(8)(B)'s enactment, primarily due to the Bankruptcy Code's failure to define "undue hardship."22

Courts have turned to section 523(a)(8)(B)'s statutory history for guidance regarding what constitutes undue hardship.23 Unfortunately, Congress provided minimal guidance for the courts.24 In fact, the report of the compromise committee that was charged with combining the House

16 B.R. 128 (Bankr. S.D.N.Y. 1981), concluded that "the dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." Id. at 131.


24. Brunner, 46 B.R. at 758. When Congress drafted section 523(a), the initial version of the House bill made no reference to student loans, whereas the Senate's bill closely resembled the final language of section 523(a)(8). Id. The Senate report that accompanied the bill, however, did not mention undue hardship, essentially permitting discharge of student loans once they had been due and owing for at least five years. Id. at 754.
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and Senate positions into one bill made no mention of undue hardship.\(^{25}\) Rather, the term "undue hardship" had its origin in a draft bill proposed by the Commission on the Bankruptcy Laws of the United States ("Commission").\(^{26}\) In its report, the Commission stated that the undue hardship provision was included to combat the ""rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts.""\(^{27}\) Regarding a framework for determining undue hardship, the Commission ""envisioned a determination of whether the amount and reliability of income and other wealth which the debtor could reasonably be expected to receive in the future could maintain the debtor and his or her dependents at a minimal standard of living as well as pay off the student loans.""\(^{28}\)


26. Id.

27. Id. (quoting REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 140 n.14 (1973)). This 1973 report of the Commission indicated the policy that ""a loan . . . that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to re-pay the educational debt."" Id. (quoting H.R. Doc. No. 93-157, at 140 n.15). In essence, the test promulgated by the Commission would measure the debtor's present or future ability to repay the debt. Wiese, supra note 2, at 448. One commentator noted:

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 capacity, as well as to pay the educational debt.


28. Brunner, 46 B.R. at 754 (citing H.R. Doc. No. 93-137, at 140-41 n.17). Along with determining the debtor's present or future ability to repay the debt, the Report of the Commission on the Bankruptcy Laws of the United States ("Bankruptcy Commission Report") would require that such an inability to repay the debt not be self-imposed, a concept that has been recognized by courts that have addressed the issue of undue hardship. Wiese, supra note 2, at 448-49 & n.28 (citing Price v. United States (In re Price), 1 B.R. 768 (Bankr. D. Haw. 1980) (stating that discharge is inappropriate where debtor was paying $2,700 a year for child's private school tuition)). In Andrews University v. Merchant (In re Merchant), 958 F.2d 738 (6th Cir. 1992), the Sixth Circuit stated:

The legislative history of 11 U.S.C. § 523(a)(8) teaches us that the exclusion of educational loans from the discharge provisions was designed to remedy an abuse by students who, immediately upon graduation, filed petition for bankruptcy and obtained a discharge of their educational loans. This was due to the fact that unlike commercial transactions where credit is extended based on the debtor's collateral, income, and credit rating, student loans are generally unsecured and based solely upon the
Not surprisingly, the ambiguity surrounding "undue hardship" as used within the Bankruptcy Code and the legislative history of section 523(a)(8)(B) has left the courts with the difficult task of developing an appropriate standard for determining when educational debt should be dischargeable. As a result, courts have adopted several different tests, generating a lack of uniformity among the nation's judiciary. Addition-

belief that the student-debtor will have sufficient income to service the debt following graduation.

Id. at 740.

29. Collins, supra note 1, at 735.

30. Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 299-300 & n.1 (3d Cir. 1995), cert. denied, 116 S. Ct. 2532 (1996). Some courts have stated that discharge of educational debt will be permitted if the debtor can establish that repayment of the loans will cause his or her standard of living to fall below a "minimal" level. E.g., Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews), 661 F.2d 702, 704 (8th Cir. 1981); Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. (CRR) 552, 557 (Bankr. E.D. Pa. 1979). Other courts have required the debtor to show that the debtor's current inability to repay the loans will extend well into the foreseeable future. E.g., Moorman v. Kentucky Higher Educ. Assistance Auth. (In re Moorman), 44 B.R. 135, 137 (Bankr. W.D. Ky. 1984); Reid v. First Tenn. Bank (In re Reid), 39 B.R. 24, 26 (Bankr. E.D. Tenn. 1984); Love v. United States (In re Love), 33 B.R. 753, 755 (Bankr. E.D. Va. 1983); Holzer v. Wachovia Servs., Inc. (In re Holzer), 33 B.R. 627, 632 (Bankr. S.D.N.Y. 1983); Briscoe v. Bank of N.Y. (In re Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981). Some courts have required debtors to show unique or exceptional circumstances requiring discharge of the loans. E.g., Rappaport v. Orange Sav. Bank (In re Rappaport), 16 B.R. 615, 617 (Bankr. D.N.J. 1981); Densmore v. Georgia Higher Educ. Assistance Corp. (In re Densmore), 8 B.R. 308, 309 (Bankr. N.D. Ga. 1979). Such unique or exceptional circumstances may be illness, lack of usable job skills, the existence of a large number of dependents or a combination thereof. See Brunner, 46 B.R. at 755 (citing numerous cases in which unique or exceptional circumstances have been found to apply and justify discharge of student loans). Many courts have required, as part of a "good faith" test analysis, that the debtor show that he or she made good faith efforts to repay the loans and that repayment is impossible due to circumstances beyond his or her control. Rappaport, 16 B.R. at 617; Wisconsin Higher Educ. Aid Bd. v. MacPherson (In re MacPherson), 4 Bankr. Ct. Dec. (CRR) 950 (Bankr. W.D. Wis. 1978). As part of a "good faith" test analysis, some courts have allowed debtors to discharge their loans if they can establish that the education they received with those loans has provided them with little or no economic benefit. E.g., Connolly v. Florida Bd. of Regents (In re Connolly), 29 B.R. 978, 982 (Bankr. M.D. Fla. 1983) (finding that possibility of 57-year-old debtor with numerous physical and emotional health problems deriving significant benefit from education received was "extremely remote"); Powelson v. Stewart Sch. of Hairstyling (In re Powelson), 25 B.R. 274, 276 (Bankr. D. Neb. 1982) (holding that debtor who received education in hairstyling did not increase job skills by any significant amount); Littell v. Oregon (In re Littell), 6 B.R. 85, 88 (Bankr. D. Or. 1980) (finding that debt was fully dischargeable where debtor had received education in a field that was overloaded and did not provide many job opportunities). Some courts have applied what has been called the "ability to pay test," which often focuses on different aspects of the debtor's ability to repay the debt. See, e.g., Cahill v. Norstar Bank of Upstate N.Y. (In re Cahill), 93 B.R. 8, 12 (Bankr. N.D.N.Y 1988) (examining ability to repay debt after other bills had been paid each month); Lisanti v. Pennsylvania Higher Educ. Assistance Agency (In re Lisanti), 77 B.R. 27, 28 (Bankr. W.D. Pa. 1987) (examining debtor's ability to maintain minimum standard of liv-
ally, although numerous tests have been suggested and implemented by lower courts, the circuit courts have remained overwhelmingly silent on the matter, leaving the decision of which test to use to the discretion of those lower courts. Among the many tests that have been developed,

ing if forced to repay loans); Bryant v. Pennsylvania Higher Educ. Assistance Agency (In re Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (examining debtor’s income in relation to federal poverty guidelines); Ballard v. Virginia ex rel. State Educ. Assistance Auth. (In re Ballard), 60 B.R. 673, 675 (Bankr. W.D. Va. 1986) (requiring certainty of hopelessness, rather than just inability to pay, in order to determine whether there is undue hardship); Connecticut Student Loan Found. v. Keenan (In re Keenan), 58 B.R. 913, 918 (Bankr. D. Conn. 1985) (adopting unique and extraordinary circumstances test regarding debtor’s present ability to repay debt); see also Ted D. Ayres & Diann R. Sagner, The Bankruptcy Reform Act and Student Loans: Unraveling New Knots, 9 J.C. & U.L. 361, 367-80 (1983) (discussing undue hardship and surveying different tests applied by various courts to make undue hardship evaluations); Janice E. Kosel, Running the Gauntlet of “Undue Hardship”—The Discharge of Student Loans in Bankruptcy, 11 Golden Gate U. L. Rev. 457, 466-78 (1981) (same). Finally, some courts have decided to reject tests that focus on a particular factor or set of factors, choosing instead to subscribe to a “totality of the circumstances” test. E.g., Mayes v. Oklahoma State Regents for Higher Educ. (In re Mayes), 183 B.R. 261, 264 (Bankr. E.D. Okla. 1995) (stating that such factors may include examination of circumstances at time of case and circumstances thereafter, as well as examination of debtor’s health and ability to find job and whether debtor’s annual cash receipts fall below poverty guideline); Claxton v. Student Loan Mktg. Ass’n (In re Claxton), 140 B.R. 565, 568-69 (Bankr. N.D. Okla. 1992) (stating that poverty guideline test is suggestive, but not conclusive); Johnson v. USA Funds, Inc. (In re Johnson), 121 B.R. 91, 94 (Bankr. N.D. Okla. 1990) (examining circumstances at time of commencement of case and circumstances thereafter); Simons v. Higher Educ. Assistance Found. (In re Simons), 119 B.R. 589, 593 (Bankr. S.D. Ohio 1990); Coleman v. Higher Educ. Assistance Found. (In re Coleman), 98 B.R. 443, 451 (Bankr. S.D. Ind. 1989); Clay v. Westmar College (In re Clay), 12 B.R. 251, 255 (Bankr. N.D. Iowa 1981) (looking at totality of circumstances but focusing primarily on lifestyle and educational background of debtor). The above examples illustrate the confusion and haphazardness of undue hardship analysis throughout the nation’s courts. See Collins, supra note 1, at 747 (stating that existence of these numerous tests that are often hard to apply and understand is “suspect”); see also Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980) (discussing problems associated with various multi-factored tests). Still, the development of the Brunner test has had an impressive effect on undue hardship analysis, as numerous jurisdictions have adopted the Brunner test to determine whether the debtor has established that repayment of his or her loan would cause undue hardship. See Elebashy v. Student Loan Corp. (In re Elebashy), 189 B.R. 922, 925-26 (Bankr. N.D. Ohio 1995) (listing numerous cases decided since 1991 in which courts have adopted Brunner standard). For a discussion of the Brunner test and cases in which courts have applied the Brunner standard, see infra notes 79-103 and accompanying text.

31. See Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 995, 996 (per curiam) (stating that before it adopted standard developed by district court in prior proceeding of same case, there was “very little appellate authority on the definition of ‘undue hardship’ in the context of 11 U.S.C. § 523 (a)(8)(B)”.

Essentially, only the Second, Sixth and Seventh Circuits have considered the standard a court should apply to determine whether undue hardship exists, and those circuits have applied the Brunner test. See Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 360 (6th Cir. 1994) (applying Brunner test, although not adopting it as controlling in Sixth Circuit), cert. denied, 115 S. Ct. 731 (1995); Matter of Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (adopting...
three have received the greatest degree of support: the Johnson test, the Bryant test and the Brunner test.32

A. The Johnson Tripartite Test

Shortly after the ratification of the Bankruptcy Code of 1978, the Bankruptcy Court for the Eastern District of Pennsylvania announced a tripartite test to determine whether repayment of educational debt would impose undue hardship on a Chapter 7 debtor in Pennsylvania Higher Education Assistance Agency v. Johnson (In re Johnson).33 In Johnson, the court divided its undue hardship analysis into three separate tests: "mechanical," "good faith" and "policy."34

1. The "Mechanical" Test

In conducting the "mechanical" prong of its undue hardship inquiry, the Johnson court focused on the debtor’s future.35 The court asked whether "the debtor’s future financial resources for the longest foreseeable period of time allowed for repayment of the loan [will] be sufficient to support the debtor and his dependent(s) at a subsistence or poverty standard of living, as well as to fund repayment of the student loan."36 If the court determines, under this prong of the test, that the debtor’s future financial resources are sufficient to support him or herself and any dependents at a subsistence level while repaying the loan, then the debt will not be discharged.37 Alternatively, if the court finds that the debtor cannot support him or herself while repaying the loan, the court will move on to the "good faith" test.38

Brunner test); Brunner, 831 F.2d at 396 (citing Brunner, 46 B.R. at 752 (adopting standard developed by district court as controlling within Second Circuit)).

32. Faish, 72 F.3d at 303. For a discussion of the Johnson test and cases in which courts chose to use the Johnson test, see infra notes 33-64 and accompanying text. For a discussion of the Bryant test and cases in which courts chose to apply the Bryant test, see infra notes 65-78 and accompanying text. For a discussion of the Brunner test and the cases in which courts have applied the Brunner test, see infra notes 79-103 and accompanying text.


34. Id. at 539-44. For a discussion of these three prongs of the Johnson test, see infra notes 35-52 and accompanying text.

35. Johnson, 5 Bankr. Ct. Dec. (CRR) at 537-39. The analysis under the "mechanical" test examines, specifically, the debtor’s future resources and future expenses in determining whether repayment of the educational debt is feasible. Dunham & Buch, supra note 1, at 696.


37. Id.

38. Id. Although the debtor may be able to satisfy the "mechanical" prong of the Johnson test, the debt will not be discharged if the debtor has failed to make a good faith effort to repay the loan. Id. at 540 (citing Alan Ahart, Discharging Student Loans in Bankruptcy, 52 AM. BANKR. L.J. 201, 207 (1978)). For a discussion of the Johnson "good faith" test, see infra notes 42-46 and accompanying text.
To establish the debtor’s potential future resources under the “mechanical” test, the court may take into account such factors as rate of pay, wages, skills, sex, ability to obtain and retain employment, education, health, access to transportation and whether the debtor has to provide for small children.\(^9\) Additionally, to determine the debtor’s future expenses, the court must ascertain “what amount of monthly expenses is reasonable for a ‘similarly situated hypothetical debtor’” and must add to that figure any “extraordinary expenses” the debtor must pay.\(^4\) Because educational loans typically are repaid over a ten year period, the debtor is generally required to show that his or her financial position “will not foreseeably improve over the next ten (10) years or so.”\(^4\)

2. The “Good Faith” Test

If the “mechanical” test is satisfied, then the court moves to the “good faith” test to determine whether the debtor has made a good faith attempt to pay the debt.\(^4\) Accordingly, the “good faith” test examines whether the debtor has “willfully or negligently immers[ed] himself in debt,” suggesting that a debtor’s educational loans will not be discharged unless the circumstances causing the debtor’s financial predicament are beyond his or her control.\(^4\)

39. Johnson, 5 Bankr. Ct. Dec. (CRR) at 537-38. The Johnson court stated that to determine future financial resources, a court should consider earned income resources like those mentioned above and other sources of income or wealth the debtor may possess, such as welfare and child support. Id. at 538.

40. Id. at 538-39 (quoting Ahart, supra note 38, at 207). When examining the reasonable expenses for a “similarly situated hypothetical debtor,” a court should examine the debtor’s marital status, number of dependents and how necessities are being supplied (whether in kind or at a reduced cost). Id. at 538. When examining a debtor’s extraordinary expenses, a court is to take into account any nondischarged debts. Id. Additionally, unique medical expenses may be deemed to constitute extraordinary expenses. Id. Extraordinary expenses are not to be confused with excess expenditures, however, which are discretionary and not to be considered when calculating a debtor’s future expenses. Dunham & Buch, supra note 1, at 697.


In analyzing whether the repayment of this loan will cause “undue hardship,” the Court recognizes that these educational loans are generally repaid over a long term—usually ten years. Therefore, ... to discharge an educational loan, the Debtor ... must ... show that her circumstances, such as they were, could not foreseeably change for the better over the next ten years.

Id. at 856-57.

42. Johnson, 5 Bankr. Ct. Dec. (CRR) at 544. Absent a good faith attempt to repay the debt, the debtor will not have his or her debt discharged even where the mechanical prong has been satisfied. Id. at 540.

43. Id. (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 140 n.14 (1973)). The Bankruptcy...
According to the Johnson court, when applying the “good faith” standard, a court is to ask two questions: “Was the debtor negligent or irresponsible in his efforts to minimize expenses, maximize resources, or secure employment?” and “If ‘yes,’ then would lack of such negligence or irresponsibility have altered the answer to the mechanical test?” If the answer to the first part of the “good faith” test is “no,” then the debtor’s obligation to repay the debt should be discharged. If both parts of the test are answered “yes,” then a presumption against dischargeability arises that the debtor may overcome only by satisfying the third test, the “policy” test.

3. The “Policy” Test

Through the “policy” test, a court determines whether an attempt to discharge educational debt by the particular debtor “constitutes the sort of abuse which section 523(a)(8)(B) was enacted to prevent.” The “policy” analysis is intended to focus on the debtor’s motivation for filing the bankruptcy petition, the amount of student loan debt and whether the debtor’s position was improved due to the education received. According to the Johnson court, the “policy” test asks:

Do the circumstances—i.e., the amount and percentage of total indebtedness of the student loan and the employment prospects of the petitioner indicate:

(a) That the dominant purpose of the bankruptcy petition was to discharge the student debt, or

Commission Report implicitly endorsed the view that an educational loan is not dischargeable if the debtor is the cause of his or her own continued financial woes:

The claimant must establish that the debtor can pay the educational debt from future earnings or other wealth, such as trust fund income or an inheritance. This requirement recognizes that in some circumstances the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments.

H.R. Doc. No. 93-137, at 140 n.16.

45. Id.
46. Id.
(b) That the debtor has definitely benefitted financially from the education which the loan helped to finance?\textsuperscript{49}

The court in \textit{Johnson} stated that if the answer to both parts of the question is "no," the debt should be discharged.\textsuperscript{50} If the answer to either part is "yes," however, the debt should not be discharged.\textsuperscript{51} This "policy" prong is considered only if the debtor has not satisfied the "mechanical" test.\textsuperscript{52}

Throughout the country, the \textit{Johnson} test has received varying degrees of support. For example, one bankruptcy court heralded the \textit{Johnson} tripartite test as "set[ting] forth a sequential procedure for analyzing the facts of a given case."\textsuperscript{53} Although courts that have applied the \textit{Johnson}

\begin{itemize}
\item \textsuperscript{49} \textit{Johnson}, 5 Bankr. Ct. Dec. (CRR) at 544. Bad faith by the debtor regarding attempts to repay the loan may be rebutted by a showing that the debtor's principal reason for filing a bankruptcy petition was not to eradicate substantial student loans, and that he or she received little or no economic benefit from the education financed by the loans at issue. Briscoe v. Bank of N.Y. (\textit{In re Briscoe}), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981).
\item \textsuperscript{50} \textit{Johnson}, 5 Bankr. Ct. Dec. (CRR) at 544.
\item \textsuperscript{51} Id. According to Dunham and Buch's analysis of the "policy" test, even if having the educational debt discharged was not the reason for filing bankruptcy, policy should influence a court to deny discharge of the debt when the debtor has received a clear benefit from his or her education. Dunham & Buch, supra note 1, at 699.
\item \textsuperscript{52} \textit{Zibura}, 128 B.R. at 133 (citing Erickson v. North Dakota State Univ. (\textit{In re Erickson}), 52 B.R. 154, 157 (Bankr. D.N.D. 1985)). Considering the overall effect of the tripartite test it had promulgated, the \textit{Johnson} court stated:
\begin{itemize}
\item [A] debtor should be denied discharge of his student loan within the [seven] year period after the debt matures, if either:
\item (a) his future financial resources are most likely sufficient to finance repayment of the student loan, and to support the debtor and his dependents at or above the poverty level, or,
\item (b) but for the debtor's negligence or irresponsibility, he would be able to repay the loan without lowering his standard of living below the poverty level.
\end{itemize}
\begin{itemize}
\item A court should grant discharge of a student loan within [seven] years after it becomes due, based on a finding that repayment of the loan would cause the debtor "undue hardship," where:
\item (a) The debtor's future income and wealth, in the maximum forseeable [sic] period allowed for repayment of the student loan, are likely to be insufficient to fund the loan's repayment and to support the debtor and his dependents at a subsistence level of living, and
\item (b) either such hardship is due to circumstances beyond the debtor's control; or,
\item (c) the circumstances clearly indicate that discharge of the student loan was not a dominant reason for filing bankruptcy, and that the debtor's earnings prospects have not appreciably benefitted from his education.
\end{itemize}
\item \textsuperscript{53} \textit{Zibura}, 128 B.R. at 132 (citing Erickson, 52 B.R. at 157). In \textit{Zibura}, the court applied the tripartite test and found that educational loans were not dischargeable where the debtor, because of the distance of his job from his family residence, maintained two residences, spoke to his family by long distance tele-
\end{itemize}
tripartite test have concurred with the test’s requirement that the “mechanical” prong and either the “good faith” or “policy” prong be satisfied to permit dischargeability.54 They have rarely had to consider the second or third prongs of the test.55 Generally, courts that have applied the Johnson test have determined whether discharge of educational debt is appropriate based solely on examination of the “mechanical” test.56 In most instances, these courts have found that the debt should not be discharged.57 Some courts have chosen to accept the Johnson test but have added other factors for a court to consider.58 One court determined that even where the Johnson test is applied, courts retain the discretion to discharge all or part of an educational loan even if the individual prongs of the Johnson test have not been met on their face.59

phone everyday and incurred transportation expenses when he visited his family each weekend. Id. at 131. The court ruled that the debtor had not satisfied the “mechanical” test because, though his current expenses exceeded his income, there was “ample reason to believe that [the debtor’s] future financial condition [would] improve and that he [would] be able to pay his student loans without undue hardship.” Id. at 133. Additionally, the court conducted a good faith analysis even though it was not required to do so under the rules of Johnson. Id. Conducting its good faith analysis, the court in Zibura found that a large portion of the debtor’s expenses were incurred due to his decision to maintain two residences and that the debtor’s family had not made a “sincere” effort to maximize financial resources (the debtor’s wife was healthy but chose not to work). Id.


56. Id.


58. See, e.g., Love v. United States (In re Love), 28 B.R. 475, 478 (Bankr. S.D. Ind. 1983) (adding to Johnson test factors such as: (1) length of time elapsed between graduation and date of bankruptcy filing and (2) amount of debt paid off by debtor before he or she filed for bankruptcy).

59. Woyame v. Career Educ. & Management (In re Woyame), 161 B.R. 198, 203 (Bankr. N.D. Ohio 1993). In Woyame, the debtor was unable to satisfy any of the prongs of the Johnson test. Id. at 201-02. The debtor received decent income as a truck driver, had excellent training in the field of heating and air conditioning repair and had no wife or children. Id. at 201. Therefore, he was unable to satisfy the “mechanical” test. Id. Further, because the debtor had made only minimal
Additionally, the Johnson test has been the subject of considerable criticism, mainly from courts that have chosen to apply the Brunner test. In Ammirati v. Nellie Mae, Inc. (In re Ammirati), for example, the United States District Court for the District of South Carolina criticized the Johnson test as imposing a policy test that is “overly complex.” The Ammirati court strongly disapproved of the requirement in Johnson that a court consider the debtor’s motives for filing a bankruptcy petition and whether the debtor benefitted from the education he or she received with the loan. According to the court in Ammirati, “[d]etermining the value of an education is both subjective and inappropriate. The debtor is not entitled to an efforts to cut back on his living expenses, the court found that he had not satisfied the “good faith” prong of Johnson. Id. at 202. The debtor also failed the “policy” prong of Johnson because he had apparently filed for bankruptcy for the dominant purpose of avoiding repayment of his educational loans. Id. at 203. Nevertheless, the Woyama court decided to discharge over $2,000 worth of the debtor’s $11,000 in loans because testimony supported a finding that full repayment would tend to work an undue hardship on the debtor. Id. The court stated that it may, in its discretion, find that equity supports reduction of nondischargeable debt to a level that removes the undue hardship from the debtor, given the debtor’s income and obligations, as well as consider some time of discharge could be expected if the debtor could take steps to improve his financial condition. Id.


62. Id. at 905. In Ammirati, the court began its analysis by stating that the Fourth Circuit had yet to formally adopt a standard for determining undue hardship. Id. The court determined that Brunner provided the appropriate standard to measure the existence of undue hardship because it presented a clear test, was supported by legislative history and had been applied in a significant number of cases within the circuit. Id. (citing Dillon, 189 B.R. at 384; Walcott v. USA Funds, Inc. (In re Walcott), 185 B.R. 721, 724 (Bankr. E.D.N.C. 1995)). The court also noted that the national trend has been toward adoption of the Brunner standard. Id. at 905-06 (citing Roberson, 999 F.2d at 1135; Stebbins-Hopf v. Texas Guaranteed Student Loan Corp. (In re Stebbins-Hopf), 176 B.R. 784 (Bankr. W.D. Tex. 1994); Lynn v. Diversified Collection Serv. (In re Lynn), 168 B.R. 693 (Bankr. D. Ariz. 1994); Healey v. Massachusetts Higher Educ. (In re Healey), 161 B.R. 389, 393 (E.D. Mich. 1993) (adopting Brunner and stating that Brunner has been adopted by courts within the Second, Sixth, Seventh, Eighth, and Eleventh Circuits)).

63. Id. at 905 (citing Sands v. United Student Aid Funds, Inc. (In re Sands), 166 B.R. 299, 306 (Bankr. W.D. Mich. 1994) (stating that Johnson is “hideously complicated”)). The Ammirati court found to be without merit Johnson’s requirement that a reviewing court “ask whether the percentage of the student loan to total indebtedness, when considered in combination with the employment prospects of Debtor, indicates either that the dominant purpose of the bankruptcy proceeding was to discharge the student debt or that the debtor definitely benefitted from the education that the loan helped to finance.” Id. (citing Pennsylvania Higher Educ. Assistance Agency v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. (CRR) 532, 544 (Bankr. E.D. Pa. 1979))
uneconomic hardship discharge by virtue of selecting an education that failed to return economic rewards."\textsuperscript{64}

\textbf{B. The Bryant Poverty Level Test}

Although the Bankruptcy Court for the Eastern District of Pennsylvania promulgated the \textit{Johnson} tripartite test, that same court explicitly rejected the \textit{Johnson} test in \textit{Bryant v. Pennsylvania Higher Education Assistance Agency (In re Bryant)}.\textsuperscript{65} The court in \textit{Bryant}, expressing its dissatisfaction with the "policy" prong of the \textit{Johnson} test, characterized the tripartite test as "unfortunately complicated."\textsuperscript{66} The test promulgated by the court in \textit{Bryant} became known as the "poverty level" test because the determination of whether repayment of an educational debt would result in undue hardship on the debtor hinged on the debtor’s income level in relation to federal poverty guidelines established by the United States Bureau of Census.\textsuperscript{67} The \textit{Bryant} court stated:

We propose, as a starting position, to analyze the income and resources of the debtor and his dependents in relation to federal poverty guidelines . . . and determine dischargeability of the student loan obligation on the basis of whether the debtor’s income is substantially over the amounts set forth in those guidelines or not. If not, a discharge will result only if the debtor can establish "unique" and "extraordinary" circumstances which should nevertheless render the debt dischargeable. If the debtor’s income is below or close to the guideline, the lender can prevail only by establishing that circumstances exist which render these guidelines unrealistic, such as the debtor’s failure to maximize his re-

\textsuperscript{64} Id. (citing Roberson, 999 F.2d at 1137).

\textsuperscript{65} 72 B.R. 913 (Bankr. E.D. Pa. 1987). \textit{Bryant} involved the bankruptcy petitions of three debtors seeking to have their educational loans discharged. \textit{Id.} The court began its analysis of undue hardship by examining the applicable legislative history, and found that because the Bankruptcy Code did not define "undue hardship," courts had applied various tests, none of which provided simple objective standards by which to measure undue hardship. \textit{Id.} at 914-15.

\textsuperscript{66} \textit{Id.} at 915 n.2. The court in \textit{Bryant} stated that the \textit{Johnson} test’s complicated nature encouraged it to attempt to develop an objective, simple test. \textit{Id.} The \textit{Bryant} court focused primarily on the "policy" prong of \textit{Johnson}, and stated that consideration of whether the debtor’s dominant purpose for filing for bankruptcy was to avoid repayment of student loans was wholly inappropriate. \textit{Id.} According to the court, avoidance of the consequences of debt is typically the reason for filing for bankruptcy, and as such, should be irrelevant to a court’s undue hardship analysis. \textit{Id.} (citing \textit{In re Gathright}, 67 B.R. 384, 391 (Bankr. E.D. Pa. 1986)).

\textsuperscript{67} \textit{See id.} at 915-16 (describing workings of its newly developed test). For a discussion of the workings of the \textit{Bryant} "poverty level" test, see \textit{infra} note 68 and accompanying text.
sources or clear prospects of the debtor for future income increases.\textsuperscript{68}

In arriving at this standard, the Bryant court stated that the test comported with the purpose of section 523(a)(8)(B) as indicated in the Report of the Commission on the Bankruptcy Laws of the United States.\textsuperscript{69} The Bryant court stated that this report represented the congressional intention "that debtors who [are] not able to maintain a minimal standard of living should be discharged of their student loan obligations, per 523(a)(8)(B)."\textsuperscript{70}

Distinguishing its analysis from the tripartite test promulgated in Johnson, the court in Bryant stated:

[O]nly if a debtor's income is significantly greater than the poverty guideline, would it become necessary to evaluate the myriad of factors and circumstances, which courts presently examine, to determine whether the debtor's situation manifests such

\textsuperscript{68} Bryant, 72 B.R. at 915. The court revealed its hope that its test would provide courts with a more objective standard than that provided by Johnson for determining whether a debtor has established undue hardship. \textit{Id.} This "poverty level" test, however, does appear to establish a per se hardship finding when the debtor's income is below the federal poverty guidelines. Dunham & Buch, \textit{supra} note 1, at 701. The court in Bryant did, however, state that lenders have the right to show unique or extraordinary circumstances that would render nondischargeable the debt of an individual whose income falls near or below the poverty guidelines. Bryant, 72 B.R. at 919. Because the court assumed that debtors will attempt to maximize their resources in an attempt to live above the poverty line, it will be hard for a creditor to establish the existence of such special circumstances warranting nondischargeability of educational debt where an individual lives below the poverty guidelines. \textit{Id.}

\textsuperscript{69} Bryant, 72 B.R. at 915 (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 141 (1973)).

\textsuperscript{70} Id. The court quoted a portion from the Bankruptcy Commission Report which stated that undue hardship can be determined through examination of the debtor's estimated future resources, measured in terms of the debtor's ability to obtain and retain employment and in terms of the wages received from such employment. \textit{Id.} The Commission, in its report, explicitly stated that "[t]he 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 capacity, as well as to pay the educational debt." H.R. DOC. NO. 93-137, at 140-41. The court in Bryant perceived this language to indicate an intent to base undue hardship on whether the debtor could make payments while maintaining a minimal standard of living in accordance with federally determined poverty guidelines. Bryant, 72 B.R. at 915.

Additionally, the court emphasized that in determining where the debtor's income fit within the federal poverty guidelines, net income, rather than gross income, was to be examined. \textit{Id. at} 916 \& n.4. Such federal poverty guidelines are commonly used to determine an individual's eligibility for various federal assistance programs. \textit{Id. at} 916. The court reasoned that such income levels are viewed by the federal government as bare subsistence levels used by the government to find that individuals are incapable of paying for necessary services. \textit{Id.} Based on how the government applies the poverty levels, the court found that such levels could also be used to determine the debtor's ability or inability to repay educational loans. \textit{Id.}
"unique" or "extraordinary" circumstances as to allow discharge of a governmentally-guaranteed student loan debt on the basis of undue hardship.\textsuperscript{71}

The court stated that this objective-based test was aimed at minimizing moral judgments by courts concerning the propriety of certain expenditures made by debtors.\textsuperscript{72}

\textsuperscript{71} Bryant, 72 B.R. at 917. The court stated, however, that even if the debtor's net income fell close to the poverty guideline, discharge might still be justified. \textit{Id.} Furthermore, even if the debtor's income was not at or near the federal poverty guideline, educational debt could be discharged if unique or extraordinary circumstances were present that would render such a financial burden on the debtor that his or her ability to repay the debt would be quite unlikely. \textit{Id.} The court noted, however, that those circumstances rendering repayment unlikely must be more than merely unpleasant. \textit{Id.} "The existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient to warrant the discharge of a student loan." \textit{Id.} (citing Brunner v. New York State Higher Educ. Servs. Corp. (\textit{In re} Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985), aff'd, 831 F.2d 395 (2d Cir. 1987) (per curiam)). One court noted that financial adversity alone is not enough to constitute undue hardship—rather, severe economic disadvantage caused by unique sets of circumstances rendering the possibility of repayment non-existent is required for a finding of undue hardship. Briscoe v. Bank of N.Y. (\textit{In re} Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981) (citing New York State Higher Educ. Servs. Corp. v. Kohn (\textit{In re} Kohn), 5 Bankr. Ct. Dec. (CRR) 419, 424 (Bankr. S.D.N.Y. 1979)). The Bryant court did recognize that there are varying gradations of unique or extraordinary circumstances and that the determination of whether such circumstances constitute undue hardship depends upon the magnitude by which the debtor's income exceeds the relevant poverty guideline. Bryant, 72 B.R. at 917. For example, "a less extraordinary circumstance would justify a discharge of a debtor whose income is slightly over the guidelines, while a very significant circumstance would be necessary to serve a debtor whose income is comfortably over the guidelines." \textit{Id.} The court emphasized that it only looks to the existence of unique or extraordinary circumstances if the test of income in relation to the federal poverty guidelines is not met by the debtor. \textit{Id.} at 918. If a court is forced to examine special circumstances, relevant factors for a court to consider include the debtor's living expenses and whether such expenses are reasonable. \textit{Id.} (citing Andrews v. South Dakota Student Loan Assistance Corp. (\textit{In re} Andrews), 661 F.2d 702 (8th Cir. 1981)). Types of expenses that would constitute unique or extraordinary expenses include those arising from physical or mental illness and/or unusual responsibilities relating to the needs of dependents. \textit{Id.} Additionally, a court may examine the debtor's employment history and/or prospects for future decrease of income to uncover the existence of special circumstances that would justify discharge of the debt. \textit{Id.}

\textsuperscript{72} Bryant, 72 B.R. at 918. The test assumes that debtors will attempt to maximize their ability to improve their lives and improve their income while spending their money in ways that further their best interests. \textit{Id.} The court observed: "We find ourselves in disagreement with those courts which have denied discharges of student loans on the basis of whether any given expenses are justified, as these represent subjective value judgments concerning which we consider ourselves no better able to gauge than, generally, debtors themselves." \textit{Id.} (citing Massachusetts Higher Educ. Assistance Corp. v. Packer (\textit{In re} Packer), 9 B.R. 884 (Bankr. D. Mass. 1981); New York State Higher Educ. Servs. Corp. v. Brock (\textit{In re} Brock), 4 B.R. 491 (Bankr. S.D.N.Y. 1980); Price v. United States (\textit{In re} Price), 1 B.R. 768 (Bankr. D. Haw. 1980)). Additionally, the court expressed its dissatisfaction with opinions that focused on whether the education received through the student loan actually benefitted the debtor. \textit{Id.} (citing Littell v. Oregon \textit{ex rel.} State Bd. of Higher Educ.
Applying the test it had just announced, the court in *Bryant* discharged the student loans in two Chapter 7 cases finding the existence of undue hardship, while denying discharge in a third case.73 The court denied discharge of the student loan obligations owed by a debtor whose income was significantly higher than the 1987 federal poverty guideline because the debtor was unable to establish “unique” or “extraordinary” circumstances to justify discharge of the debt.74 In the two cases in which discharge was granted, the debtors’ annual gross income either fell below the poverty guideline or was approximately consistent with the guideline.75

(In re Littell), 6 B.R. 85, 88 (Bankr. D. Or. 1980) (stating that courts should examine whether debtor’s acceptance of loan in order to receive education was economically sound decision by debtor for purposes of discharge of debt)). But see Motor v. Great Am. Fed. Sav. & Loan Ass’n (In re Motor), 64 B.R. 317, 318 (Bankr. W.D. Pa. 1986) (stating that receipt of education opens doors unavailable to those without college degrees and that discharge should be denied unless debtor establishes “uniquely devastating hardship”). The *Bryant* court emphasized that the purpose of educational loans is to provide students with the means to improve their intellectual skills and their chances of achieving success, not to guarantee ultimate success. *Bryant*, 72 B.R. at 919 (citing Fitzgerald v. Pennsylvania Higher Educ. Assistance Agency (In re Fitzgerald), 40 B.R. 528, 529-530 (Bankr. E.D. Pa. 1984)). Specifically, the *Bryant* court stated that the debtor’s “use” of the education received via the educational loans is to be considered by a court only to aid in determination of the debtor’s income, and nothing more. *Id.*

73. *Bryant*, 72 B.R. at 919-26. For a discussion regarding the reasons behind the *Bryant* court’s ruling, see infra notes 74-75 and accompanying text.

74. *Bryant*, 72 B.R. at 922. The debtor had various skills, was only 23 years-old, had no dependents and lived with his self-sufficient father. *Id.* at 921-22. The debtor had made no payments on his student loans and stated that his current wages exceeded his monthly expenditures by only ten dollars. *Id.* at 922. The court found that no unique or extraordinary circumstances existed warranting discharge of the debtor’s loans, especially since the lender was willing to set up a payment plan with the debtor whereby the debtor would make monthly payments on his loan of thirty dollars. *Id.* at 922-23.

75. *Id.* at 919-21, 925-27. The debtor whose income was significantly below the federal poverty guideline was a young woman with no dependents, who had no prospects for full-time employment at more than minimum wage because she lacked experience necessary for all of the previous jobs she had sought. *Id.* at 920. This debtor lived alone in a one room apartment, owned no furniture, owned no car and had not received complete training from the community college she had attended. *Id.* The court stated that the facts of this case underscored the propriety of the test it had developed in allowing a court to make a quick decision in such a clear-cut case. *Id.* at 921.

In the case of the debtor whose income mirrored the poverty guideline, the court determined that discharge was justified because the debtor did not have steady employment (he was a substitute teacher whose monthly income fluctuated based on school holidays, vacations, etc.) and because of unique circumstances such as costs for insulin to control diabetes and expenses incurred for his special dietary needs. *Id.* at 926. By factoring such extraordinary costs into a situation where the debtor’s income already placed him at the poverty line, the court found that the debtor essentially lived below the poverty guideline, warranting discharge of his educational debt. *Id.* at 926-27.
The Bryant test has received only limited acceptance. In Reilly v. United Student Aid Funds, Inc. (In re Reilly), one of the few cases to accept the Bryant standard, the Bankruptcy Court for the District of Maryland was presented with a fact pattern that fit perfectly within the Bryant standard for finding undue hardship—the debtor’s gross income was just barely above the federal poverty guideline, her former husband was terminally ill, she had three children to raise, her home had been lost to foreclosure and the family incurred a deficit of approximately $600 per month. Beyond the holding in Reilly, however, bankruptcy courts generally have been reluctant to subscribe to a standard that focuses primarily on the debtor’s status in relation to federal poverty-level guidelines.

77. Id. at 41. The circumstances the debtor faced outweighed the fact that she had not attempted to make a single payment on her educational loan of $2,762. Id. The court also determined that the debtor was not in a position to improve her situation because she was 24 credits away from receiving her degree. Id. The court stated that it adopted the Bryant standard because it was more objective than Brunner, while still providing a court with the flexibility to consider unique or extraordinary circumstances if necessary. Id. at 40-41. For a discussion of the court’s holding in Brunner, see infra notes 81-87 and accompanying text.
78. Cf. Reyes v. Oklahoma State Regents for Higher Educ. (In re Reyes), 154 B.R. 320 (Bankr. E.D. Okla. 1993) (involving acceptance of Bryant standard by Bankruptcy Court for Eastern District of Oklahoma). In Reyes, the Bankruptcy Court for the Eastern District of Oklahoma adopted the Bryant test and found that the debtors’ educational loans were not dischargeable. Id. at 323-24. The debtors’ wages in Reyes were well above the federal poverty guidelines. Id. at 324. Applying the Bryant test, the court in Reyes chose to adopt a gross income test rather than a net income test as prescribed in Bryant. Id. at 323. Although the debtors cared for an ill, dependent child, they were unable to show that such illness presented a significant financial burden to constitute a unique or extraordinary circumstance. Id. at 324. The only financial impact presented by the debtors was evidence of a monthly prescription expense of $75. Id. The Reyes court rejected the Brunner test, finding that the legislative history of section 523(a)(8)(B) supported the Bryant test. Id. at 323-24. Additionally, the court ruled that the Bryant test provided an objective approach to determining undue hardship that would not create different results regarding similarly situated debtors located in different jurisdictions. Id.

The court found that the Bryant test most closely comport with the Bankruptcy Code’s goal of providing unfortunate debtors with an opportunity to make a fresh start. Id. at 323. Further, the court noted that the Bryant poverty level test reflected the drafters’ intent of the Bankruptcy Commission Report, in which “undue hardship” was defined in terms of a debtor’s ability to maintain a “minimal standard of living.” Id. The court believed that adoption of the Bryant test would provide an element of predictability to such litigation, allowing debtors to determine, even before litigation had commenced, their probability of obtaining discharge of their educational loans. Id.

Such support for the Bryant test, however, was short-lived. In Mayes v. Oklahoma State Regents for Higher Education (In re Mayes), 183 B.R. 261 (Bankr. E.D. Okla. 1995), the same court rejected the Bryant test, choosing instead to follow bankruptcy courts in other parts of Oklahoma that had declined to adhere to any particular test. Id. at 264 (citing Claxton v. Student Loan Mktg. Ass’n (In re Claxton), 140 B.R. 565 (Bankr. N.D. Okla. 1992); Johnson v. USA Funds, Inc. (In re Johnson), 121 B.R. 91 (Bankr. N.D. Okla. 1990)). The Bankruptcy Court for the Northern District of Oklahoma, in the above cases, looked at the totality of the circumstances to determine whether discharge of educational loans would be justi-
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C. The Brunner Test

In recent years, the Brunner test has easily received the most support, and has been lauded as providing the most appropriate standard for determining whether repayment of educational debt would impose an undue hardship on the debtor and his or her dependents. Although little appellate authority exists regarding the proper definition of "undue hard-

ied. Claxton, 140 B.R. at 569; Johnson, 121 B.R. at 93-94. The Claxton court would examine, for example, the circumstances at the time the case is commenced and circumstances thereafter. Claxton, 140 B.R. at 569. In addition, the Claxton court stated that it would consider the "poverty level" test, but that such a test would not be conclusive of whether discharge would be permitted or denied. Id.

Based on its examination of the cases from the Bankruptcy Court for the Northern District of Oklahoma, the Mayes court determined that a "totality of the circumstances" test, in which numerous factors would be examined based on the facts of a particular case, would most adequately prevent the federal student loan program from being abused. Mayes, 183 B.R. at 264. The court stated that an additional factor to consider is "whether the Debtor's annual cash receipts are less than the poverty guideline," thereby incorporating the Bryant test as a factor to consider during undue hardship analysis. Id. A court can consider other factors, such as the level of the debtor's education, the debtor's expenses for rent, the debtor's health, the debtor's employment (including whether it has been steady) and the debtor's ability to adjust and find jobs easily. Id. While noting that discharge of educational debt should be reserved for rare circumstances, the court stated that a court, using the "totality of the circumstances" test, could "modify the amount owed on the student loan or revise the payment terms." Id. (citing Albert v. Ohio Student Loan Comm'n (In re Albert), 25 B.R. 98, 102 (Bankr. N.D. Ohio 1982)). One court had determined that although the principal of an educational loan was not dischargeable, interest and attorney fees were dischargeable. Id. (citing Ballard v. Virginia ex rel. State Educ. Assistance Auth. (In re Ballard), 60 B.R. 675, 675 (Bankr. W.D. Va. 1986)). Based on its research, the Mayes court determined that it was appropriate to discharge the debtor's accrued interest and attorney fees. Id. Additionally, the court modified the monthly payment the debtor was required to make to his lender. Id.

ship,” those federal circuit courts that have addressed the matter have subscribed to the Brunner three-part test.80

In Brunner v. New York State Higher Education Services Corp. (In re Brunner)81 the United States Court of Appeals for the Second Circuit, in a per curiam opinion, adopted an undue hardship standard that required a three-part showing:

1. that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
2. that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. that the debtor has made good faith efforts to repay the loans.82


81. 831 F.2d 395 (2d Cir. 1987) (per curiam).

82. Id. at 396 (adopting standard created by district court in prior disposition of same case). The Second Circuit determined that the three prong test developed by the district court was in accord with section 523(a)(8)(B)’s legislative history and with the decisions of other district and bankruptcy courts across the country. Id. The court found that the first prong of the test comport with common sense and had been put to use by other courts as an aspect of other undue hardship tests. Id. (citing Bryant v. Pennsylvania Higher Educ. Assistance Agency (In re Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987); North Dakota State Bd. of Higher Educ. v. Frech (In re Frech), 62 B.R. 235 (Bankr. D. Minn. 1986); Marion v. Pennsylvania Higher Educ. Assistance Agency (In re Marion), 61 B.R. 815 (Bankr. W.D. Pa. 1986)). The court next stated that the second prong of the test reflected Congress’s intent, displayed within section 523(a)(8), to make discharge of educational debt particularly difficult. Id. Requiring evidence of both current and future inability to repay the debt, while often speculative, more closely guarantees that the hardship presented by the debtor is truly “undue.” Id.

Based on the test adopted by the Second Circuit, the court found that the district court had correctly ruled that the debtor’s loans were nondischargeable. Id. at 396-97. Although the debtor was unemployed, no evidence existed to show that such condition was likely to continue for a significant portion of the repayment period. Id. at 396. The debtor was not disabled or elderly, and she had no dependents. Id. Additionally, there was no evidence to suggest that job opportunities in the debtor’s chosen field were non-existent. Id. at 396-97. From the time of the debtor’s graduation to the filing of her bankruptcy petition, only ten months had elapsed. Id. at 397. Understandably, the court found that the debtor had not satisfied the “good faith” prong of the test, because she had filed her bankruptcy petition within one month of the date on which the first payment on her debt became due. Id. The debtor had filed her bankruptcy petition without attempting to defer payment. Id.
Because the Second Circuit’s reasoning for its promulgation of this test was quite limited, it is appropriate to examine the district court’s discussion and factual findings in Brunner. The district court in Brunner stated that its proposed test would require the debtor to do more than simply claim that because of his or her current financial condition, repayment of the loan would be “difficult or impossible.” The debtor is required to show, in addition to his or her strained financial condition as mandated by the first prong of the test, the existence of unique or exceptional circumstances that exhibit an inability to repay the debt in the future, such as illness, lack of usable job skills, a large number of dependents or a combination thereof. Additionally, the third prong of the test, 83. For a discussion of the district court’s holding in Brunner, see infra notes 84-87 and accompanying text.


Additionally, a freely chosen lifestyle that limits a debtor’s income cannot be asserted by the debtor to establish that repayment of the loan would work an undue hardship on the debtor. Melton v. New York State Higher Educ. Servs. Corp. (In re Melton), 187 B.R. 98, 99 (Bankr. W.D.N.Y. 1995). The court in Melton rejected the discharge petition submitted by a healthy 28 year-old debtor who chose to work only 30 hours a week and combine his financial affairs with those of his live-in girlfriend. Id. at 101-02. The debtor had argued that although he could work a more demanding schedule, any financial improvements he received, combined with his girlfriend’s earnings, would be offset by a decrease in public assistance, a loss of Medicaid and an increase in his child support obligation, thereby resulting in less money for the debtor to use to repay his loans. Id. at 101. The court rejected the debtor’s argument, stating that “the idiosyncrasies of assistance programs have no relevant impact on the Brunner analysis.” Id. at 102. The debtor chose to combine his finances with his girlfriend’s even though he was under no legal obligation to provide for his girlfriend or her child. Id. If such a choice “has the effect of reducing or limiting [the debtor’s] present or future income, creditors... should not have to subsidize that choice.” Id. The debtor, therefore,
which requires the debtor to make good faith efforts at repayment and to establish that the cause of his or her inability to repay is beyond reasonable control, is supported by Congress's stated purpose of section 523(a)(8): "to forestall students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans."86 Finally, the district court in Brunner expressed its disagreement with other courts that, in connection with a good faith analysis like that described in Johnson, had permitted debtors to discharge their loans upon a showing that the education received with those loans was of little use to them.87

failed the second prong of Brunner because he was able to improve his financial condition but chose not to do so. Id. at 103. "For th[e] debtor to rest his showing of undue hardship on a lack of potential for self-improvement created by his decision to link his financial affairs with his girlfriend's, has no authority in law." Id.

86. Brunner, 46 B.R. at 755 (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 140 n.14 (1973)). The Commission on the Bankruptcy Laws of the United States stated that discharge of educational debt after five years (now seven years), when a showing of undue hardship was no longer required, would be fair because the debtor may be unable to repay the debt due to "factors beyond his reasonable control." H.R. Doc. No. 93-137, at 140 n.16. The court in Brunner reasoned that "[i]f external circumstances were seen as justifying discharge after five years, it is likely that only such circumstances should be permitted to justify discharge prior to that time." Brunner, 46 B.R. at 755.

87. Brunner, 46 B.R. at 755 n.3 (citing Connolly v. Florida Bd. of Regents ex rel. Univ. of No. Fla. (In re Connolly), 29 B.R. 978, 982 (Bankr. D. Fla. 1983); Powelson v. Stewart Sch. of Hairstyling, Inc. (In re Powelson), 25 B.R. 274, 276 (Bankr. D. Neb. 1982); Littell v. Oregon ex rel. State Bd. of Higher Educ. (In re Littell), 6 B.R. 85, 88 (Bankr. D. Or. 1980)). "Consideration of this factor is not only improper, it is antithetical to the spirit of the guaranteed loan program." Id. The court noted that the student loan program grants aid unlike traditional, private lending programs. Id. at 756. The loan program provides loans to students regardless of their financial security or the wisdom of the individual borrower's choice to receive an education, whereas private lenders examine numerous factors before granting a loan, including the borrower's projected ability to repay. Id. The government offers loans at a fixed rate of interest, almost entirely without regard to the creditworthiness of the borrower. Id. As a result, the government often lends money to the worst credit risks—those who could not receive loans through private lending institutions. Id. If courts are to consider the value of the education received when determining whether to discharge educational loans, then the judiciary places the student loan program in a precarious position and unfairly turns the government into "an insurer of educational value." Id. at 755 n.3.

The court further stated that although "[s]ection 523(a)(8) represents a conscious congressional choice to override the normal 'fresh start' goal of bankruptcy," the debtor is aware of a risk that he or she may be unable to make effective use of the education received when he or she borrows from the government and must make the decision "whether the risks of future hardship outweigh the potential benefits of a deferred-payment education." Id. at 756 (citing Johnson v. Edinboro State College, 728 F.2d 163, 164 (3d Cir. 1984)). Such a risk is a consequence a uncreditworthy individual must accept when borrowing from the government, and section 523(a)(8) recognizes that such a borrower must repay his or her debt regardless of subsequent economic circumstances. Id.

89. 999 F.2d 1132 (7th Cir. 1993).

90. Id. at 1134-36. Roberson involved a debtor who had borrowed over $9,000 in order to receive a degree in industrial technology. Id. at 1133. Upon graduation, the debtor worked as an automobile assembler for Chrysler earning approximately $30,000 per year, much more than he could have received in the field of industrial technology. Id. at 1133-34. The debtor's life then fell apart—he was convicted for driving under the influence of alcohol and lost his license, was laid off by Chrysler and was divorced by his wife. Id. at 1134. The debtor was ordered to pay $121.60 per month in child support, and lost his car and house to his former wife. Id. The debtor filed for bankruptcy, reporting $18,357 in assets and over $34,000 in debts. Id. The bankruptcy court applied the Johnson tripartite test (although it did not expressly state that it was applying Johnson) and determined that the educational debt was nondischargeable. Id. at 1134-35. Nevertheless, the court did grant a two-year deferment of the debt to allow the debtor to attempt to recover financially. Id. at 1134-35 & n.2. The bankruptcy court stated that the debtor, although satisfying the "mechanical" and "good faith" prongs of Johnson, had failed the "policy" prong because he would be able to use his numerous skills in the not-too-distant future to better his situation. Id. at n.2. Additionally, the court felt that the debtor's loss of his driver's license was a self-inflicted harm, further supporting a finding of failure of the "policy" prong. Id. The district court reversed and discharged the loans, stating that the bankruptcy court should not have considered the "policy" test after finding that the "mechanical" and "good faith" prongs had been satisfied. Id. For a discussion of the Johnson tripartite test, see supra notes 33-64 and accompanying text.

91. Roberson, 999 F.2d at 1135-36. The Seventh Circuit took issue with the aspect of the "policy" prong that called for an examination of whether the debtor had benefitted financially as a result of the education received with the loans. Id. at 1136. The court stated that because the Brunner test essentially eliminated bankruptcy petitions aimed at avoiding repayment of the debt there was no need for a separate "policy" test. Id.

Congress'[s] decision to increase the availability of higher education through student loans does not necessarily equate to a decision to insure the future success of each student taking advantage of that opportunity. . . . If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow. Hence, we find Johnson's policy test inappropriate and decline to apply it.

Id. at 1136-37. Applying the Brunner test, the court found that the debtor's educational loans were nondischargeable because the debtor had "not indicated his road to recovery [was] obstructed by the type of barrier that would lead us to
believe he will lack the ability to repay for several years."  \textit{Id.} at 1137 (citing Financial Collection Agencies v. Norman (\textit{In re Norman}), 25 B.R. 545, 550 (Bankr. S.D.N.Y. 1982) (involving psychiatric problems that prevented debtor from working); Clay v. Westmar College (\textit{In re Clay}), 12 B.R. 251, 254 (Bankr. N.D. Iowa 1981) (regarding debtor's obligation to fully support numerous dependents); Siebert v. United States Dep't of Health, Educ. & Welfare (\textit{In re Siebert}), 10 B.R. 704, 705 (Bankr. S.D. Ohio 1981) (involving lack of usable skills and limited education of debtor)).

93. \textit{Id.} at 359-61. In \textit{Cheesman}, the debtors were a married couple who had taken loans to attend Middle Tennessee State University. \textit{Id.} at 358. Following graduation, the debtors' net income was $13,720, and the prospects of an increase in their income in the foreseeable future were minimal. \textit{Id.} at 358-59. The debtors only made two payments on each of their loans, and each payment made was for less than the stated amount. \textit{Id.} at 358. The debtors sent their daughter to private school, claiming that public schools were unacceptable because they threatened use of corporal punishment. \textit{Id.} Relatives apparently provided most of the money for the child's tuition. \textit{Id.} The debtors' daughter also received medical treatment for asthma, amounting to $140 in medical fees. \textit{Id.} Further, the debtors owed over $7,000 on a 1988 Chevrolet Nova, worth only approximately $3,000. \textit{Id.} at 359.

The court found no indication that the debtors would be able to make loan payments and maintain a minimum standard of living. \textit{Id.} The debtors' expense chart indicated that they maintained a frugal lifestyle while still incurring a $400 monthly deficit. \textit{Id.} at 359-60. Further, the court determined that there was no indication that the debtors' financial condition would improve in the foreseeable future, based primarily on an examination of the debtors' employment histories. \textit{Id.} at 360. Finally, the court held that the debtors had acted in good faith because they had made payments on the loans more than a year prior to filing for bankruptcy. \textit{Id.}

Although the court ruled that the loans were dischargeable, one circuit judge dissented, stating that the debtors had not satisfied their burden of establishing that their inability to repay their debt would extend for a significant portion of the repayment period. \textit{Id.} at 362 (Guy, J., dissenting). The dissent argued that because the debtors were not ill or elderly, and because they were both college-trained, there had been no demonstration that their adversities would be prolonged for a significant period of time. \textit{Id.} (Guy, J., dissenting). Additionally, the dissent argued that the debtors did not act in good faith because they had only made two payments on each of the loans over a six year period and they had not sought additional deferments before applying for discharge of the debt. \textit{Id.} (Guy, J., dissenting).

Although the Sixth Circuit has not formally adopted the \textit{Brunner} test, lower courts have consistently cited \textit{Cheesman} for the proposition that the Sixth Circuit follows the \textit{Brunner} standard for reviewing undue hardship. Cobb v. University of Toledo (\textit{In re Cobb}), 188 B.R. 22, 23 (Bankr. N.D. Ohio 1995); Hawkins v. Buena Vista College (\textit{In re Hawkins}), 187 B.R. 294, 298 (Bankr. N.D. Iowa 1995); Daugherty v. First Tenn. Bank (\textit{In re Daugherty}), 175 B.R. 953, 958 (Bankr. E.D. Tenn. 1994). Additionally, several courts within the Sixth Circuit had approved of use of the \textit{Brunner} test even before the Sixth Circuit's application of the test in \textit{Cheesman}. See Healey v. Massachusetts Higher Educ. (\textit{In re Healey}), 161 B.R. 389, 399 (E.D. Mich. 1999) (applying \textit{Brunner} standard because it most adequately contemplates undue hardship standard); Bakkum v. Great Lakes Higher Educ. Corp. (\textit{In re Bakkum}), 139 B.R. 680, 682 (Bankr. N.D. Ohio 1992) (same); Connor v. Michigan
Although most of the courts that have applied the *Brunner* standard have found in favor of nondischargeability due to the debtor's inability to satisfy the first or second prongs of the test,94 numerous bankruptcy courts have focused their inquiries on the debtor's failure to satisfy the test's third prong.95 The third prong of *Brunner* measures the debtor's good faith attempt to repay the debt,96 emphasizing that receipt of an education that fails to provide economic rewards does not discharge the obliga-

94. See, e.g., Virginia State Educ. Assistance Auth. v. Dillon, 189 B.R. 382, 385-86 (W.D. Va. 1995) (finding that educational debt was nondischargeable based on failure to show either current or future inability to repay loan, causing court not even to consider "good faith" prong of *Brunner* test); *Hawkins*, 187 B.R. at 299-300 (stating that educational loan was nondischargeable because debtor had failed to establish proof of continued financial inability to repay loan for significant period of repayment period); McLeod v. Diversified Collection Serv. (*In re McLeod*), 176 B.R. 455, 457 (Bankr. N.D. Ohio 1994) (finding that debtor failed to show current inability to maintain minimum standard of living while repaying loan); Ipsen v. Higher Educ. Assistance Found. (*In re Ipsen*), 149 B.R. 583, 585-86 (Bankr. W.D. Mo. 1992) (holding that debtor had been unable to satisfy either of first two prongs of *Brunner* test); Cadle Co. v. Webb (*In re Webb*), 132 B.R. 199, 202 (Bankr. M.D. Fla. 1991) (holding that debtor had not demonstrated that current inability to repay debt would extend into foreseeable future).

95. See, e.g., Coveney v. Costep Servicing Agent (*In re Coveney*), 192 B.R. 140, 144 (Bankr. W.D. Tex. 1996) (finding that debtor who makes conscious choice to live with and care for ill mother rather than seek employment in other cities fails "good faith" prong because moral obligation to family member who is not legal dependent does not take priority over legal obligation to repay debt); Walcott v. USA Funds, Inc. (*In re Walcott*), 185 B.R. 721, 724-25 (Bankr. E.D.N.C. 1995) (noting that debtor's limited scope of search for employment, including unwillingness to relocate to region with greater job opportunities, may be considered evidence of bad faith); *Doughtery*, 175 B.R. at 959-60 (holding that debtor's failure to make any effort to repay loans after obtaining deferments for six years was evidence of bad faith); *Healey*, 161 B.R. at 397 (holding that debtor failed to act in good faith when attempting to discharge debt after making only two payments without attempts to negotiate new payment schedule with lender); Malloy v. United States (*In re Malloy*), 144 B.R. 38, 42 (Bankr. E.D. Va. 1992) (noting that lack of effort to repay debt may represent failure to act in good faith); *Connor*, 83 B.R. at 444 (holding that debtor failed to act in good faith when she made no effort to repay loans during time when she was gainfully employed). In most of these cases, the courts have actually conducted an inquiry that combines the good faith issue with the first prong of *Brunner* (dealing with a debtor's current inability to repay the student loans), thereby asking whether the debtor acted in good faith to minimize expenses and budget his or her monthly income. See, e.g., *Dillon*, 189 B.R. at 386 (holding that debtors' expenses for cable television and furniture rental prevented debtors from satisfying first prong of *Brunner* standard); *Healey*, 161 B.R. at 394 (stating that as part of first prong of *Brunner*, debtor must demonstrate that he or she actively sought to minimize expenses and maximize income).

96. See Maulin v. Sallie Mae (*In re Maulin*), 190 B.R. 153, 156 (Bankr. W.D.N.Y. 1995) ("Good faith is a moving target that must be tested in light of the particular circumstances of the party under review.").
tion to repay one’s educational debt. Ultimately, debtors fail to establish undue hardship because they have not taken all necessary steps, when budgeting their resources, to make good faith efforts to repay their debt.

Many debtors have had their petitions for discharge denied because they have neither attempted to make a single payment to the creditor nor contacted the creditor about creating a modified payment plan. Other debtors fail in spite of a claimed monthly deficit because they “somehow” find a way to pay for “luxury” items such as cable television or numerous long distance telephone calls. Finally, the Brunner test has frequently


98. Compare Stebbins-Hopf v. Texas Guaranteed Student Loan Corp. (In re Stebbins-Hopf), 176 B.R. 784, 788 (Bankr. W.D. Tex. 1994) (finding that debtor failed to act in good faith when she used funds available to make repayment to support family members who were not legally her dependents), and Healey, 161 B.R. at 997 (finding that debtor spent time and money looking for lawyer to represent her in bankruptcy proceeding rather than using time and money to make payments and/or renegotiate payment plan with lender), with Correll v. Union Nat’l Bank of Pittsburgh (In re Correll), 105 B.R. 302, 310 (Bankr. W.D. Pa. 1989) (applying Johnson test and finding that $648 annual home insurance payment for house costing $15,000 was unreasonably large), and Conner v. Illinois State Scholarship Comm’n (In re Conner), 89 B.R. 744, 749 (Bankr. N.D. Ill. 1988) (holding that debtor imposed hardship on herself by sending children to private colleges rather than less expensive state universities).

99. E.g., Cobb v. University of Toledo (In re Cobb), 188 B.R. 22, 24 (Bankr. N.D. Ohio 1995) (failing to make effort to repay); Garrett v. New Hampshire Higher Educ. Assistance Found. (In re Garrett), 180 B.R. 358, 364 (Bankr. D.N.H. 1995) (showing lack of good faith where debtor made no payments and was unaware of payment plans submitted by lender); McLeod, 176 B.R. at 458 (failing “good faith” test where debtor was unable to testify clearly regarding repayment efforts); Daugherty, 175 B.R. at 959 (finding lack of effort to repay where debtor obtained deferments while being gainfully employed as result of education she received with loans); Healey, 161 B.R. at 997 (finding absence of good faith where debtor spent time searching for lawyer to represent her in discharge proceedings rather than spending time attempting to find way to repay debt). When examining whether the debtor has made a good faith repayment effort, the court’s characterization of that effort must reflect, among other things, the environment in which the debtor’s objective conduct occurred. Maulin, 190 B.R. at 156. The Maulin court stated:

In those instances in which the debtor cannot maintain a minimal standard of living even without payment of student loans, the demonstration of good faith does not necessarily command a history of payment. It does require a history of effort to achieve repayment, such as when a borrower diligently uses a deferment period to attempt the reorganization of her financial affairs. On the other hand, for a previously solvent debtor, good faith may require a history of substantial payment. . . . In all cases, the debtor must come forward with evidence of efforts to achieve the same result, that of payment, but through means that reflect a sense of good faith under the circumstances of each particular obligor.

Id.

100. Compare Dillon, 189 B.R. at 385-86 (W.D. Va. 1995) (denying discharge of educational debt and finding that debtor incurred $35 per month cable television expense that could have been applied toward repayment of debt), Walcott, 185 B.R.
been used to dismiss debtors’ discharge petitions in cases where the debtor is young, healthy, fresh out of college and has no dependents to support.\(^\text{101}\)

Consequently, many courts view the *Brunner* test as a strict standard that typically results in the debtor being required to repay his or her educational debt even following the close of the debtor’s Chapter 7 case.\(^\text{102}\)

at 725 (suggesting that money spent on long distance calls could have been used to make partial payment to lender, in combination with attempt to work with lender to renegotiate payment schedule), Wardlow v. Great Lakes Higher Educ. Corp. (In re Wardlow), 167 B.R. 148, 151 (Bankr. W.D. Mo. 1993) (finding that debtors lived above minimal standard of living, and that discharge of $25,000 of debt was, therefore, impermissible where debtors’ monthly expenses included $100 for telephone usage and $35 for cable television), Bakkum v. Great Lakes Higher Educ. Corp. (In re Bakkum), 199 B.R. 680, 683 (Bankr. N.D. Ohio 1993) (finding that sharp increase in payments for food and rent after filing of bankruptcy petition signaled lack of good faith), and Perkins v. Vermont Student Assistance Corp. (In re Perkins), 11 B.R. 160, 161 (Bankr. D. Vt. 1980) (finding that purchase of new car was self-imposed hardship that evidenced lack of good faith), with Zibura v. Academic Fin. Servs. Ass’n (In re Zibura), 128 B.R. 129, 133 (Bankr. W.D. Pa. 1991) (applying *Johnson* test and finding that good faith had not been established by debtor who maintained two residences, made $60 worth of long distance phone calls per month, had cable television, spent $50 per month on books and recreation and paid close relatives $40 per month in relocation expenses). *E.g.*, McLeod v. AFSA Data Corp. (In re McLeod), 197 B.R. 624, 626 (Bankr. N.D. Ohio 1996) (noting that debtor incurred monthly expenses for cigarettes, long distance telephone calls, cable television and other entertainment exceeding $150); Kraft v. New York State Higher Educ. Servs. Corp. (In re Kraft), 161 B.R. 82, 83 (Bankr. W.D.N.Y. 1993) (finding that discharge was not justified and noting that debtor spent $80 per month on her “vices”—cable television and cigarettes).

101. *E.g.*, Walcott, 185 B.R. at 725-25 (suggesting that young college graduate relocate to cold weather city where she had family and where jobs were more plentiful); Kraft, 161 B.R. at 83, 86 (holding that discharge had been attempted prematurely by 38 year-old recent graduate with no actual dependents). In such cases, the court typically requires the debtor to pick up and move to a location where jobs are more plentiful, regardless of emotional ties the debtor may have to his or her current home. *See, e.g.*, Walcott, 185 B.R. at 725-25 (stating that 28 year-old debtor could leave rural North Carolina where jobs are sparse and move to Indianapolis where she had family and where jobs were more plentiful). The *Walcott* court dismissed the debtor’s complaints that Indianapolis was too cold and that she was not interested in pursuing employment which would not turn into a job that paid at least $12,000 per year. *Id.* The court ruled that because the debtor had no dependents in North Carolina for whom to provide, there was no reason why she could not explore employment opportunities in Indianapolis or in other counties within North Carolina where jobs in her chosen field were more plentiful. *Id.* at 724-25; see also Kraft, 161 B.R. at 86 (stating that because debtor had only been out of school for year and one-half, she must make more extensive search for employment within her chosen field, even though such search may have to include examination of opportunities in other cities).

102. See Matter of Roberson, 999 F.2d 1192, 1196 (7th Cir. 1993) (stating that stringent requirements imposed by *Brunner* test weed out petitions aimed at avoiding responsibility to repay); Dillon, 189 B.R. at 384 (stating that *Brunner* test involves three prongs that must be satisfied in order for discharge to be justified); Healey, 161 B.R. at 993 (same); see also *Brunner*, 46 B.R. at 756 (stating that effect of test it promulgated was to make discharge of educational loans extremely difficult); Kosel, *supra* note 90, at 459 ("[S]urvey of the case law indicates that the
As the district court in Brunner recognized, because the government provides loans to students almost completely without regard for creditworthiness, the government loan program can survive only if "it strips [poor credit risks] of the refuge of bankruptcy in all but extreme circumstances."

When Marjorie Jo Faish appeared before the Third Circuit, the court had yet to discuss the validity of any of the aforementioned tests. With these various tests and goals in mind, then, the Third Circuit set out to definitively address the proper application of section 523(a)(8)(B) in *In re Faish*.

III. THE THIRD CIRCUIT FOLLOWS SUIT ANDadopts THE Brunner TEST: A DISCUSSION OF IN RE FAISH

Although the Johnson and Bryant tests originated within the Third Circuit, the circuit court itself had never officially adopted a legal standard for its courts to apply when considering whether the facts of a Chapter 7 case gave rise to "undue hardship" under section 523(a)(8)(B). In Faish, the Third Circuit sought to end the confusion within the circuit caused by the multiple tests that bankruptcy courts in the circuit were applying and adopted the standard set forth by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.* Based on the facts of the case before it, the Third Circuit affirmed the district court's decision that the debtor's educational loan debt should not be discharged in whole or in part.

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103. *Brunner*, 46 B.R. at 756 (citing Johnson v. Edinboro State College, 728 F.2d 163, 164 (3d Cir. 1984) (stating that promulgation of section 523(a)(8) represented congressional intent to deviate from typical "fresh start" goal of bankruptcy)).

104. See Pennsylvania Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 299-300 & n.1 (3d Cir. 1995) (recognizing that it had to adopt standard for circuit because of considerable confusion on part of bankruptcy courts regarding which standard to apply).

105. *Id.* at 300. For an explanation of the Third Circuit's reasons for adopting the *Brunner* standard, see *infra* notes 119-38 and accompanying text.

106. *Faish*, 72 F.3d at 300. Although the Third Circuit agreed with the district court that the debt was nondischargeable, it disagreed with the standard the district court had applied to reach such a result. *Id.* For a discussion of the district court's application of the Johnson test and the Third Circuit's rejection of Johnson, see *infra* notes 116-38 and accompanying text.
In *Faish*, the debtor, Marjorie Jo Faish, was an unmarried thirty year-old woman who supported her eleven year-old son.\textsuperscript{107} In 1989, Faish had received a Master's Degree in Public Health and Community Health Services Administration from the University of Pittsburgh, incurring debt in excess of $31,000.\textsuperscript{108} Although Faish suffered from Crohn's disease and back problems, she had a job working for the Commonwealth in which she earned approximately $27,000 per year.\textsuperscript{109} On September 27, 1993, nearly two years after she was required to begin repayment of her loans, Faish filed a Chapter 7 bankruptcy petition and a complaint to determine whether her student loans were dischargeable.\textsuperscript{110} As of the date of her petition, Faish had repaid over $4,600 of her loan, but still owed in excess of $32,000.\textsuperscript{111}

In evaluating Faish's case, the Bankruptcy Court for the Middle District of Pennsylvania adopted the *Johnson* test for undue hardship.\textsuperscript{112} The court applied the first prong of the test, the "mechanical" prong and determined that "Faish ha[d] failed to establish a lack of financial ability to repay for the foreseeable future and therefore fail[ed] the 'mechanical' prong of the *Johnson* test."\textsuperscript{113} The bankruptcy court, however, declined to follow *Johnson*'s express requirement that discharge of an educational loan must be denied if the "mechanical" prong is not satisfied, and instead conducted inquiries under *Johnson*'s "good faith" and "policy" tests.\textsuperscript{114} Although Faish failed the *Johnson* test, the bankruptcy court determined

\textsuperscript{107} *Faish*, 72 F.3d at 300. The debtor received no support from the child's father. *Id.* She was highly concerned about the quality of the neighborhood in which she and her son lived and was attempting to save money so that she could move into a better apartment in a better neighborhood and buy a car. *Id.* At the time of the litigation, the debtor had no car and commuted to work by bus. *Id.*

\textsuperscript{108} *Id.* Under the terms of the loan agreement, the debtor was scheduled to begin repayment of her educational debt on October 1, 1991. *Id.*

\textsuperscript{109} *Id.* The debtor worked in the Commonwealth's Department of Public Welfare as a budget analyst. *Id.* The debtor had attempted to obtain a better paying job, but had been unsuccessful in such pursuit. *Id.* Although the bankruptcy court recognized the significance of the debtor's physical ailments, it found that her health problems did not interfere with her ability to work. *Id.* (citing Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), No. 93-01686, slip op. at 5 (Bankr. M.D. Pa. July 12, 1994)).

\textsuperscript{110} *Id.*

\textsuperscript{111} *Id.* (citing Faish, No. 93-01686, slip op. at 2).

\textsuperscript{112} *Faish*, No. 93-01686, slip op. at 4.

\textsuperscript{113} *Id.* at 5.

\textsuperscript{114} *Faish*, 72 F.3d at 300. Applying the "good faith" prong of *Johnson*, the bankruptcy court held that Faish had "established a sufficient degree of good faith." *Faish*, No. 93-01686, slip op. at 6. The bankruptcy court also determined that Faish had failed the "policy" test because the dominant reason for her filing of the bankruptcy petition was to avoid her obligation to repay the loans. *Id.* As a result, Faish had essentially failed the *Johnson* test, and discharge should have been denied. *Faish*, 72 F.3d at 301.
that it was permitted to weigh equitable considerations and held that Faish should be relieved of approximately half of her outstanding debt.\(^\text{115}\)

The United States District Court for the Middle District of Pennsylvania reversed the bankruptcy court, stating that it was obliged to “abide by Johnson’s general framework.”\(^\text{116}\) The district court, in dictum, recognized that the bankruptcy court might be permitted to expand the scope of Johnson, but only where the Johnson test fails to take into account situations in which “the circumstances necessary to justify discharge [are] unusual, and the hardship faced in the event of full repayment [is] substantial.”\(^\text{117}\) Because Faish did not establish such circumstances, the

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115. *Faish*, 72 F.3d at 301. The bankruptcy court stated that in light of the decision of the Bankruptcy Court for the Northern District of Ohio in *Woyame v. Career Educ. & Mgmt. (In re Woyame)*, 161 B.R. 198 (Bankr. N.D. Ohio 1993), bankruptcy courts had some amount of discretion to discharge portions of educational debt even where the individual prongs of Johnson had not been satisfied. *Faish*, No. 93-01686, slip op. at 7. For a discussion of the bankruptcy court’s holding in *Woyame*, see supra note 59. Even though the bankruptcy court had determined that Faish’s current job and income, as well as future prospects, were good, it ruled that the equities of the case justified partial discharge. *Faish*, 72 F.3d at 301 & n.2 (citing *Faish*, No. 93-01686, slip op. at 8). The bankruptcy court ordered partial discharge even though Faish’s monthly payments of approximately $300 to her lender would not place Faish and her son below the subsistence level. *Id.* at 301 n.2. The bankruptcy court stated that it was influenced by Faish’s desire to save money so that she could provide a better life for her child. *Faish*, No. 93-01686, slip op. at 7-8.

Although the Third Circuit rejected the bankruptcy court’s decision to discharge a portion of Faish’s debt, the concepts of partial discharge and revision of loan terms have received a legitimate amount of approval from bankruptcy courts across the country. *See Collins*, supra note 1, at 749-53 & nn.139-71 (discussing ideas of partial discharge, revision of loan terms and describing ways in which bankruptcy courts have implemented such restructuring plans). Although the topic of partial discharge as an alternative/middle ground was not discussed by the Third Circuit and is beyond the scope of this Casebrief, one should recognize that courts have considered it to be a valid option. *See id.* at 749 (stating that numerous courts have decided to order partial discharge or revision of payment terms where it has been impossible to apply “rigid, all-or-nothing” tests in “less than clear-cut cases”). In his Note, Collins also discusses the importance of partial discharge and restructuring of loan repayments in an environment where rigid undue hardship tests may not result in a fair adjudication to the debtor and/or the lender. *Id.* at 753-57.

116. Pennsylvania Higher Educ. Assistance Agency v. Faish (*In re Faish*), No. 94-1353, slip op. at 4 (M.D. Pa. Feb. 21, 1995). The district court explained that although it would respect Johnson’s general principles, it “would not rigidly confine itself to Johnson’s tripartite analysis,” but rather, would adhere to Johnson’s “general framework.” *Id.* The district court found that the bankruptcy judge’s consideration of equitable factors beyond the framework of the Johnson test, while permissible in certain circumstances, failed to present evidence of the magnitude necessary to warrant partial discharge of educational debt. *Id.* at 7.

117. *Id.* The district court stated that a bankruptcy court may go outside of the Johnson framework where analysis under Johnson “fails to capture scenarios requiring some form of student debt relief to alleviate undue hardship.” *Id.*
district court ruled that her educational debt was entirely nondischargeable.\footnote{118} On appeal, the Third Circuit first analyzed Congress's purpose for enacting section 523(a)(8)(B) in order to ascertain how to define "undue hardship."\footnote{119} Looking to an earlier Third Circuit case, which examined whether non-student obligors could have educational loans discharged pursuant to section 523(a)(8)(B),\footnote{120} the court in \textit{Faish} determined that section 523(a)(8)(B) represented Congress's intent to "'rescue[e] the student loan program from fiscal doom and prevent[ ] abuse of the bankruptcy process by undeserving debtors.'"\footnote{121} As a result, the Third Circuit determined that "Congress clearly intended that most educational debt still due within seven years of graduation should be nondischargeable."\footnote{122}

The court in \textit{Faish} next examined the three most prominent "undue hardship" tests (\textit{Johnson}, \textit{Bryant} and \textit{Brunner}), as it sought to adopt a test that would permit litigants within the circuit to present evidence effectively to support or defeat a finding of undue hardship.\footnote{123}

The court first examined the tripartite \textit{Johnson} test and, like many bankruptcy courts that had previously rejected \textit{Johnson}, found the "tripartite analysis . . . to be both unnecessarily complicated and unduly cumbersome."\footnote{124} Though the Third Circuit recognized that the \textit{Johnson} test, when applied properly, would serve Congress's apparent objectives, it

\begin{footnotesize}
\begin{enumerate}
\item[118] \textit{Id.} at 7-8. Faish's loans were nondischargeable because of her favorable prospects for future employment. \textit{Id.}
\item[119] \textit{Faish}, 72 F.3d at 301-02. For a discussion of the legislative history to section 523(a)(8)(B), see \textit{supra} notes 21-28 and accompanying text, and \textit{infra} notes 151-54 and accompanying text.
\item[120] \textit{Pelkowski} v. Ohio Student Loan Comm'n (\textit{In re Pelkowski}), 990 F.2d 737 (3d Cir. 1993).
\item[121] \textit{Faish}, 72 F.3d at 302 (quoting \textit{Pelkowski}, 990 F.2d at 743). The court in \textit{Pelkowski} determined that Congress, in enacting section 523(a)(8)(B), intended to limit the ability to discharge educational debt (regardless of who signed and/or co-signed the loan). \textit{Pelkowski}, 990 F.2d at 745. Therefore, the courts, in order to preserve Congress's intent, could not construe section 523(a)(8)(B) any more narrowly than that allowed by the language and legislative history of the statute. \textit{Id.}
\item[122] \textit{Faish}, 72 F.3d at 302 (quoting Dunham & Buch, \textit{supra} note 1, at 702).
\item[123] \textit{Id.} at 302-05. The court noted that while numerous bankruptcy courts had applied a variety of undue hardship tests, no test had been so widely accepted that it "authoritatively guides or governs the undue hardship determination." \textit{Id.} at 302 (quoting Collins, \textit{supra} note 1, at 744). This lack of a clear uniform standard leaves a litigant confused as to which test a court will apply to the facts of his or her individual case. \textit{Id.} at 302-03 (citing Collins, \textit{supra} note 1, at 747). Unless a jurisdiction adopts a test to be applied uniformly throughout the circuit, effective presentation of evidence regarding undue hardship is greatly hampered. \textit{Id.} Based on its reading of Collins's Note, the Third Circuit set out to definitively adopt an undue hardship standard for application by all courts within the circuit. \textit{Id.} at 302-05. For a discussion regarding why the Third Circuit chose to adopt the \textit{Brunner} standard, see \textit{infra} notes 124-38 and accompanying text.
\item[124] \textit{Faish}, 72 F.3d at 303.
\end{enumerate}
\end{footnotesize}
stated that the tripartite analysis of Johnson improperly restricted a bankruptcy court's flexibility regarding considerations of equity.\textsuperscript{125}

Next, the court examined the Bryant test and refused to accept it on a number of counts.\textsuperscript{126} First, the Third Circuit noted that the Bryant test would not closely scrutinize a debtor's expenditures to determine whether the debtor was abusing the loan program.\textsuperscript{127} Additionally, the Third Circuit found problematic the bankruptcy court's statement in Bryant that the debtor's motive for filing for bankruptcy should not be considered during undue hardship analysis because "avoiding the consequences of debts is normally the reason for filing for bankruptcy."\textsuperscript{128} The Third Circuit noted instead that the debtor's motive for filing a bankruptcy petition was highly relevant "because one of the reasons that Congress enacted section 523(a)(8)(B) was in response to 'reports of students discharging student loan debts after graduation and subsequently accepting high-paying jobs.'"\textsuperscript{129}

Finally, the Third Circuit analyzed the Brunner test and concluded that of the three tests considered, it was "the most consistent with the scheme that Congress established in 1978."\textsuperscript{130} The court found that the Brunner test best reflected Congress's desire to preserve the educational loan program's integrity by placing a significant burden on a debtor seeking to have his or her educational loan obligations discharged.\textsuperscript{131} Thus,

\textsuperscript{125} Id. at 303-04. The court stated that the Johnson test, if properly applied, would work to deny most petitions for discharge after application of the "mechanical" test. Id. at 303. By denying discharge after analysis under the "mechanical" prong, courts would be serving the goal of protecting the integrity of the student loan program. Id. (citing Pelkowski, 990 F.2d at 743-44). Additionally, the "policy" and "good faith" prongs of Johnson may provide some level of protection against abuse of the bankruptcy process. Id.

\textsuperscript{126} Id. at 304.

\textsuperscript{127} Id. Debtors often find themselves in bankruptcy court precisely because "subjective value judgments" are often representative of their inability to adequately budget their income. Id. Bankruptcy courts should be permitted to consider these value judgments when ruling on the propriety of discharge of educational loans. Id.

\textsuperscript{128} Id. (quoting Bryant v. Pennsylvania Higher Educ. Assistance Agency (In re Bryant), 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987)).

\textsuperscript{129} Id. (quoting Wiese, supra note 2, at 446).

\textsuperscript{130} Id. at 305. The Third Circuit determined that it should adopt the Brunner test based on an analysis of the Seventh Circuit's holding in Matter of Roberson, 999 F.2d 1132 (7th Cir. 1993). Id. Not only did the Third Circuit agree with the Roberson court that the Brunner test most closely comport with the goals of preserving the student loan program and preventing abuse of the bankruptcy process, the Third Circuit agreed that the Johnson test was entirely unworkable. Id. The Third Circuit further stated that Johnson is unnecessarily cumbersome because its multiple tests have masked the law. Id. For a discussion of the Seventh Circuit's holding in Roberson, see supra notes 89-91 and accompanying text.

\textsuperscript{131} Faish, 72 F.3d at 305-06. The Faish court also discussed the particular advantages associated with the Brunner test. Id. The court concluded that the Brunner test is most effective because it requires a debtor who has received the benefits of an education to establish that repayment would cause more than mere personal and financial sacrifices. Id. Further, the Brunner test is preferable be-
the Third Circuit determined that “the Brunner ‘undue hardship’ test must now be applied by bankruptcy courts within the Third Circuit.”132

Following its decision to adopt the Brunner test, the Third Circuit applied the test to the facts of the case before it.133 The court ruled that when applying the Brunner test it could not consider equitable concerns or other factors “not contemplated by the Brunner framework” in order to support the dischargeability of educational debt.134

The Third Circuit found that under Brunner, Faish’s educational debt was entirely nondischargeable.135 Applying the first prong of the Brunner test, the court found that Faish had not established that she and her son would currently be unable to maintain a minimal standard of living if she had to repay her loans.136 Because Faish failed the first prong, the court stated that it did not need to examine the second or third elements of the

cause it does not entail the faulty Johnson “policy” test nor does it involve Bryant’s deference to the spending habits of debtors. Id. at 306. Finally, the three-step Brunner approach is quite easy to follow and apply. Id.

132. Id.

133. Id. at 306-07. The court ruled that “[a]ll three elements of the test must be satisfied individually before a discharge can be granted.” Id. at 306 (citing Roberson, 999 F.2d at 1195). The court stated that it did not have to remand the case for a determination as to whether Faish had established that repayment would impose an undue hardship on her because sufficient facts existed in the record from the previous dispositions of the case. Id. at 306 n.4.

134. Id. (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)). “Whatever equitable powers remain in the bankruptcy courts can only be exercised within the confines of the Bankruptcy Code.” Id.

135. Id. at 306-07.

136. Id. at 306. The bankruptcy court had found that repayment, although significantly affecting Faish and her son, would not place Faish below the subsistence level. Id. (citing Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), No. 93-01686, slip op. at 5 (Bankr. M.D. Pa. July 12, 1994)). The first prong of the Brunner test requires the debtor to show more than just tight finances. Id. Faish had failed to present evidence to show that due to her income and expenses she would fall below a minimal standard of living if forced to repay her loans. Id. Faish had a steady job and made $27,000 per year. Id.

The Third Circuit, responding to Faish’s claim that discharge should be granted because she had been unable to find a job in her chosen field, emphasized its holding by comparing Faish’s situation with that faced by the debtor in Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 831 F.2d 395 (2d Cir. 1987). Faish, 72 F.3d at 306-07. The Third Circuit stated that the financial hardship faced by the debtor in Brunner was much more serious than that faced by Faish. Id. at 307. Because the Second Circuit, in Brunner, had determined that discharge of the debtor’s student loans was inappropriate, Faish’s debt would have to be nondischargeable. Id. For a discussion of the Second Circuit’s holding in Brunner and how other courts have applied the Brunner standard, see supra notes 79-103 and accompanying text.

The court determined that Faish could overcome her inability to repay the debt simply by engaging in a serious plan of short-term financial budgeting. Faish, 72 F.3d at 307; see also McLeod v. AFSA Data Corp. (In re McLeod), 197 B.R. 624, 628 (Bankr. N.D. Ohio 1996) (citing Faish with approval and stating that debtor who earned $29,094.52 per year did not demonstrate inability to maintain minimal standard of living even though she anticipated five percent pay reduction in near future).
test—Faish's entire educational debt was nondischargeable. 137 Yet, the court attempted to bolster its holding by conducting a good faith analysis—it emphasized that the facts of the case called for a finding of nondischargeability because Faish wanted to discharge her debt in order to "free up" money to buy a new car and move into a better apartment. 138

IV. POTENTIAL RAMIFICATIONS OF THE THIRD CIRCUIT'S HOLDING IN IN RE FAISH

The Third Circuit's decision to adopt the Brunner test will generally persuade courts within the circuit to find that educational loans are nondischargeable. 139 The results of prior cases in which courts have applied the Brunner test reveal that the test is a strenuous one that is rarely overcome by the debtor. 140 If Congress intended, in enacting section

137. Faish, 72 F.3d at 306. With Brunner's requirement that all three prongs be satisfied in order to permit discharge, the failure to satisfy the first prong of the test warrants an abrupt end to judicial scrutiny of the discharge petition. See Roberson, 999 F.2d at 1135 (stating that Brunner requires all prongs of test to be met before ordering discharge).

138. Faish, 72 F.3d at 307.

139. See Dunham & Buch, supra note 1, at 702 & n.27 (stating that regardless of test used, most courts find that debtor has not established undue hardship, and listing Brunner as support for such statement).

523(a)(8)(B), to make dischargeability of educational debt difficult, then the Brunner test clearly effectuates that goal.141

The Brunner test presents an overwhelming obstacle to dischargeability primarily because of its stringent requirement that the debtor satisfy all three prongs of the test.142 Typically, debtors will not be able to satisfy Brunner's first prong: that their current financial conditions will place them below a minimal standard of living if forced to repay the debt.143 Even if a debtor is capable of satisfying the first prong of Brunner, he or she is likely to have difficulty satisfying the second prong of the test.144 The requirement that the debtor establish extraordinary future search by debtor, revealed present inability to maintain minimum standard of living if forced to repay debt).

141. See Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 755-56 (S.D.N.Y. 1985) (stating that test created was aimed at meeting congressional goals of preserving student loan program and preventing abuse of bankruptcy process), aff'd, 831 F.2d 395 (2d Cir. 1987) (per curiam); see also Lohman v. Connecticut Student Loan Found. (In re Lohman), 79 B.R. 576, 581 (Bankr. D. Vt. 1987) (stating that Congress's goal regarding section 523(a)(8)(B) was to permit discharge of educational debt only in rare cases where debtor had established existence of exceptional circumstances).

142. Roberson, 999 F.2d at 1135.

143. See, e.g., Dillon, 189 B.R. at 385 (holding that debtor had not satisfied first prong of Brunner because debtor had stated she could make monthly payments on her loans of $50 to $75); Daugherty v. First Tenn. Bank (In re Daugherty), 175 B.R. 953, 959 (Bankr. E.D. Tenn. 1994) (finding that record did not support debtor's claim that she was unable to work because of health problems); Sands v. United Student Aid Funds, Inc. (In re Sands), 166 B.R. 299, 309-10 (Bankr. W.D. Mich. 1994) (holding that debtor failed to show that he had maximized his financial resources); Healey, 161 B.R. at 394-95 (same); Ipsen v. Higher Educ. Assistance Found. (In re Ipsen), 149 B.R. 583, 585-86 (Bankr. W.D. Mo. 1992) (holding that debtor failed first prong of Brunner because husband provided her housing, her mother paid her car loan and her job provided sufficient income to require debtor to repay her student loans).

144. Numerous cases reveal the difficulties debtors face when attempting to establish that their financial situation in the future will be poor enough to warrant discharge in the present. See, e.g., Roberson, 999 F.2d at 1137 (stating that debtor failed second prong of Brunner because he possessed skills necessary to improve his financial condition in foreseeable future and because most of his current financial problems stemmed from self-imposed hardship); Hawkins, 187 B.R. at 300 (holding that prospects for debtor were good because she was intelligent, in good health, and because her youngest child was nearly old enough to support himself); Wadcott, 185 B.R. at 725 (finding that although repayment may currently impose hardship on debtor, inability to repay was not likely to extend for substantial portion of repayment period because debtor had potential employment opportunities located in other areas of country); Stedins-Hopf, 176 B.R. at 787-88 (holding that debtor's health problems did not prevent her from future employment, raises and promotions). Further, some courts have stated that the debtor failed the second prong of Brunner because his or her financial condition might improve in the foreseeable future because the debtor's child or children would soon reach the age of majority. See McLeod v. AFSA Data Corp. (In re McLeod), 197 B.R. 624, 629 (Bankr. N.D. Ohio 1996) (stating that debtor failed second prong of Brunner in part because her obligation to care for her son would terminate in 1999); Simons v. Higher Educ. Assistance Found. (In re Simons), 119 B.R. 589, 593 (Bankr. S.D. Ohio 1990) (finding debtors' circumstances likely to improve in foreseeable future...
circumstances which will inhibit repayment of the loan for years to come actually forces the debtor to look into a crystal ball and envision what is often an uncertain future. Yet, because the burden is on the debtor to firmly establish continuing financial hardship, the Brunner test will more often than not result in a court ruling in favor of nondischargeability of educational debt.145

Although the Brunner test is harsh on debtors, its promulgation and adoption by the Third Circuit are understandable.146 The tests developed prior to Brunner provided considerable leeway for debtors to escape an obligation of which they were fully aware when they applied for their loans.147 Debtors receive no guarantees that an education paid for in part

because their 16 year-old son was close to age of majority); Lohman, 79 B.R. at 584 (holding that debtor's obligation to support 18 year-old child did not warrant finding of undue hardship where debtor failed to establish that obligation would continue beyond high school graduation).

Nevertheless, it is possible for a debtor to satisfy the second prong of the Brunner test. See Roberson, 999 F.2d at 1187 (citing Norman v. Financial Collection Agencies (In re Norman), 25 B.R. 545, 550 (Bankr. S.D. Cal. 1982) (permitting discharge of debt where psychiatric problems prevent debtor from working); Clay v. Westmar College (In re Clay), 12 B.R. 251, 254 (Bankr. N.D. Iowa 1981) (allowing discharge where debtor had numerous dependents to fully support); Siebert v. United States Gov't Dep't of Health, Educ. & Welfare (In re Siebert), 10 B.R. 704, 705 (Bankr. S.D. Ohio 1981) (discharging debt where debtor has few usable skills and severely limited education)); see also Coveney v. Costep Servicing Agent (In re Coveney), 192 B.R. 140, 143 n.3 (Bankr. W.D. Tex. 1996) ("Cases where the debtor met the second prong of the Brunner test exhibited a combination of low income and exceptional circumstances so severe that the debtor would not have been able to repay the loans."). For a discussion of the second prong of Brunner, see supra note 85 and accompanying text.

145. For a discussion of the cases in which courts found that a debtor had not satisfied the second prong of the Brunner test, see supra note 144 and accompanying text. One court, however, determined that a debtor had satisfied the second prong of Brunner by examining the debtor's job history and finding that an inability to repay the debt would persist well into the future. See Raimondo v. New York State Higher Educ. Servs. Corp. (In re Raimondo), 183 B.R. 677, 679 (Bankr. W.D.N.Y. 1999) (permitting partial discharge of educational debt even though unemployed debtor presented no special circumstances indicating that unemployment would persist through repayment period because evidence indicated that based on his last job, debtor would not earn income in excess of $18,000 per year during term of repayment period).

146. See Michele S. Greif, Comment, Bankruptcy—Dischargeability—For a Student-Loan Debt to be Discharged Pursuant to the "Undue Hardship" Exception in the Bankruptcy Code, a Grievous Irrevocable Financial Situation Which Placed the Debtor Near or Below the Poverty Level, Must Exist Throughout Most of the Repayment Period—Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 26 SETON HALL L. REV. 949, 955 (1996) ("The standard adopted by the Third Circuit in Faish demonstrates a reasonable and equitable approach to evaluating whether a student loan debt is dischargeable pursuant to the 'undue hardship' exception in the Bankruptcy Code."). For a discussion of the Third Circuit's reasoning for adopting the Brunner test, see supra notes 119-38 and accompanying text.

147. See Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 792, 754-56 (S.D.N.Y. 1985) (describing other tests used by bankruptcy courts to justify discharge of educational debt), aff'd, 831 F.2d 395 (2d Cir. 1987) (per curiam). For a discussion of the holding in Brunner, see supra notes 81-87 and
or in full by government-backed loans will result in immediate financial stability, a fact of which borrowers are aware when they choose to borrow. To permit borrowers/debtors essentially to "have their cake and eat it too" without having to overcome a stringent burden, would lead to the ultimate and speedy bankruptcy of the government-backed student loan program. Congress has a legitimate interest in ensuring that this does not occur, and the courts have recognized their role in promoting the continued existence of an institution that benefits thousands of students each year.

By adopting the Brunner test, the Third Circuit has taken the necessary step to further the public policy originally recognized by the drafters of the Bankruptcy Reform Act of 1978—that the student loan program must not be abused if it is to continue to exist and aid students in need. Although the legislative history to section 523(a)(8) (B) is not dispositive,

accompanying text. For a discussion of the other tests applied by bankruptcy courts across the country, including the Johnson and Bryant tests, see supra notes 33-78 and accompanying text.

148. Brunner, 46 B.R. at 756; see Greif, supra note 146, at 955 ("A student loan is a voluntary purchase of debt that makes repayment a binding obligation; as such, it should only be discharged in the most dire circumstances.").

149. Brunner, 46 B.R. at 756. This result would ensue, of course, because the government does not have the luxury afforded to private commercial lenders of investigating the finances of the borrowers before deciding whether to grant credit. Id. Also, the government grants loans at a fixed rate of interest, regardless of the borrower's creditworthiness, making the existence of the student loan program even more precarious. Id. For a discussion of the Brunner test and the reasons for its creation, see supra notes 81-87, 94-103 and accompanying text.


151. See Pelkowski v. Ohio Student Loan Comm'n (In re Pelkowski), 990 F.2d 737, 742-43 (3d Cir. 1993) (describing purposes of enactment of section 523(a)(8) (citing 124 CONG. REC. 1791, 1791-95 (1978))). The court in Pelkowski stated that the statements of the members of the House of Representatives who supported section 523(a)(8) provide the strongest indication of legislative intent regarding the provision. Id. at 742. In describing the purpose of section 523(a)(8), Representative Ertel, of Pennsylvania, stated:

[Section 523(a)(8) was intended] to keep our student loan programs intact . . . . [T]he default rate in the student loan program has been escalating to tremendous proportions in the past year . . . . [T]he number of students going into bankruptcy—or ex-students—has increased . . . . Without this amendment, we are discriminating against future students, because there will be no funds available for them to get an education.

124 CONG. REC. at 1791-92. Additionally, Representative Erlenborn attacked debtors who, "not having assets to pledge, [are] pledging [their] future earning power. Having pledged that future earning power, if, shortly after graduation and before having an opportunity to repay the debt, [they] seek[] to discharge that obligation, I say that is tantamount to fraud." Id. at 1793. Having analyzed the applicable legislative history, the court in Pelkowski concluded that "Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of the educational loan programs."

Pelkowski, 990 F.2d at 743 (quoting Andrews Univ. v. Merchant (In re Merchant), 958 F.2d 738, 742 (6th Cir. 1992)). For a further discussion of the applicable legislative history surrounding the enactment of section 523(a)(8), see supra notes 21-28 and accompanying text.
it appears that Congress was acting in a reactionary mode, attempting to thwart a growing national trend in which recent college graduates would file for bankruptcy in order to have their educational loans discharged.\textsuperscript{152} Section 523(a)(8)(B), therefore, is an expression of Congress's desire to make discharge of educational debt as infrequent as possible.\textsuperscript{153} To interpret section 523(a)(8)(B) differently would render it nothing more than superfluous language, something that would be absurd considering the fact that it was included within the Bankruptcy Reform Act.\textsuperscript{154} The Brunner test is, therefore, judicial application of a policy that Congress determined should be furthered.\textsuperscript{155}

Moreover, an examination of the present-day economy supports the implementation of a stringent test such as that developed in Brunner. It appears that recent college graduates are experiencing difficulty in securing employment after graduation.\textsuperscript{156} As a result, a borrower's typical

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\textsuperscript{152} See 124 CONG. REC. at 1791 (discussing congressional motive regarding enactment of section 523(a)(8)). For a discussion of what members of Congress said about the need to enact section 523(a)(8), see supra note 151 and accompanying text.

\textsuperscript{153} See Johnson v. Edinboro State College, 728 F.2d 163, 164 (3d Cir. 1984) (stating that section 523(a)(8) represents clear congressional goal that normal "fresh start" approach of bankruptcy is not to extend to situations in which debtors attempt to discharge government-backed educational loans). The government's goal is not to make life unbearable for borrowers who experience financial setbacks, yet section 523(a)(8)(B) does express Congress's desire that borrowers weigh the risks of potential future hardship against the benefits of a government-sponsored education before deciding whether to accept a student loan and its terms. Brunner, 46 B.R. at 756 & n.4.

\textsuperscript{154} See Pelkowski, 990 F.2d at 742 (indicating that Congress enacted section 523(a)(8) as response to concern of legislators and members of public regarding increase in bankruptcy filings by students before they could embark on lucrative careers) (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-197, pts. I & II (1973))). Additionally, section 523(a)(8) has been amended on numerous occasions, always in an attempt to expand its coverage, signifying Congress's intent that discharge of educational debt be extremely rare. Id. at 743 (noting that Congress's decision to amend time interval before student loans can become dischargeable from five years to seven years supports such interpretation).

\textsuperscript{155} See Brunner v. New York State Higher Educ. Servs. Corp., 851 F.2d 395, 396 (2d Cir. 1987) (per curiam) (stating that three-prong test created by district court is reasonable in light of congressional intent that discharge of educational loans be more difficult than discharge of other types of nonexcepted debt). In Matter of Roberson, the Seventh Circuit expressly stated that each prong of the Brunner test comports with aspects of congressional intent displayed in the legislative history to section 523(a)(8). 999 F.2d 1132, 1135-36 (7th Cir. 1993). For a discussion of the Seventh Circuit's holding in Roberson, see supra notes 89-91 and accompanying text.

\textsuperscript{156} See, e.g., Walcott v. USA Funds, Inc. (In re Walcott), 185 B.R. 721, 721-23 (Bankr. E.D.N.C. 1995) (involving debtor who had only one full-time position in four years since graduation and that such job lasted only three months). In Walcott, the debtor, upon graduation, had applied for professional positions, but was told she was underqualified. Id. at 722. She then applied for positions as a salesperson, restaurant hostess and child care provider, but was turned down because she was overqualified. Id. As a result of this "catch-22" situation, the debtor
deferment period often expires before he or she has found a job that will enable the borrower to maintain a minimal standard of living and make loan payments.\textsuperscript{157} Because of this dilemma, the temptation exists for young graduates to file for bankruptcy under Chapter 7 with the hope that bankruptcy courts will discharge their educational debt, rather than contact creditors to obtain additional deferments or re-work payment schedules. Certainly, the present job market would favor dischargability in the absence of a stringent test aimed at deterring abuse of the educational loan program.\textsuperscript{158} The test enumerated in \textit{Brunner}, and adopted by the Third Circuit in \textit{Faish}, reflects an understanding that recent college graduates should escape liability for their educational debt only if they can affirmatively establish that time will not result in an improved financial condition.\textsuperscript{159}

was forced to obtain low-paying part-time jobs that never seemed to last. \textit{Id.}; see also \textit{Kraft} v. New York State Higher Educ. Servs. Corp. (\textit{In re Kraft}), 161 B.R. 82, 83-84 (Bankr. W.D.N.Y. 1993) (invoking debtor with degree preparing her for work in tourism industry who had to accept job dispatching tow trucks for five dollars per hour). In \textit{Kraft}, the debtor spent two years attempting to find a full-time position in her chosen field without success. \textit{Id.} To obtain a job in her chosen field, the debtor was told she needed three years of experience. \textit{Id.} at 83. Because she was unable to secure a full-time job in the field for which she was trained, the debtor accepted low-paying positions as a tow truck dispatcher, a tour bus operator and a school bus driver in order to earn income. \textit{Id.} at 84; see also \textit{Healey} v. Massachusetts Higher Educ. (\textit{In re Healey}), 161 B.R. 389, 391 (E.D. Mich. 1993) (involving 28 year-old debtor who found minimal full-time employment over three-year period following receipt of degree in education).

\textsuperscript{157} See, e.g., Hawkins v. Buena Vista College (\textit{In re Hawkins}), 187 B.R. 294, 296-97 (Bankr. N.D. Iowa 1995) (invoking debtor who filed for bankruptcy after three years of unsuccessful attempts to obtain teaching position); \textit{Walcott}, 185 B.R. at 722 (involving situation in which four years had expired since debtor’s graduation and she still had not obtained meaningful full-time employment).

\textsuperscript{158} See \textit{Walcott}, 185 B.R. at 723-25 (stating that although debtor had shown legitimate efforts to find employment, \textit{Brunner} test required debtor to expand scope of her job search because debtor was smart, articulate, healthy and had family support in other regions of country). Although it may appear that discharge should be permitted for an individual who has continually attempted but failed to find meaningful employment, the \textit{Brunner} test, like the Bankruptcy Reform Act of 1978 from which the \textit{Brunner} test derives, requires the debtor to exhaust all future options. \textit{Id.}; see also \textit{Kraft}, 161 B.R. at 86-87 (stating that debtor sought discharge too quickly—before “she gave ‘life after discharge’ a fair chance and before she gave opportunities inside and outside [her chosen field] a fair chance”). While such debtors may appear to be worthy candidates for discharge, it seems that they have become victims of abuses committed by those who are less needy. See \textit{Rappaport} v. Orange Sav. Bank (\textit{In re Rappaport}), 16 B.R. 615, 616 (Bankr. D.N.J. 1981) (citing H.R. Rep. No. 95-595, at 135 (1978), \textit{reprinted in 1978 U.S.C.C.A.N. 5787, 6094}) (“A few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who have filed bankruptcy shortly after leaving school and before any loans became due, have generated the movement for an exception to discharge.”).

\textsuperscript{159} \textit{Walcott}, 185 B.R. at 725 (interpreting second prong of \textit{Brunner} test); \textit{Healey}, 161 B.R. at 396 (same); \textit{Kraft}, 161 B.R. at 86-87 (same). In \textit{Healey}, the court stated:
Given that the Brunner test is a bright-line rule, a debtor seeking to have his or her debt discharged must find a way to conform to the three-prong test that the Brunner court developed. As a result, the success of a Chapter 7 debtor attempting to have his or her educational debt discharged will depend heavily on the facts of that particular debtor’s life. An examination of how a debtor can satisfy the three prongs of Brunner reveals just how true it is that success or failure relies heavily on the facts of an individual case.

Because the first prong of the Brunner test requires the debtor to show that he or she will be unable to maintain a minimal standard of living if forced to repay the educational debt, the debtor must establish a lack of available means of effecting repayment. First, the debtor must show that because of a low-paying job that offers little or no opportunity for advancement, his or her income is inadequate to avoid a monthly deficit. Yet, the existence of a monthly deficit is meaningless if the debtor

The experience of life teaches us that, other than the privileged few, all encounter intervals in which they cannot do precisely what they desire because it simply does not pay enough money. A resolute determination to work in one’s field of dreams, no matter how little it pays, cannot be the fundamental standard from which “undue hardship” under § 523(a)(8)(B) is measured.

Healey, 161 B.R. at 395; see also Wheeler v. Student Loan Mktg. Ass’n, No. 93-CV-3415, 1994 U.S. Dist. LEXIS 1622, at *13-14 (W.D.N.Y. Jan. 27, 1994) (stating that poor economic conditions and poor job market do not constitute compelling “additional circumstance” warranting discharge of educational debt because undue hardship inquiry focuses on debtor, and state of national or local economy cannot, by itself, establish that debtor’s financial condition will persist through life of repayment period).

160. See Roberson, 999 F.2d at 1135 (stating that debtor must satisfy all three prongs of Brunner in order to have debt discharged).

161. See Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 754-56 (S.D.N.Y. 1985) (developing test that requires debtor to show that repayment of debt will cause him or her to fall below minimum standard of living and to show that extraordinary or unique circumstances exist that warrant finding that debtor’s situation will not improve in foreseeable future). The requirement that the debtor show additional extraordinary or unique circumstances indicates that the Brunner standard is quite fact sensitive. See id. at 755 (describing individual situations that could amount to unique or extraordinary circumstances faced by debtor).

162. Roberson, 999 F.2d at 1135.

163. See, e.g., Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 359-60 (6th Cir. 1994) (determining that debtor could not maintain minimum standard of living if forced to repay student loans because he was already experiencing monthly deficit of $400); Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 907 (D.S.C. 1995) (finding that debtor had satisfied first prong of Brunner in part because monthly expenses, while being minimized, still exceeded monthly income); Stebbins-Hopf v. Texas Guaranteed Student Loan Corp. (In re Stebbins-Hopf), 176 B.R. 784, 787 (Bankr. W.D. Tex. 1994) (involving debtor who satisfied first prong of Brunner solely because her expenses exceeded income by $400 per month); Sands v. United Student Aid Funds, Inc. (In re Sands), 166 B.R. 299, 308 & n.15 (Bankr. W.D. Mich. 1994) (finding that debtor’s expenses exceeded his gross income by $50 to $100 per month, and that in order for him to make even $10 monthly payment on his loan, court would have to find
has not attempted to spend more conservatively the money he or she actually has.\textsuperscript{164} Second, the debtor’s cause will be greatly benefited if he or she has an ill spouse who is incapable of working or has several children to support.\textsuperscript{165} Where the debtor is responsible for so many people, a court is less apt to suggest that the debtor move to a new location where better-paying jobs may be more plentiful.\textsuperscript{166} Third, and most essential to surviving the first prong of the \textit{Brunner} test, the debtor must eliminate expenses for “luxury items.”\textsuperscript{167} The debtor must establish that he or she has worked

way to trim $60 to $110 off his monthly expenses). Production of financial records that establish a consistent monthly deficit is liable to cause a bankruptcy court to inquire further into whether undue hardship may be present. \textit{See Chessman}, 25 F.3d at 358-60 (finding that debtor had satisfied first prong of \textit{Brunner} by presenting records of consistent monthly deficit for three years).

\textsuperscript{164} \textit{See Mayer v. Pennsylvania Higher Educ. Assistance Agency (In re Mayer), 198 B.R. 116, 125-26 (Bankr. E.D. Pa. 1996) (stating that first prong of \textit{Brunner/Faish} was met where debtor acted to minimize expenses by moving from her own dwelling, with her baby, to live with her family in public housing unit in another state); Healey, 161 B.R. at 394-95 (holding that debtor must maximize personal and professional resources along with duty to minimize expenses). Very often, maximizing resources will require the debtor to accept a better-paying job outside his or her chosen field. \textit{Id.} at 395; see also Sands, 166 B.R. at 508-09 (finding that although debtor had minimized expenses, he had not attempted to maximize his income mainly because he had not consistently and diligently searched for employment). Although the existence of a monthly deficit may be persuasive, it alone will not act to establish undue hardship. \textit{See Healey}, 161 B.R. at 394-95 (holding that monthly deficit, in face of showing of failure to maximize income, was insufficient to satisfy first prong of \textit{Brunner}); Ballard v. Virginia ex rel. State Educ. Assistance Auth. (\textit{In re Ballard}, 60 B.R. 673, 675 (Bankr. W.D. Va. 1986) (holding that no undue hardship existed where debtor had shown that expenses exceeded income by $400).

\textsuperscript{165} \textit{See Mayer}, 198 B.R. at 125 (considering fact that debtor had baby to support); \textit{Ammirati}, 187 B.R. at 904 (ruling in favor of discharge of student loans of debtor whose dependents included ill wife and granddaughter); Hawkins v. Buena Vista College (\textit{In re Hawkins}, 187 B.R. 294, 296, 299 (Bankr. N.D. Iowa 1995) (finding that debtor satisfied first prong of \textit{Brunner} after considering fact that debtor had four young children); \textit{Brunner}, 46 B.R. at 755 (stating that debtor satisfied first prong of test because illness and large number of dependents qualified as extraordinary circumstances).

\textsuperscript{166} \textit{See Walcott v. USA Funds, Inc. (In re Walcott), 185 B.R. 721, 723, 725 (Bankr. E.D.N.C. 1995) (holding that where debtor has no dependents and is responsible only for her own support, court may require debtor to make greater effort to obtain employment that will permit her to make payments on student loans); Kraft v. New York State Higher Educ. Servs. Corp. (\textit{In re Kraft}), 161 B.R. 82, 83, 86 (Bankr. W.D.N.Y. 1993) (holding that debtor who no longer houses or otherwise supports her three children has no dependents and therefore must persist in attempts to find more lucrative employment).

\textsuperscript{167} \textit{See Virginia State Educ. Assistance Auth. v. Dillon, 189 B.R. 382, 386 (W.D. Va. 1995) (holding that debtors’ decision to retain their cable television and to continue $100 per month payments on debt to furniture company provided evidence that first prong of \textit{Brunner} had not been satisfied); \textit{Walcott}, 185 B.R. at 725 (finding that debtor had made only one $50 payment on her debt but continued to spend $25 to $50 per month on personal phone calls); Wardlow v. Great Lakes Higher Educ. Corp. (\textit{In re Wardlow}, 167 B.R. 148, 151 (Bankr. W.D. Mo. 1993) (stating that debtor failed first prong of \textit{Brunner} because he spent nearly
to budget available funds and has not carried on in a lavish manner.\(^{168}\)
This means that the debtor must disconnect the cable television, reduce or even eliminate long distance telephone calls, and otherwise show the court that he or she has engaged in strenuous financial belt-tightening.\(^{169}\)

Even assuming the debtor can satisfy the first prong of Brunner, it is unlikely he or she will be able to demonstrate that financial straits will run for a significant portion of the repayment period. Because the debtor has received the benefits of an education, it is hard for a debtor to argue that he or she will be unable to obtain meaningful employment in the near future if the debtor conducts a serious job search.\(^{170}\) To satisfy the second

\(\$300\) per month on telephone charges, cable television, recreation and miscellaneous expenses; Kraft, 161 B.R. at 85 (noting that debtor maintained “vices” of purchasing cigarettes and subscribing for cable television (including HBO) at rate of \$80 per month); Ipsen v. Higher Educ. Assistance Found. (In re Ipsen), 149 B.R. 583, 585 (Bankr. W.D. Mo. 1992) (taking issue with debtor’s prior monthly expense of \$50 for life insurance premiums).

\(^{168}\) Wardlow, 167 B.R. at 151.

\(^{169}\) For a discussion of the cases in which courts have denied discharge of educational debt based on the debtor’s cavalier expenditures, see supra note 167. If a court is able to discover an unnecessary expense, it is likely to deny discharge because the money spent by the debtor could have been used to make some form of monthly payment on the student debt. See Dillon, 189 B.R. at 386 (stating that money spent on cable television and furniture payments could have been used to make payments on educational debt); Walcott, 185 B.R. at 725 (implying that money spent on phone calls could have been applied to loan repayment); Wardlow, 167 B.R. at 151 (stating that \$300 per month spent on luxury items could have been applied to reduce outstanding balance on \$25,000 student loan).

\(^{170}\) See Brunner, 46 B.R. at 756 & n.3 (rejecting argument that courts should permit discharge where education received has not benefitted debtor). For a discussion of the holding in Brunner, see supra notes 81-87 and accompanying text. See also Matter of Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (stating that because government has made loans available to students who ordinarily would not be able to receive financing for education from private lenders, students have responsibility to utilize education received with government-backed loans and use best efforts to obtain employment, minimize expenses and maximize income). Typically, where a debtor has received a college education, courts are reluctant to find that, over the life of his or her loan, the debtor will be unable to obtain a job that will permit repayment of the debt. See Walcott, 185 B.R. at 725 (stating that debtor is well-educated and articulate, and therefore, should be able to find a better job in near-future that will permit her to repay debt); Healey v. Massachusetts Higher Educ. (In re Healey), 161 B.R. 389, 396 (E.D. Mich. 1993) (stating that debtor had not satisfied second prong of Brunner because education received prepared her to succeed in her chosen field).

As a result of Brunner and other similar holdings, it would appear that students who receive degrees from law schools and medical schools are almost automatically excluded from the list of debtors who could potentially have their educational debts discharged because their opportunities for financial success within the typical ten-year repayment period are virtually limitless. See Healy, 161 B.R. at 396 (holding that second prong of Brunner test cannot be met where debtor receives degree from “highly regarded” institution and has marketable skills). Because an individual fresh out of law school or medical school is obviously well-educated and possesses highly specified training in a field that provides numerous high-paying opportunities, he or she cannot reasonably expect that the debt incurred for such education will be dischargeable. See Gilchrist v. Department of Educ., No. 88-
prong of Brunner, therefore, the debtor must present substantial evidence of prior employment history suggesting that, even with the acquisition of a better job, the debtor’s financial condition would not improve considerably in the near future.\textsuperscript{171} A debtor must first present a bleak picture regarding employment in the field for which the debtor has received a government-financed education.\textsuperscript{172} Urging a court to find that a bleak employment future constitutes a unique or extraordinary circumstance may be quite difficult, especially because the court may order the debtor to investigate job opportunities outside his or her chosen field.\textsuperscript{173} Such an outcome should not be surprising because courts will often find that

\textsuperscript{171} See Cheesman v. Tennessee Student Assistance Corp. (\textit{In re Cheesman}), 25 F.3d 356, 360 (6th Cir. 1994) (holding that based on employment history, as well as future prospects, debtor’s financial condition would not improve considerably even if she received position in her desired field).

\textsuperscript{172} See id. (permitting discharge where debtor’s employment history suggested that any job debtor received in chosen field would probably pay minimal wages like those she received from her prior positions). \textit{Cf.} Dillon, 189 B.R. at 386 (finding that second prong of Brunner was not met where debtors expected to receive raises and/or be promoted to full-time status); Healey, 161 B.R. at 396 (holding that debtor failed to satisfy second prong of Brunner because she anticipated obtaining employment with public school that paid more than salary she received from private school where she was employed).

\textsuperscript{173} See Hawkins v. Buena Vista College (\textit{In re Hawkins}), 187 B.R. 294, 299-300 (Bankr. N.D. Iowa 1995) (indicating that although debtor had been unable to secure job paying much more than minimum wage in four years since her graduation, court believed that her difficulty would not extend over life of repayment period because debtor was well-educated, healthy, had positive demeanor and, therefore, could gain employment in other fields); \textit{see also} Kraft, 161 B.R. at 86.
even physical disabilities or other medical problems do not constitute exceptional circumstances warranting discharge.174

The Brunner standard, however, does present certain drawbacks for debtors, creditors and courts. Even though numerous courts have adopted the standard, they have applied the first two prongs of the test in different ways, sometimes resulting in a debtor in one court receiving a discharge based on the same circumstances that resulted in the denial of a discharge of another’s debt by a different court.175

Even if a debtor is fortunate enough to survive judicial scrutiny under the first two prongs of Brunner, there is no guarantee that his or her educational debt will be discharged.176 To satisfy the “good faith” prong under Brunner, a debtor must establish that he or she has attempted to repay the

(suggesting that debtor attempt to find better-paying job outside her chosen field if employment future within chosen field is bleak).

174. See Cobb v. University of Toledo (In re Cobb), 188 B.R. 22, 24 (Bankr. N.D. Ohio 1995) (refusing to find undue hardship where debtor suffered from epileptic seizures); Stebbins-Hopf v. Texas Guaranteed Student Loan Corp. (In re Stebbins-Hopf), 176 B.R. 784, 785 (Bankr. W.D. Tex. 1994) (stating that debtor had failed to satisfy Brunner’s second prong even though debtor had foot damage, bronchitis and arthritis, debtor’s daughter had epilepsy, debtor’s mother had cancer and debtor’s grandchildren had asthma); Daugherty v. First Tenn. Bank (In re Daugherty), 175 B.R. 953, 959-60 (Bankr. E.D. Tenn. 1994) (holding that debtor who was suicidal and had other psychological and medical conditions had not satisfied “additional circumstances” requirement of Brunner); Sands v. United Student Aid Funds, Inc. (In re Sands), 166 B.R. 299, 310-11 (Bankr. W.D. Mich. 1994) (holding that debtor failed to show undue hardship where debtor had lost vision in one eye and had ulcers on his feet).

175. Compare Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 906-07 (D.S.C. 1995) (finding that partial discharge was justified where debtor presented evidence of health problems), with Cobb, 188 B.R. at 24 (rejecting debtor’s claim that his medical condition constituted unique circumstance warranting discharge of educational debt), and Daugherty, 175 B.R. at 959-60 (rejecting claim that debtor’s suicidal condition presented extraordinary circumstance that would justify finding that second prong of Brunner had been met). A similar “divergent result has occurred where the debtor has been faced with a considerable monthly financial deficit. Compare Cheessman, 25 F.3d at 359-60 (holding that $400 monthly deficit required finding that debtors could not maintain minimum standard of living if forced to repay educational debt and, therefore, debt was dischargeable), with Ipsen v. Higher Educ. Assistance Found. (In re Ipsen), 149 B.R. 583, 584-85 (Bankr. W.D. Mo. 1992) (holding that debtor failed to satisfy first prong of Brunner despite monthly deficit of $271).

176. See Healey, 161 B.R. at 397 (finding that even if debtor had satisfied first two prongs of Brunner, her debt still would have been non-dischargeable because she failed to satisfy third prong of test). To a certain extent, the “good faith” prong is intertwined with the other two prongs of the standard. See Wardlow v. Great Lakes Higher Educ. Corp. (In re Wardlow), 167 B.R. 147, 151 (Bankr. W.D. Mo. 1993) (holding that debtor’s choice to spend resources on cable television and other non-essentials constituted failure to satisfy first prong of Brunner and also constituted lack of good faith attempt to repay educational debt); Kraft, 161 B.R. at 86 (stating that debtor did not demonstrate good faith because she was unable to establish that financial woes would extend well into future).
student loans.\textsuperscript{177} Therefore, if the debtor has been unable to make payments on the student loans, he or she must establish attempts had been made to negotiate deferments or to structure new payment schedules with the lending agency.\textsuperscript{178} Additionally, a court will often look to the timing of the bankruptcy petition as a component of its good faith analysis: where a debtor has filed a bankruptcy petition shortly after graduation, before he or she has had adequate time to find employment and attempt to repay the debt, a court is less likely to discharge the debt.\textsuperscript{179} Therefore, 

\textsuperscript{177} Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). Where the debtor has not made a single payment to the lender, a court will typically find that the debtor has failed to make a good faith effort to repay the loans. Daughtery, 175 B.R. at 960; Sands, 166 B.R. at 312. Even if the debtor has made a few payments, the court will require that the debtor establish the existence of forces beyond his or her reasonable control that have made repayment impossible. \textit{See, e.g.}, Cobb, 188 B.R. at 24 (holding that debtor who made two payments failed to satisfy “good faith” prong because educational loans represented over 50% of his total debt and because he had not shown that repayment was rendered impossible by forces beyond his control); Stebbins-Hopf, 176 B.R. at 788 (holding that debtor failed to satisfy “good faith” prong where she repaid $1,300 in interest on her loans and then ceased payment in order to give money to family members for whom she was not legally responsible); Healey, 161 B.R. at 397 (stating that debtor failed to establish good faith where she made only two payments on her loan totaling $174); Connor v. Michigan Dep’t of Treasury (\textit{In re} Connor), 83 B.R. 440, 444 (Bankr. E.D. Mich. 1988) (holding that gainfully employed debtor failed to establish good faith where she made no effort to repay debt).

\textsuperscript{178} \textit{See} Sands, 166 B.R. at 311 (stating that court measures good faith by examining debtor’s payments toward student loans and debtor’s efforts to negotiate deferments with his or her particular lender). “Asking for a deferment is ‘a less drastic remedy available to those unable to pay [student loans] because of prolonged unemployment.’” \textit{Id.} at 312 (quoting Brunner, 831 F.2d at 397). Where a debtor has attempted to work out a new payment schedule or has negotiated for new deferment periods but has failed, a court may be more inclined to grant a discharge. \textit{See} Hawkins, 187 B.R. at 300 (noting that lender presented reasonable alternative of fashioning repayment schedule that debtor should have considered before filing discharge petition); Walcott v. USA Funds, Inc. (\textit{In re} Walcott), 185 B.R. 791, 725 (Bankr. E.D.N.C. 1995) (suggesting that debtor who had made only one $50 payment on debt could have used money spent on long distance telephone calls to make partial payment on loans); Healey, 161 B.R. at 397 (finding that debtor had not established good faith where she made only two payments and did not attempt to negotiate new payment arrangement with lender).

\textsuperscript{179} \textit{Sands}, 166 B.R. at 312. In \textit{Sands}, although the court had determined that the debtor had failed to satisfy the first two prongs of the \textit{Brunner} test, it nonetheless conducted an analysis of the “good faith” prong. \textit{Id.} at 310-12. The court stated that although the debtor had not made payments on his student loans, he had obtained deferments of his loans over the two and one-half years between the time he graduated from college and the time he filed his bankruptcy petition. \textit{Id.} at 312. The court ruled that the case before it was quite distinguishable from those in which the debtor filed for bankruptcy within one year of his or her graduation from school and made no arrangements to defer the debt or negotiate a restructuring of the payment schedule. \textit{Id.} (citing Brunner, 831 F.2d at 396; Healey, 161 B.R. at 397); \textit{see also} Kraft, 161 B.R. at 86 (stating that debtor had failed to establish good faith because she had filed for bankruptcy after being out of school for just eighteen months and had not exhausted all options).
if a debtor hopes to satisfy Brunner’s “good faith” prong, he or she must make payments on the debt for at least a period of a few years and/or contact the lender to negotiate new deferments or restructured payment schedules before filing a petition for discharge.\textsuperscript{180}

V. Conclusion

Even if a debtor follows the suggestions outlined above, there is no guarantee that a court will find that the evidence presented warrants a discharge of educational debt. The Brunner test has become a necessarily stringent one, primarily because it requires the debtor to establish not only a current inability to repay his or her student loans, but also to establish a significant probability that such financial inability will extend over a large portion of the repayment period.\textsuperscript{181}

By adopting the Brunner test, the Third Circuit in Faish has set forth a uniform standard that must be applied within the jurisdiction to ensure that the goals of the Bankruptcy Reform Act of 1978 are achieved.\textsuperscript{182} As a result, it will be quite difficult for a debtor in the Third Circuit to have his or her student loans discharged pursuant to section 523(a)(8)(B).\textsuperscript{183} Yet, by enacting such a stringent standard, the Third Circuit has determined that it must play an active role in preserving the student loan program. In fact, the Third Circuit’s holding acts to buoy a student loan program that could disappear in the not-too-distant future if courts do not adopt a uni-

\textsuperscript{180} For a discussion of what a debtor must do to establish that he or she has acted in good faith, see supra notes 176-79 and accompanying text. Unless the debtor has made attempts to repay the debt or work something out with the lender, the debtor will typically be unable to show that the inability to repay the debt was due to forces beyond “his or her reasonable control.” See Brunner v. New York State Higher Educ. Servs. Corp. (\textit{In re Brunner}), 46 B.R. 752, 756 (S.D.N.Y. 1985) (stating that debtor’s inability to make payments on debt must not be self-imposed), aff’d, 831 F.2d 395 (2d Cir. 1987) (per curiam).

\textsuperscript{181} See Brunner, 46 B.R. at 756 (setting out prongs of test and noting that test is stringent on debtors who attempt to shake free from chains of educational debt).


\textsuperscript{183} See Faish, 72 F.3d at 306 (stating that debtor must satisfy each prong of Brunner individually and that factors not contemplated within Brunner standard are not to be examined); \textit{see also} Brunner, 46 B.R. at 756 (recognizing that goal of test is to make discharge of educational debt as difficult as possible without being inhumane). For a discussion of the reasoning the Brunner court employed for the creation and implementation of its three-prong standard, see supra notes 81-87, 94-103 and accompanying text.
form and logical standard of review that places an almost insurmountable burden on a debtor who seeks to avoid a self-imposed obligation.\footnote{See \textit{Faish}, 72 F.3d at 305 (agreeing with Seventh Circuit's opinion in \textit{Matter of Roberson} that goal of section 523(a)(8) is to preserve student loan program and require debtors to accept consequences of decision to borrow funds for education); Greif, \textit{supra} note 145, at 955 ("[B]y preventing discharge in cases where repayment causes ordinary hardships or tight finances if the loan is repaid, the \textit{Brunner} test [as adopted in \textit{Faish}] also upholds the legislative goals of preventing misuse of the bankruptcy process and safeguarding the solvency and credibility of the educational loan program."). The Third Circuit also recognized that it had to step in and resolve the existing uncertainty regarding a proper standard of review and how courts within the circuit should apply such a standard. \textit{Faish}, 72 F.3d at 299-300 \& n.1. For a discussion of the Seventh Circuit's holding in \textit{Roberson}, see \textit{supra} notes 89-91 and accompanying text. For a discussion of the applicable legislative history surrounding the enactment of section 523(a)(8) as part of the Bankruptcy Reform Act of 1978, see \textit{supra} notes 21-28, 151-52 and accompanying text.}