INHERITED TROUBLES: FOR SENIORS, PARTIALLY DISCHARGING STUDENT LOAN DEBT SHOULD BE AS SIMPLE AS MICHAEL SCOTT "DECLARING" BANKRUPTCY

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It's at the forefront of every presidential campaign and dubbed a "national crisis," but what is it? Student loan debt. Though student loan debt is often considered a uniquely millennial problem, there are other victims lurking in the shadows, the elderly. Like their children, Baby Boomers and Gen X-ers suffer under the burden of student loan debt. The current Federal Bankruptcy Code and the ways in which the federal courts have reacted are inadequate to address the debt issues facing the elderly. The current system must consider revising the undue hardship standard or reviewing the Brunner test.

This Note analyzes data sets pertinent to the discharge of student debt across age groups to identify the problem at hand. It proposes considering partial discharge regardless of the availability of Income Driven Repayment Plans. Ultimately, this Note proposes revisiting the statutes addressing student debt through the lens of the elderly impacted by the statutes. Additionally, it proposes a partial discharge option dependent on the age of the debtor.

I. Introduction

The rapid increase in the cost of post-secondary education has placed a tremendous burden on American students and their families; in-state tuition rates at four-year public universities have risen by 221%

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in the last twenty years.[1] As a result, student loans have become the second-highest category of consumer debt with forty-four million borrowers collectively holding over $1.5 trillion in student debt.[2] Additionally, student loans have the highest delinquency rate among all types of household debt.[3] Politicians, news outlets, and scholars frequently discuss the problems student loan debt creates for young Americans; and economists often discuss the ripple effect of the student loan crisis on other sectors of the economy.[4] Interestingly, these policy discussions rarely include the elderly. Americans between the ages of sixty and sixty-nine have quietly experienced the largest percent increase of student debt of any age group over the last five years.[5]

The number of elders with student debt continues to increase at a surprising rate.[6] Unfortunately, this trend is set to continue.[7] Baby boomers hold the second-highest amount of average student debt by

1. Briana Boyington & Emma Kerr, *See 20 Years of Tuition Growth at National Universities*, U.S. NEWS & WORLD REPORT (Sept. 19, 2019, 12:36 PM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities.

2. Zack Friedman, *Student Loan Debt Statistics in 2018: A $1.5 Trillion Crisis*, FORBES (June 13, 2018), https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/#553544487310 [hereinafter Friedman] (citing Household Debt And Credit, FED. RESERVE BANK OF N.Y.: CTR. FOR MICRO ECON. DATA, https://www.newyorkfed.org/microeconomics/hhdc/background.html (last visited Nov. 11, 2019).

3. Press Release, Federal Reserve Bank of New York, Total Household Debt Increases, Delinquency Rates of Several Debt Types Continue Rising (Nov. 14, 2017) (on file with author at https://www.newyorkfed.org/newsevents/news/research/2017/rp171114); Press Release, Federal Reserve Bank of New York, Total Household Debt Increases, Delinquency Rates of Several Debt Types Continue Rising (Nov. 13, 2017) (https://www.newyorkfed.org/newsevents/news/research/2017/rp171114); Megan Leonhardt, *This Map Shows Where People are Having the Hardest Time Paying Off Student Loans,* CNBC MONEY (Sept. 27, 2018, 8:30 AM), https://www.cnbc.com/2018/09/26/this-map-shows-highest-student-loans-delinquency-rates.html.

4. Kelley Holland, *The High Economic and Social Costs of Student Loan Debt*, CNBC COLLEGE (June 15, 2015, 10:59 AM), https://www.cnbc.com/2018/09/26/this-map-shows-highest-student-loans-delinquency-rates.html.

5. Friedman, s*upra* note 2.

6. *See generally*, Mikhail Zinshteyn, *Student Loan Debt Soaring Among Adults Over 50, AARP Study Finds*, AARP MONEY MANAGING DEBT (July 26, 2019), https://www.aarp.org/money/credit-loans-debt/info-2019/student-loan-debt-report.html.

7. Stefan Stolba, *Baby Boomers' Student Loan Debt Continues to Grow*, EXPERIAN (July 18, 2019), https://www.experian.com/blogs/ask-experian/research/baby-boomers-and-student-loan-debt/.

generation.[8] Generation X—those quickly approaching retirement—are the only age group with a higher average student loan obligation.[9]

Not only are a rising number of student borrowers quickly approaching and reaching retirement, but many aging Americans also cosign student loans for their children and grandchildren.[10] Some experts even claim that these older guarantors often do not realize the implications of what they are signing.[11] The current Bankruptcy Code ("the Code") and its application by Federal Circuit Courts make discharging student loan debt incredibly difficult.[12] Proposed solutions often include doing away with the *Brunner* test, a judicially created test commonly used to determine when student loans can be discharged in bankruptcy, to soften the undue hardship standard.

The Code aims to provide a "fresh start" by protecting the "honest but unfortunate debtor" from post-petition collection efforts of creditors.[13] Allowing debtors to discharge student loans in bankruptcy seems to accomplish one of the paramount goals of bankruptcy by offering student debtors a fresh start. Nevertheless, proponents of providing relief to student debtors in bankruptcy rarely contemplate debtors who are at or near the age of retirement; arguably those for whom the rationales for excepting student loans from discharge are least compelling.

Part II provides background information on the Code's treatment of student loan obligations, including an overview of the legislative history of the relevant provision and how it has been applied by courts.

8. The State of Student Loan Debt in 2017, EXPERIAN (Aug. 23, 2017), https://www.experian.com/innovation/thought-leadership/state-of-student-lending-in-2017.jsp.

9. *Id.*

10. Gary Strauss, *Student Loan Debt Rising Among Older Borrowers*, AARP (Aug. 18, 2017), https://www.aarp.org/money/credit-loans-debt/info-2017/older-adults-student-loan-debt-rising-fd.html [hereinafter Strauss] (citing data from CFPB, Consumer Finance Protection Bureau).

11. *Id.*

12. The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Unless otherwise noted, all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. Specific sections of the Bankruptcy Code are identified herein as "section __." Similarly, specific rules from the Federal Rules of Bankruptcy Procedure are identified herein as "Bankruptcy Rule __." Louis DeNicola, *The Truth About Student Loan Bankruptcy Discharge*, U.S. NEWS & WORLD REPORT (May 2, 2018, 12:00 PM), https://loans.usnews.com/the-truth-about-student-loan-bankruptcy-discharge.

13. Harris v. Viegelahn, 135 S. Ct. 1829, 1838 (2015) (citing Marrama v. Citizens Bank, 549 U.S. 365, 367 (2007)).

Part III discusses data from the Consumer Bankruptcy Project to illustrate the need for reform and evaluates various concerns associated with student loan discharge litigation. Part IV recommends that courts weigh age more heavily in granting partial discharge. Part V concludes that the treatment of elder debtors' student loans in bankruptcy should be reformed.

II. Background

This section discusses the evolution of the treatment of student loans in bankruptcy. The section begins with the commonly used *Brunner* standard and its iterations. Next, the section introduces different approaches courts take to student loans in bankruptcy, such as providing a partial discharge. The section concludes by discussing the intersection between student loans and the elderly.

Like most other debts, student loans were eligible for discharge in an ordinary bankruptcy proceeding until Congress excepted them in 1976.[14] The availability of discharge to student debtors has been consistently reduced through amendments Congress has made to the Code over the last 50 years.[15] Section 523(a)(8) of the Code excepts student loans from discharge "unless excepting such debt from discharge . . . would impose an *undue hardship* on the debtor and the debtor's dependents . . . ." (emphasis added).[16]

When the exception to discharge was added to the Code in 1976 and adopted by the Bankruptcy Reform Act of 1978, federal student loans were excepted from discharge for five years after loan repayment

14. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, 2591 (1978) (current version at 11 U.S.C. § 523(a)(8) (2018)) [hereinafter Bankruptcy Reform Act of 1978].

15. *See* Andrew M. Campbell, *Bankruptcy Discharge of Student Loan On Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978 (11 U.S.C.A. § 523(a)(8)(B)) Discharge of Student Loans*, 144 A.L.R. FED. 1, 4 (1998).

16. 11 U.S.C. § 523(a)(8)(A)(i)—(B) (2018) (stating that "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, 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 an obligation to repay funds received as an educational benefit, scholarship, or stipend; or any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . . .").

began; debtors only had to show undue hardship if they wanted to discharge student loans early.[17] In 1990, the time bar was increased from five to seven years.[18] By 1998, the time period ban was removed and certain types of student loans were excepted from discharge altogether.[19] In 2005, Congress expanded the educational loans covered by section 523(a)(8)(B) to exclude private student loans from discharge.[20] Now, a student debtor's only hope for obtaining bankruptcy relief from their student loan debt is to show undue hardship under the same standard that was developed when undue hardship was only required to waive a five-year wait period.[21]

The original rationale behind excepting student loans from discharge for five years was to "prevent indebted college or graduate students from filing for bankruptcy immediately upon graduation, thereby absolving themselves of the obligation to repay their student loans."[22] Recent graduates would not have assets to distribute among creditors in a bankruptcy case and could walk away from their student loan obligations. While the original amendment excepting student loan discharge for five years was motivated largely by preventing abuse of the discharge by opportunistic recent graduates, this reasoning was "notably absent" from the legislative history for the subsequent extension of the non-dischargeability period.[23] The legislative history of these subsequent amendments demonstrates that they were primarily implemented to protect the government's interest in federal educational loan repayment.[24]

17. *See* Bankruptcy Reform Act of 1978, *supra* note 14.

18. Crime Control Act of 1990, Pub. L. No. 101–647, § 3621 (1), 104 Stat. 4789, 4964 (1990).

19. Higher Education Amendments of 1998, Pub. L. No. 105–244, § 971 (a), 112 Stat. 1837 (1998).

20. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 220, 119 Stat. 23, 59 [hereinafter BAPCPA].

21. *See* Pardo Assessment *infra* note 131, at 513 and note 415 (citing 11 U.S.C. § 523(a)(8)(A) (1988) (amended 1990 and repealed 1998)) ("The Second Circuit established the Brunner framework for interpreting the meaning of 'undue hardship' at the time when a debtor could obtain a discharge of educational debt if such debt 'first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition.'").

22. *In re* Hornsby, 144 F.3d 433, 436–37 (6th Cir. 1998).

23. John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1311 (2018) [hereinafter Hunt].

24. *See id.*

The Supreme Court has concluded that the section 523(a)(8) prohibition on discharging student loans is "self-executing."[25] This has several implications on discharge litigation. As a procedural matter, a debtor who wishes to discharge their student loan debt must file an adversary proceeding.[26] An adversary proceeding is a separate lawsuit filed in a bankruptcy case to determine, among other things, the dischargeability of a debt.[27] Once a creditor establishes that the contested debt is a student loan, the debtor carries the burden of proving each element of *undue hardship* by a preponderance of the evidence.[28] The high burden of proof, the perceived impossibility of discharging student loans, and procedural process required—could potentially explain the lack of debtors attempting to discharge their student loans.[29]

Despite the standard's longstanding statutory significance, Congress has not defined "undue hardship."[30] The judicially created *Brunner* test, adopted in 1987, is still widely accepted as the standard of undue hardship; it has been adopted in all but two circuits.[31] "Undue hardship," at the time of the *Brunner* decision, was the standard to bypass the five-year wait period; it only applied to federally guaranteed student loans[32] and had not yet been expanded to cover private student loans.[33] In *Brunner*, the Second Circuit adopted a three-prong test, under which a debtor may only discharge educational loans under section

25. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004).

26. *In re* Jones, 495 B.R. 674, 684 (Bankr. E.D. Pa. 2013).

27. FED. R. BANKR. P. 7001(6); *U.S. Bankruptcy Courts–Judicial Business 2017*, UNITED STATES COURTS, https://www.uscourts.gov/statistics-reports/us-bankruptcy-courts-judicial-business-2017 (last visited Nov. 11, 2019).

28. *In re* Jones, 495 B.R. at 684 (Bankr. E.D. Pa. 2013); Aaron N. Taylor & Daniel J. Sheffner, *Oh, What A Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 309 (2016) [hereinafter Taylor & Sheffner].

29. *See* Iuliano *infra* note 153.

30. *In re* Hornsby, 144 F.3d 433, 437 (6th Cir. 1998) ("Congress has not defined 'undue hardship,' leaving the task to the courts.")

31. Brunner v. N.Y. State Higher Educ. Services Corp., 831 F.2d 395, 396 (2d Cir. 1987); *see* United States Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998); Penn. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995); Cheesman v. Tenn. Student Assistance Corp. (*In re* Cheesman), 25 F.3d 356, 359–60 (6th Cir. 1994); *In re* Roberson, 999 F.2d 1132, 1135–36 (7th Cir. 1993).

32. *Brunner*, 831 F.2d at 395 (noting that the debtor in *Brunner* had only been out of school for ten months when she filed bankruptcy).

33. *Id.* at 396; *see United States Dep't of Educ.*, 348 F.3d at 91; *Hemar Ins. Corp. of Am.*, 338 F.3d at 1241; *United Student Aid Funds, Inc.*, 155 F.3d at 1114; *Penn. Higher*

523(a)(8) if they are able to show: "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans."[34]

While the *Brunner* test is the predominant method courts use in assessing undue hardship, courts still vary tremendously in their interpretations of the test.[35] Pursuant to the first *Brunner* prong, courts typically consider six categories necessary to establish a minimal standard of living: (1) shelter; (2) basic utilities; (3) food and personal hygiene products; (4) vehicles for transportation; (5) health insurance or the ability to pay for medical expenses; and (6) the ability to pay for some diversion or source of recreation.[36] Bankruptcy courts examine a debtor's income and expenses to make a common-sense determination of whether the debtor can maintain a minimal standard of living. Some courts analyze whether a debtor has maximized their income and critique a debtor's expenses as part of this determination.[37]

The second prong of *Brunner* has been interpreted by some courts to require "exceptional circumstances," such as a serious illness, which creates a "certainty of hopelessness" that the loan will be repaid.[38] In other words, these courts require a debtor to prove that their financial situation will not improve enough to make repayment possible.[39] Other courts have softened this standard. In *In re Nys*, the Bankruptcy Appellate Panel of the Ninth Circuit held that the "additional circumstances" of the second *Brunner* element do not need to be "exceptional," such as

Educ. Assistance Agency, 72 F.3d at 306; *Cheesman*, 25 F.3d at 359-60; *In re Roberson*, 999 F.2d at 1135-36.

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

35. *Comments of Bankruptcy Scholars on Evaluating Hardship Claims in Bankruptcy*, 21 J. CONSUMER & COM. L. 114, 118 (2018) [hereinafter *Comments*].

36. *See* Kevin J. Smith, *Defining the Brunner Test's Three Parts: Time to Set A National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 257 (2013) [hereinafter Smith] (discussing Douglas v. Educ. Credit Mgmt. Corp., 366 B.R. 241, 253 (Bankr. M.D. Ga. 2007) (citing Ivory v. United States (*In re* Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001)).

37. *See id*.

38. *See* Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544 (4th Cir. 2008).

39. *See id*.

a serious illness.[40] The court concluded that "additional circumstances" were "any circumstances . . . that show that the inability to pay is likely to persist for a significant portion of the repayment period."[41]

Not only do courts vary in which undue hardship test they apply and how they apply the standard, but courts also provide different remedies.

One former circuit approach, which is still applied in some lower courts in other circuits even though it has been overruled, applied the plain meaning of sections within the Code and concluded that partial discharge of student loans was not authorized. In *In re Taylor*,[42] the court reasoned that the plain language of section 523(a)(8) implied that only the entire debt could be discharged.[43] The court relied on the Code's definition of debt, liability on a claim.[44] The court reasoned that this statutory definition and its use in section 523(a)(8) ("excepting such debt from discharge . . . will impose [an] undue hardship on the debtor . . . .") implied a single claim that encompassed the entire liability, not merely some portion of repayment.[45] This approach has been referred to as the "all or nothing approach" to discharge and is still implemented by some bankruptcy courts.[46]

On the other hand, some courts hold that bankruptcy courts have the power to afford a partial discharge to debtors whose circumstances do not constitute an undue hardship. In *In re Hornsby*, the Sixth Circuit reasoned that the Code empowered courts to grant a partial discharge under the equitable powers pursuant to section 105(a).[47] Under section

40. *In re* Nys, 308 B.R. 436, 444 (Bankr. App. 9th Cir. 2004), *aff'd*, 446 F.3d 938 (9th Cir. 2006).

41. *See id. See for Circuit Split* Educ. Credit Mgt. Corp. v. Curiston, 351 B.R. 22, 30 n.5 (D. Conn. 2006) ("The Ninth Circuit Bankruptcy Appellate Panel appears to have softened *Brunner*'s additional circumstances requirement somewhat by stating that '[s]uch circumstances need not be 'exceptional,' except in the sense that they are tenacious and demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay for a significant portion of the repayment period.' *Nys*, 308 B.R. at 446. This Court, however, is bound by the Second Circuit's pronouncement in Brunner, which described the necessary showing of additional circumstances as 'exceptional' and 'strongly suggestive of continuing inability to repay over an extended period of time. . . .' *Brunner*, 831 F.2d at 396.")

42. 11 U.S.C. § 101(12) (2018); 11 U.S.C. § 523(a)(8) (2018); *In re* Taylor, 223 B.R. 747, 752 (Bankr. App. 9th Cir. 1998).

43. *In re* Taylor, 223 B.R. at 752.

44. *Id*. at 753–54.

45. *Id.*

46. *See In re* Skaggs, 196 B.R. 865 (Bankr. W.D. Okla. 1996).

47. 11 U.S.C. § 105(a) (2018); *In re* Hornsby, 144 F.3d 433, 440 (6th Cir. 1998).

105(a), "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]."[48] The court reasoned that a partial discharge grants a debtor much needed relief from "oppressive financial circumstances" while still upholding the rights of educational lenders.[49] The court even listed potential remedies that could be implemented by bankruptcy courts to further the "fresh start" principle of bankruptcy.[50] The court reasoned that this approach was statutorily permissible despite its rejection by other circuits and determined it was preferable to the "all or nothing" determination discussed above.[51]

Though the Ninth Circuit had applied *In re Hornsby*'s partial discharge rationale to other dischargeability contexts—specifically, the portion of section 523 addressing marital support obligations, which require a debtor to pay alimony and child support—the Ninth Circuit disagreed with *In re Hornsby*'s holding.[52] In *In re Saxman*, the Ninth Circuit reasoned that an all-or-nothing approach to the dischargeability of student debt contravenes congressional intent in granting bankruptcy courts equitable authority to enforce the provisions of the Code.[53]

Nevertheless, the court concluded that bankruptcy courts were only able to exercise this power when they found undue hardship.[54] The court instructed bankruptcy courts to consider the student loans, to determine what portion of those loans constituted undue hardship, and to only discharge that portion of student debt.[55] It should be noted, however, that this approach actually benefited the educational creditor and disadvantaged the debtor. In this case, the debtor had received a complete discharge at the trial level and the appellate court's approach afforded only a partial discharge.[56]

One approach combines the reasoning of the all-or-nothing and partial approaches and allows discharge for all or none of individual debts.[57] A debtor's student loan obligations in their entirety are broken

48. 11 U.S.C. §105(a) (2018).
49. *In re* Hornsby, 144 F.3d at 440.
50. *Id.*
51. *Id.*
52. *In re* Saxman, 325 F.3d 1168 (9th Cir. 2003).
53. *Id.* at 1174 (holding that the court may, but only when undue hardship is satisfied, discharge the portion causing undue hardship).
54. *Id.*
55. *Id.* at 1175.
56. *Id.*
57. *See* Taylor & Sheffner, *supra* note 28, at 310.

up into individual "debts"—some of which may be discharged in full, if they constitute an "undue hardship"—and other debts are left undischarged.[58]

In contrast to the majority *Brunner* test, the Eighth Circuit applies a seemingly more forgiving "totality of circumstances" standard of undue hardship.[59] According to the court, "Each bankruptcy case involving a student loan must be examined on the facts and circumstances surrounding that particular bankruptcy for the Court to make a determination as to 'undue hardship.'"[60] Courts in the Eighth Circuit still apply the "totality of circumstances test" when determining whether an individual is allowed to discharge their student loan debt.[61] The "totality of circumstances" test allows bankruptcy judges to consider the debtor's age as well as the debtor's medical conditions and expenses when determining whether undue hardship is satisfied.[62]

The First Circuit has not adopted either test; the circuit allows district courts to apply either the *Brunner* test or the totality of circumstances test.[63] This circuit split leads to inconsistent applications of federal law because courts apply the same statutory standard differently.

The number of baby boomers declaring bankruptcy is increasing at an alarming rate.[64] While much of this is attributable to healthcare costs and credit card debt,[65] a surprisingly high number of these debtors hold student loan obligations.[66] To make matters worse for the elderly, the overall number of student debt holders age sixty and older surged

58. *Id.*

59. Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702 (8th Cir. 1981).

60. *Id.* at 704 (internal citations omitted).

61. *See* Taylor & Sheffner, *supra* note 28, at 310.

62. *In re* Andrews, 661 F.2d at 704–05.

63. *See* Lorenz v. Am. Educ. Servs./Pa. Higher Educ. Assistance Agency (*In re* Lorenz), 337 B.R. 423, 430 (B.A.P. 1st Cir. 2006) (addressing bankruptcy court in the First Circuit that ruled in the alternative, that undue hardship was not satisfied under either standard, and acknowledging that the appellate court determined they did not need to adopt one of the tests).

64. Tara Siegel Bernard, '*Too Little Too Late': Bankruptcy Booms Among Older Americans*, N.Y. TIMES (Aug. 5, 2018), https://www.nytimes.com/2018/08/05/business/bankruptcy-older-americans.html ("The rate of people 65 and older filing for bankruptcy is three times what it was in 1991.").

65. Theresa J. Pulley Radwan & Rebecca C. Morgan, *The Elderly in Bankruptcy and Health Reform*, 18 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2010).

66. Jay Goldberg, *Student Loan Debt Is Crippling Seniors Too*, BANYAN HILL, https://banyanhill.com/student-loan-debt-cripples-seniors/ (last visited Nov. 11, 2019) [hereinafter Goldberg].

by 385% from 2005 to 2017, increasing from 700,000 seniors to 3.4 million.[67] Many of these additional loans are being used to finance education for the elderly debt holder's children or grandchildren.[68]

These older individuals sometimes do not realize the full implications of cosigning a student loan. Even when a student loan obligation is contingent, the debtor is a guarantor of the student loan, and the debt is often still difficult to discharge under section 523.[69] Though the loans do not directly benefit cosigning elders, they are often required to meet the same standard as student borrowers in order to discharge their contingent student loan obligations in bankruptcy.[70]

In *Uterhark v. Great Lakes Higher Education Corp.*, the court discussed the legislative intent of section 523(a)(8), stating that "it is unlikely the drafters intended to exclude parent borrowers from [section] 523(a)(8) but failed to say so."[71] The court reasoned that while some bankruptcy courts have held that the provision was directed at students and not their cosigning parents, "the majority of cases . . . have held that the parent's liability is non-dischargeable under [section] 523(a)(8) even where the student who actually receives the education is liable on the loan."[72]

Administrative remedies may provide some relief from student loan debt outside of bankruptcy. Income-driven repayment plans ("IDR") often come up in the context of undue hardship discussions.[73] IDRs allow student borrowers to set monthly student loan payments at an amount that is intended to be affordable.[74] IDRs spread a student borrower's payments out over twenty or twenty-five years depending on under which plan a borrower qualifies.[75]

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67. *See* Strauss, *supra* note 10.

68. CONSUMER FIN. PROT. BUREAU, SNAPSHOT OF OLDER CONSUMERS AND STUDENT LOAN DEBT, (Jan. 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf [hereinafter STUDENT LOAN SNAPSHOT].

69. *See generally* Paul B. Porvaznik, *Is Discharging Student Loan Debt in Bankruptcy Getting Easier?*, 102 ILL. B.J. 540, 542 (2014) [hereinafter Porvaznik].

70. *Id.*

71. Uterhark v. Great Lakes Higher Educ. Corp. (*In re* Uterhark), 185 B.R. 39, 41 (Bankr. N.D. Ohio 1995) (citing *In re* Pelkowski, 990 F.2d 737 (3d Cir. 1993))(other citations omitted).

72. *Id.*

73. *See* Hunt, *supra* note 24.

74. FEDERAL STUDENT AID, *Income-Driven Plans*, STUDENTAID.ED.GOV, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven, (last visited Nov. 11, 2019).

75. *Id.*

According to one study, the percent of debtors over the age of sixty-five who hold at least some student loan debt has nearly tripled since the 2007–2010 Consumer Bankruptcy Project iteration, underscoring the need for reform.[76] With the crisis facing the elderly, the standard for discharge must be relaxed for elder student debtors.

III. Analysis

While the elderly are not the first demographic that comes to mind with respect to student loan debt, this section provides data that suggest that the number of seniors with student loan debt in bankruptcy is increasing. Next, the section addresses the legislative intent behind prohibiting student loans from discharge. Additionally, the section discusses several aspects of student loan discharge litigation and its application to the elderly.

A. Seniors in Bankruptcy with Student Loan Debt Is an Increasing Problem.

I was granted access to the Consumer Bankruptcy Project ("CBP") dataset for the purpose of collecting data for this Note. The CBP is a unique long-term research project designed to better understand the causes and consequences of debtors filing bankruptcy.[77]

This Note analyzes the Chapter 7 and/or Chapter 13 bankruptcy petitions of 120 individuals over the age of sixty-five and 775 younger debtors. I recorded the student debts listed on each debtor's Schedule F. For purposes of gathering a data set for this note, student debt was defined as "the sum of debts listed on Schedule F that were debts owed to a school or state educational authority or a creditor whose name indicates the debt is a student loan; or any debt described by the debtor

76. *See* Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1071–74 (describing the Consumer Bankruptcy Project data set, methodology, and 2007–10 data).

77. THE CONSUMER BANKRUPTCY PROJECT, 2013–2016 DATA SET, U. OF ILL. C. OF L. (2019) [hereinafter CBP DATA] (The CBP collects national, random samples from across the country to create a database. The set used for this Note comes from the 2013–2016 iteration. Beginning in February 2013, and every quarter since then, a list of all individuals who filed a chapter seven or thirteen petition in the United States is generated for three randomly selected business days. From this list, a sample of 200 debtors is collected and their bankruptcy petitions and court documents are analyzed. The CBP records numerous variables with respect to debts, assets, income, and expenses. Debtors are sent a written survey, which includes questions about the debtor's age.).

as educational or student loan." When gathering data, each individual listing that satisfied the definition of student loans was listed separately in order to accurately record whether the debt was federally guaranteed or owed to a private lender.[78] Additionally, binary variables were used to denote contingent debts (cosign obligations) and potential duplicate listings within a single debtor's Schedule F.

The CBP data is most useful for demonstrating that an elderly person with student loans who files for bankruptcy is not a farfetched idea. Even seniors outside of bankruptcy face unique challenges when they hold student loan debt. This study demonstrates that seniors in bankruptcy hold student loan debt more often than one might expect. Though bankruptcy policy discussions concerning the dischargeability of student loans rarely consider the needs of seniors, the number of elder debtors burdened with student debt has increased rapidly.[79]

The first major finding of this study is that the number of seniors with student loan obligations in bankruptcy has increased dramatically in the last decade. Among the 117 senior debtors for whom a Schedule F was available, eleven had at least some student loan debt.[80] When compared to the 2007–2010 data, which contained 189 elderly observations, six of whom had at least some student debt, this demonstrates an increase from about 3.28% to 9.4%.[81]

This finding may seem surprising because the elderly are not intuitively considered a demographic who struggle as a result of the section 523(a)(8) exception to discharging student loans in bankruptcy.[82] Yet these findings appear to mirror nationwide trends in the increased frequency of student loan debt among senior citizens; the number of seniors holding student debt more than quadrupled between 2005–2015.[83]

The second finding from the CBP data is that the average amount of debt held by senior debtors has increased. The average amount of student debt held among elder student debtors in this study was

78. Student loans were described as 'Federal' for entries owed to a school or state educational authority, as well as a student loan defined as 'government guaranteed loans.' Private loans were identified as non-federal loans which were owed to a private lender. For the purposes of this study while a U was assigned to entries for which it was unclear whether the debt was private or federal.

79. *See* Goldberg, *supra* note 66.

80. *See* CBP DATA, *supra* note 77.

81. *Id.*

82. *See* Porvaznik, *supra* note 69.

83. *See* STUDENT LOAN SNAPSHOT, *supra* note 68.

$30,593 with a standard deviation of $30,946.78. For the previous CBP iteration, 2007–2010, the average student loan obligation held by elder debtors was $11,522.01.[84] The average debt figures calculated from this Note's dataset are also similar to the nationwide trends in the average debt among seniors who hold student loans ($23,500 nationwide, but $30,593 for debtors in bankruptcy in this study). The average debt owed by nationwide borrowers sixty and older roughly doubled between 2005 and 2015, from about $12,100 to $23,500.[85]

For comparison, data regarding debtors under the age of sixty-five was collected, with a total of 775 observations among whom sixteen were missing their Schedule F.[86] For debtors under sixty-five, 239 (31.5%) held an average of $40,103.05 in student debt. According to the 2007–2010 CBP data, 19.4% of debtors under the age of sixty-five held an average of $23,401.07 in student loan debt. This 19.4% to 31.5% increase seems significant, though it is not as dramatic as the 3.28% to 9.4% increase among elder debtors. Nationwide, the number of student

84. Brian O'Connell, *Old School: U.S. Seniors Are Unlikely Victims of Student Loan Debt*, THE STREET (Jan. 15, 2017), https://www.thestreet.com/story/13948563/1/old-school-u-s-seniors-are-unlikely-victims-of-student-loan-debt.html.

85. *Id.*

86.

Table of student loan data for debtors under the age of sixty-five	
Total number of debtors for whom schedule F was available	759 (out of 775 total observations)
Total number of debtors with student loan debt listed on schedule F	239 (31.5%)
Average student loan debt listed on schedule F (standard deviation)	$40,103.05 ($47,148.67)
Median student loan debt	$21,676

loan borrowers under sixty grew by about 72.1% between 2005 and 2015.

Debtors likely underreport the amount of their student loan obligations. It is possible that some debtors simply do not list student loan obligations on their Schedule F because they believe that it is impossible to discharge student loan debt. Additionally, there were multiple instances in which student lenders were listed for notice only purposes.[87] There were also obligations under which debtors listed the amount owed as "[u]nknown."[88]

Furthermore, almost no student debts were marked as contingent. One possible explanation is that debtors are unaware of their contingent student loan liability.[89] Alternatively, a debtor who is not attempting to obtain a discharge may have little reason to accurately record their contingent student loan obligations.

Notably, there were several observations of student obligations specifically denoted as "non-dischargeable."[90] These observations seem to support the assertion that one major problem related to student loans in bankruptcy is the lack of debtors who file adversarial proceedings attempting to discharge their student loan debt. Some empirical studies have determined that the lack of adversary proceedings filed is caused, at least in part, by the perception that student loans are impossible to discharge.[91] While some attorneys state that they advised the debtor of the "non-dischargeable nature" of student loan debts on Schedule F's submitted to bankruptcy courts, the vast majority do not.[92] Next, this section will discuss policies which may provide relief to elder student debtors.

87. CBP DATA, *supra* note 77.
88. *Id.*
89. *See* Strauss, *supra* note 10.
90. CBP DATA, *supra* note 77.
91. *See supra* discussion of the lack of filing; *see also* discussion of an adversarial proceeding. *See infra* empirical study on the lack of filings.
92. *See* CBP DATA, *supra* note 77 (containing multiple instances of "debtor has been counseled of the non-dischargeable nature of student loans" or similar language appearing in description of the debt).

B. The Legislative Purpose Behind Section 523(a)(8) Does Not Apply to Seniors.

1. BILLS SEEKING TO AMEND SECTION 523(A)(8)

Two recent bills proposed amendments to section 523(a)(8). The Discharge Student Loans in Bankruptcy Act of 2017 attempted to eliminate section 523(a)(8) completely, which would have allowed all student loans to be discharged in bankruptcy.[93] On the other hand, the Private Student Loan Bankruptcy Fairness Act of 2017 only sought to remove the exception to discharge for private loans by eliminating section 523(a)(8)(B) and undoing what Congress did in the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005.[94] Concerns exist, however, regarding the Federal Reserve and Department of Education's interest in being repaid. These arguments may dissuade enacting the first Act, but the same cannot be said for the second. [95] Even if eliminating section 523(a)(8)(B) altogether is unsuccessful, the Code should at least be amended to allow individuals sixty-five and older greater access to discharge relief. The rationales for excepting student loans from discharge are much weaker for both federal and private student loans as applied to the elderly.

a. Section 523(a)(8)(B)

The benefits of excepting private student loans have not been realized. Congress specifically excluded private student loans, which provide very little protection to borrowers and co-borrowers, from discharge in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[96] While most student loans are federally guaranteed, the private student loan discharge exception should not be ignored; private student loans account for around $91 billion of the student loan market.[97] Additionally, the Consumer Financial Protection Bureau ("CFPB") estimates that 27% of individuals cosigning on

93. H.R. 2366, 115th Cong. (2017).
94. H.R. 2527, 115th Cong. (2017).
95. *Id.*
96. Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL'Y REV. 175, 176 (2017). [hereinafter Alexandrov & Jiménez].
97. *Private Student Loan Facts*, CONSUMER BANKERS ASS'N, http://www.privatestudentloanfacts.com/the-private-student-loan-market.html (last visited Nov. 11, 2019).

private student loans are sixty-two and older, while 57% are fifty-five and older.[98] The elderly, and those quickly approaching retirement, represent a disproportionate number of student loan cosigners.[99] These contingent obligors are often faced with the same standard of undue hardship as student borrowers in bankruptcy.[100]

Before 2005, private student loans were automatically dischargeable in bankruptcy.[101] A compelling argument can be made that Congress's enactment of this amendment was the result of the lobbying efforts of private student lenders.[102] Congress's repeated failure to seriously consider legislation that would allow private student loans to be discharged seems to strengthen this argument.[103] Nevertheless, proponents of excepting private student loans have argued that economic theory rationalizes BAPCPA's treatment of private student loans.[104]

Specifically, economic theory suggests that prohibiting discharge of private student loans would lower interest rates and increase the availability of private loans to consumers.[105] Judge Posner advocated that "by increasing the rights of creditors in bankruptcy . . . [bankruptcy reform] should reduce interest rates and thus make borrowers better off."[106]

Assuming both student borrowers and lenders have complete information, the price of student loans should decrease when borrowers forfeit their right to discharge and lenders no longer need to charge higher interest rates to offset the risk of discharge. According to this

98. *See* STUDENT LOAN SNAPSHOT, *supra* note 68, at 10.

99. *Id.*

100. *See* Uterhark v. Great Lakes Higher Educ. Corp. (*In re* Uterhark), 185 B.R. 39, 41 (Bankr. N.D. Ohio 1995).

101. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L. J. 179, 181 (2009) [hereinafter Pardo Litigation].

102. *See id.* at 180–83.

103. *See id*. *See also* John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L. J. 245 (2007) [hereinafter Pottow].

104. *See* Hunt, *supra* note 23.

105. *See* Alexandrov & Jiménez, *supra* note 96, at 175–79.

106. *Id*. at 178 (quoting Richard Posner, *The Bankruptcy Reform Act--Posner*, THE BECKER-POSNER BLOG (Mar. 27, 2005), http://www.becker-posner-blog.com/2005/03/the-bankruptcy-reform-act--posner.html. However, note that this is not necessarily true for all borrowers ex ante; borrowers with prime credit scores who did not think they would be likely to file bankruptcy might prefer lower prices to the availability of a bankruptcy discharge.).

rationale, when private student loans are no longer dischargeable, lenders no longer need to charge higher interest rates to adjust for the fact that they will lose some money from loan discharge.

A study analyzing the effects of BAPCPA, however, specifically exempting private loans from discharge on the private loan market concluded that these benefits had not been realized.[107] The study used national data from the CFPB to determine that the price of private educational loans, interest rates, did not significantly decrease interest rates for those the exception from discharge was designed to help.[108] The study reasoned that the relatively inelastic demand for private student loans partially explains this market result.[109] The authors further determined that private student lenders have better access to information regarding a student's future earning potential than student borrowers.[110] Essentially, lenders consider what would happen if a borrower defaults on their student loans while student borrowers typically do not.[111] The study concluded that this inequality of information, coupled with an inelastic demand, meant that students would not be in a position to negotiate lower interest rates simply because their loans would not be readily dischargeable in bankruptcy.[112]

Because the justifications for exempting private student loans from discharge have not been realized, private loans should be dischargeable in bankruptcy. At the very least, the elderly are not the typically perceived beneficiaries of excepting private student loans from discharge. Moreover, the policy failure of private student loan exception from discharge warrants a presumption of undue hardship for the elderly faced with private student loans and/or cosigner obligations.

b. Section 523(a)(8)(A): The Rationale Behind Excepting Federal Student Loans

The Department of Education's interest in being repaid on federally guaranteed student loans provides a coherent rationale for excepting federal student loans from discharge. Meanwhile, society has a vested interest in the financial security and stability of seniors. Holding

107. *See id*. at 176.
108. *See id*. at 178.
109. *Id*. at 180.
110. *Id*. at 189–91.
111. *Id.*
112. *See id*. at 180–91.

student debt adversely affects the financial well-being of seniors on both an individual level and in the aggregate. Balancing these competing interests between debtor and creditor should be the aim of bankruptcy policy concerning student loans.

The legislative history of amendments to section 523 and a review of arguments in support of excepting federal loans from discharge reveals two primary rationales favoring excepting federally guaranteed student loans from discharge: protecting the government's interest in repayment and preventing abuse of the bankruptcy discharge.[113]

John Hunt, a professor at the University of California-Davis School of Law, argues that the primary legislative intent behind the section 523(a)(8) is promoting the government's interest in having student loans repaid.[114] His argument analyzes the legislative history of the Bankruptcy Reform Act of 1978 and indicates that supporters voiced concerns about opportunistic debtors who could walk away from their student loan obligations by filing bankruptcy after graduation but before starting a lucrative career.[115] Furthermore, Hunt suggests that the "prevention of abuse" legislative intent one may read into section 523(a)(8) should only be considered during the first five years of student loan repayment.[116]

This is because both the Crime Control Act of 1990, which increased the conditional non-dischargeability period from five to seven years, and the Higher Education Amendments of 1998, which removed the wait period in favor of an indefinite presumption of non-dischargeability, were primarily motivated by other interests.[117] The Senate introduced the provision of the Crime Control Act which extended non-dischargeability in recognition of the time required for the government to collect debts.[118] The available legislative history seems to suggest that the non-dischargeability period was extended in an effort to increase

113. *See* Hunt, *supra* note 23, at 1300.

114. *See id.* at 1300–04 (discussing Bankruptcy Reform Act of 1978, H.R. 95-595, 95th Cong. 1st Sess. (1978)).

115. *See id*. at 1304–07.

116. *See id.* at 1305.

117. *See id. See also* Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4965; Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837.

118. *See* Hunt, *supra* note 23, at 1308–09.

the government's financial recovery.[119] Similarly, the Higher Education Amendments provision was intended to promote budget neutrality.[120]

The inference drawn from this legislative history discussion is that the primary reasons for adopting section 523(a)(8) were promoting society and the government's interest in the repayment of loans and preventing abuse of the bankruptcy system. Advocates continue to argue that concerns about government repayment justify section 523's treatment of federal student loans.[121]

One concern raised in favor of excepting federally guaranteed student loans from discharge is the protection of the solvency of the federal loan program.[122] Assuming bankruptcy filings are at least partially motivated by endogenous factors (that debtors choose bankruptcy rather than being forced into it as a last resort), debtors at the margin would choose filing bankruptcy as their preferred method for handling student loan obligations.[123] According to this argument, when bankruptcy offers discharge relief from student loans, consumers holding student debt obligations have a greater incentive to file bankruptcy.[124] As a result, the number of student debt holders discharging their student loans in bankruptcy would increase as a greater number of student borrowers file bankruptcy.

Proponents of prohibiting the discharge of federal loans further advocate that discharge would hinder the disbursement of new federal loans and create public fiscal concerns.[125] Effectively, federal funds set aside for education, namely the distribution of new federal student loans, would be used to reimburse federally secured lenders and to pay off discharged loans.[126]

The strength of this argument depends on the extent to which people are willing to choose bankruptcy as an alternative to holding student loan debt. Regardless, there is at least a reasonable explanation for the exception to discharging federal loans that does not extend to private student loans.

119. *Id.*
120. *Id.*
121. *Id.*
122. *See* Pottow, *supra* note 103, at 261.
123. *See id.*
124. *See id.*
125. *See id.*
126. *Id.*

c. Arguments in Favor of Excepting Federal Student Loans from Discharge Hold Little Weight When Applied to the Elderly.

Neither congressional justification for excepting federally guaranteed student loans from discharge is compelling when applied to the elderly. Obviously, student borrowers over the age of sixty-five are easily distinguishable from Congress's theoretical "opportunistic" recent graduate. The federal government has an interest in being repaid, but older student loan obligors often have limited income and employment opportunities.[127] This is especially true for seniors in bankruptcy.[128]

Seniors are the most likely age group to be in default on their federal student loans.[129] Unlike younger debtors, who may have the ability to improve their employment opportunities,[130] debtors over the age of sixty-five do not have time to recover financially before retirement. Additionally, younger debtors have greater opportunities to seek alternative relief from their student loan debt.[131] When recovery from elder student borrowers is unlikely, the prohibition on bankruptcy discharge does not effectively serve the government's interests in recovery. Thus, the legislative purpose for excluding educational loans from discharge does not apply with much force to senior debtors.

While society has an interest in the government being repaid, society also has a vested interest in the financial well-being of the aging and the elderly. Older Americans are the fastest-growing segment of student loan borrowers.[132] According to a Consumer Reports staff attorney, a recent report from the CFPB "makes clear that the education debt crisis and the retirement crisis in this country are very closely

127. *See* Abha Bhattarai, *Student Debt Now Affects a Staggering Number of Elderly Americans*, WASH. POST (Jan. 16, 2017, 6:42 AM), https://www.washingtonpost.com/news/business/wp/2017/01/16/student-debt-now-affects-a-staggering-number-of-elderly-americans/?noredirect=on&utm_term=.d2a1aed91d56 (discussing Government Office of Accountability report).

128. *Id.*

129. *Id.*

130. *See In re* Modeen, 586 B.R. 298, 306 (Bankr. W.D. Wis. 2018) (reasoning that given debtor's age and earning potential, her income would likely increase, weighing against "undue hardship").

131. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 444 (2009) [hereinafter Pardo Assessment].

132. Richard Eisenberg, *The Student Loan Crisis of Older Americans*, FORBES (Jan. 6, 2017, 9:41 AM), https://www.forbes.com/sites/nextavenue/2017/01/06/the-student-loan-crisis-of-older-americans/#290dcce81a53) [hereinafter Eisenberg].

linked."[133] Moreover, the CFPB reported that student loans contribute to the financial insecurity of older Americans.[134]

The link between the student debt crisis and the retirement crisis can be partially explained by the adverse effect student loan debt has on retirement savings and a borrower's ability to pay significant debts such as mortgages.[135] Both of these impacts are surprisingly pronounced among elder student borrowers. Also, seniors who hold student loan debt are more likely than seniors without student debt to forgo health care, such as prescription medicine, doctors' visits, and dental care, because they cannot afford it.[136] Social safety nets intended to provide financial security for the elderly are already strained due to a lack of pensions and retirement savings.[137]

The exception of discharging federal student loans is purportedly a policy based on society's interest.[138] Thus, more relief should be available to the elderly.

i. The "Fresh Start" for Senior Student Debtors Should Be Afforded Special Consideration Relative to Student Loan Debt.

Sections of the Code exist within a system that values providing a fresh start for debtors.[139] Courts have held that this "fresh start" policy ought to be weighed against the interest of educational lenders in repayment.[140] These courts have implemented partial discharges under

133. *Id*. (citing Donna Rosato, *Older Americans Are Sacrificing Retirement to Pay Off Student Debt*, CONSUMER REPORTS (Jan. 5, 2017), https://www.consumerreports.org/paying-for-college/older-americans-sacrifice-retirement-to-pay-off-student-debt/).

134. *Id.*

135. *See* STUDENT LOAN SNAPSHOT, *supra* note 68, at 14.

136. *See* Eisenberg, *supra* note 132.

137. *See* Gayle L. Reznik et al., *Coping with the Demographic Challenge: Fewer Children and Living Longer*, 66 SOC. SEC. ADMIN. 4 (2006), https://www.ssa.gov/policy/docs/ssb/v66n4/v66n4p37.html.

138. *See id.*

139. *See* Pardo Litigation, *supra* note 101, at 186–90 (discussing how student loan discharge litigation affects debtors' fresh start).

140. *See* Tenn. Student Assistance Corp. v. Hornsby, 144 F.3d 433, 440 (6th Cir. 1998) ("Where a debtor's circumstances do not constitute undue hardship, some bankruptcy courts have thus given a debtor the benefit of a 'fresh start' by partially discharging loans, whether by discharging an arbitrary amount of the principal, interest accrued, or attorney's fees; by instituting a repayment schedule; by deferring the debtor's repayment of the student loans; or by simply acknowledging that a debtor may reopen bankruptcy proceedings to revisit the question of undue hardship.").

section 523.[141] The fresh start for elderly student borrowers in bankruptcy should be considered more heavily with respect to student loan debt.

Student loan obligations hinder a senior student borrower's ability to pay for necessities. The Association of Young Americans ("AYA") and the American Association of Retired Persons ("AARP") recently conducted a joint survey regarding the impact of student debt on different age demographics.[142] The survey revealed that 32% of seniors with student debt reported using their retirement savings to help pay their student loan obligations, while 31% reported student loan debt had prevented them from purchasing a new home.[143] Nine percent could not even afford health care because of student debt.[144]

Additionally, senior student borrowers may be subject to garnishment of Social Security Disability Benefits and tax returns to offset their federal student loan obligations. The Department of Treasury allows federal agencies to seize federal payments to offset any "delinquent debt owed to a federal or state agency."[145] According to a 2016 study by the Government Office of Accountability ("GAO"), 43% of borrowers over the age of fifty who were subject to offset for the first time between 2001 and 2015 had held their student debt for twenty years or more.[146] In 2015 alone, over 100,000 borrowers over the age of fifty experienced offset due to student loan obligations, half of which were subject to the maximum allowed reduction in benefits.[147] Finally, the study revealed an alarming trend among senior student borrowers; the number of stu-

141. *Id.*

142. *The Three Generations Survey*, AARP, https://www.aarp.org/research/topics/economics/info-2018/three-generations-survey.html (last visited Nov. 11, 2019).

143. *Id.*

144. *Id.*

145. *See Comments*, *supra* note 35, at 117–18.

146. Danielle Douglas-Gabriel, *The Disturbing Trend of People Losing Social Security Benefits to Student Debt*, WASH. POST (Dec. 20, 2016, 11:23 AM), https://www.washingtonpost.com/news/grade-point/wp/2016/12/20/the-disturbing-trend-of-people-losing-social-security-benefits-to-student-debt/?noredirect=on&utm_term=.41ff0c0121e3 [hereinafter Gabriel]. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-45, SOCIAL SECURITY OFFSETS: IMPROVEMENTS TO PROGRAM DESIGN COULD BETTER ASSIST OLDER STUDENT LOAN BORROWERS WITH OBTAINING PERMITTED RELIEF (2016).

147. *See* Gabriel, *supra* note 146.

dent borrowers sixty-five and older who had their Social Security Disability Benefits garnished to offset federal student loan obligations increased from around 8700 in 2005 to over 40,000 by 2015.[148]

ii. Partial Discharge and its Application to the Elderly

While the Code does not expressly instruct courts to partially discharge student loans, many courts have.[149] These courts reason that "an all-or-nothing approach to the dischargeability of student debt contravenes Congress's intent in granting bankruptcy courts equitable authority" to enforce the Code.[150] According to the court in *In re Modeen*, the partial discharge remedy "should be reserved for appropriate circumstances when the equities of the situation weigh distinctly in favor of the debtor."[151] While granting a partial discharge however, the same court noted a lack of "clear guidelines" on when a court should partially discharge student loans.[152]

Many have criticized *Brunner* for its lack of consistent results.[153] The availability of a partial discharge is one area of ambiguity.[154] Ideas have been put forth to make the application of *Brunner* more mechanical, thus improving consistency across jurisdictions.[155] This would also inform litigants of their chances of success before filing an adversary proceeding.[156]

The fresh start of elder student debtors should be afforded special weight in the equities of bankruptcy cases. Not only do student loans

148. *See* Harriet Edleson, *Student Loan Debt Can Sink Your Retirement Plan*, AARP (Sept. 18, 2018), https://www.aarp.org/money/credit-loans-debt/info-2018/student-loans-garnish-ss.html ("Between 2002 and 2015, offsets jumped 407 percent among 50- to 64-year-olds and 540 percent for those 65 and older.").

149. Manion v. Modeen (*In re* Modeen), 585 B.R. 298, 305 (Bankr. W.D. Wis. 2018). *But see In re* Heckathorn, 199 B.R. 188, 194 (Bankr. N.D. Okla. 2006) (applying the all or nothing approach).

150. *See* Heckathorn, 199 B.R. at 306.

151. *See* in re Modeen, 585 B.R.

152. *See id.*

153. *See* Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 227 (2012) [hereinafter Taylor] (discussing inconsistent results because of the ambiguity of the undue hardship standard). *But see* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 501 [hereinafter Iuliano].

154. *See* Taylor, *supra* note 153, at 227.

155. *See* Smith, *supra* note 36, at 250–72.

156. *See* Pardo Litigation, *supra* note 101, 185–90 (discussing uncertainty in student loan discharge litigation).

hurt their ability to prepare for retirement, older student borrowers often have problems with both federal and private student loan servicers.[157]

According to the CFPB, many older debtors report unfair practices of federal loan servicers.[158] Problems related to cosigning private student loans and accessing protections guaranteed under federal law for federal student loan borrowers are among the chief complaints reported by elder student borrowers.[159] These complaints suggest that loan servicing problems can exacerbate older borrowers' financial distress.[160] Older consumers also report hostile collection tactics used in relation to student loan debt, with some elderly stating that these tactics cause fear and high levels of stress.[161]

Additionally, older consumers report being wrongfully subjected to Social Security benefit offsets.[162] As limited income individuals, seniors should be eligible to participate in federal student loan rehabilitation.[163] When problems are encountered during the rehabilitation process, however, seniors complain of being treated unfairly.[164]

Similarly, seniors claim that *private* student loan collectors harass them about cosigned obligations and threaten them with collecting on their federally protected benefits.[165] While *federal* student loans may be collected by an offset of federal benefits, the same federal benefits are protected from *private* student loan collectors.[166]

The equities of the debtor's case should weigh more heavily in favor of senior debtors; senior debtors should be granted a partial discharge of student loan debt based on their age. Furthermore, old age deserves a presumption that at least a percentage of federal loan debt held by seniors in bankruptcy constitutes "undue hardship." This presumption should be greater for private loan obligations. Cosign obligations exist primarily for private student loans disbursed for the benefit

157. Stacy Canan & Seth Frotman, *Four Tips to Help Older Student Loan Borrowers Navigate Common Problems with Their Student Loans*, CONSUMER FIN. PROT. BUREAU (Jan. 5, 2017), https://www.consumerfinance.gov/about-us/blog/four-tips-help-older-student-loan-borrowers-navigate-common-problems-their-student-loans/.

158. *See* STUDENT LOAN SNAPSHOT, *supra* note 68, at 16–20.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *See id.*

164. *See id.*

165. *Id.*

166. *Id.*

of someone other than the senior. Therefore, the presumption should also be greater for cosigning obligations.

iii. Income-Driven Repayment Plans Do Not Provide Effective Relief for Seniors with Student Loan Debt

Some argue that income-driven repayment plans offer a viable alternative to bankruptcy discharge for federal student borrowers with limited income.[167] An income-driven repayment plan sets monthly student loan payments based on a federal student borrower's income and family size.[168] The Department of Education offers four different IDR plans wherein a borrower pays between 10% and 20% of their income for twenty to twenty-five years, at which point any remaining balance is discharged.[169] Because a borrower's payments can be as low as zero,

167. *See* Kat Tretina, *Is It Worth Using Bankruptcy to Free Yourself from Student Loans?*, CREDITKARMA (Aug. 7, 2019), https://www.creditkarma.com/advice/i/student-loans-in-bankruptcy/.

168. *If Your Federal Student Loan Payments Are High Compared to Your Income, You May Want to Repay Your Loans Under an Income-Driven Repayment Plan.*, FED. STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven#page (last visited Nov. 11, 2019).

169. *Summary of Income-Driven Repayment Plans*, IBRINFO, http://www.ibrinfo.org/existingidr.vp.html (last visited Nov. 11, 2019).

REPAYMENT PLAN	AVAILABLE?	ELIGIBILITY	MONTHLY PAYMENT	DISCHARGE AFTER
Revised Pay As You Eran (REPAYE)	Now (since December 17, 2015)	All Direct student loan borrowers. No partial financial hardship (PFH) requirement.	10% of discretionary income	20 years if repaying only undergraduate debt; 25 years if repaying any graduate debt
Income-Based Repayment (2014 IBR)	Now (since July 1, 2014)	Borrowers who take out their first loan on or after July 1, 2014, and have a PFH.	10% of discretionary income, up to the fixed 10-year payment amount	20 years
Pay As You Earn (PAYE)	Now (since 2012)	Direct student loan borrowers who took out their first loan after September 30, 2007 and at least one loan	10% of discretionary income, up to the fixed 10-year payment amount	20 years

some suggest the availability of a discharge in bankruptcy is unnecessary.[170]

Though in theory, IDR seems like an appealing alternative to a bankruptcy discharge, all the available empirical evidence indicates that the IDR system is failing the most vulnerable borrowers.[171] Around 80% of federal student loan borrowers in default would have been eligible for an IDR, yet they remain unenrolled.[172] According to the CFPB Student Loan Ombudsman's Report, problems with servicing practices and implementation appear to be preventing vulnerable student loan borrowers from accessing affordable repayment options.[173]

Specifically, older student borrowers on fixed incomes have reported that servicing delays and processing errors have limited their ability to take advantage of IDR plans.[174] This includes reports of seniors who enrolled in an IDR while working and later moved to a fixed

		after September 30, 2011, and have a PFH.		
Income-Based Repayment (Original IBR)	Now (since 2009)	All federal student loan borrowers (Direct or FFEL) with a PFH.	15% of discretionary income, up to the fixed 10-year payment amount	25 years
Income-Contingent Repayment (ICR)	Now (since 1994)	All Direct Loan borrowers. No PFH requirement.	The lesser of: 20% of discretionary income and 12-year repayment amount x income percentage factor	25 years

170. *See* Jillian Berman, *Government Watchdog: 76,200 Student-loan Borrowers May Be Defrauding the System—DeVos Calls Them 'Dishonest People'*, MARKETWATCH (July 29, 2019, 2:23 PM), https://www.marketwatch.com/story/government-watchdog-76200-student-loan-borrowers-may-be-defrauding-the-system-devos-calls-them-dishonest-people-2019-07-26.

171. *See Comments*, *supra* note 35, at 117. *See also* Susan Dynarski, *An Economist's Perspective on Student Loans in the United States* 1–27 (Brookings ES Working Paper Series, Sept. 2014) available at https://www.brookings.edu/wp-content/uploads/2016/06/economist_perspective_student_loans_dynarski.pdf [hereinafter Dynarski].

172. *Id*.

173. *Id*.

174. *See* STUDENT LOAN SNAPSHOT, *supra* note 68, at 17.

income.[175] A borrower's monthly IDR payments can and should be recalculated to account for changes in income, but reports suggest that federal loan servicers do not inform older borrowers of this right.[176] Furthermore, some senior borrowers, who are typically slowing down and working less, are improperly placed on IDR plans designed for individuals with growing incomes.[177]

Additionally, enrollment in an income-driven repayment plan may counteract the fresh start policy. Indebtedness may result in harassment by creditors.[178] With respect to federally guaranteed loans, debtors risk garnishment of federally owed funds to offset student loan debt.[179] One circuit court and several lower courts have expressly considered the mental and emotional impact of student debt in relation to the fresh start policy.[180] These courts have weighed these harms in favor of discharge even when an IDR would seemingly provide relief.[181]

In addition, an IDR can harm a debtor's fresh start financially in two ways. First, it shows up on credit reports which can affect a debtor's access to housing and obtaining credit.[182] Second, it runs directly counter to the fresh start goal of encouraging participation in the economy; if the borrower increases their income, they will be subject to higher repayment obligations. This may disincentivize increased participation in the labor force.[183]

iv. The Availability of IDR Should Be Considered Less for Senior Debtors.

Seven circuit courts have ruled on whether an IDR should be considered in an undue hardship analysis of student loan debt.[184] While these circuits have unanimously considered the availability of an IDR relevant to an undue hardship determination, no circuit has held that

175. *See id.*
176. *See id*. *See also* CONSUMER FIN. PROT. BUREAU, MIDYEAR UPDATE ON STUDENT LOAN COMPLAINTS: INCOME-DRIVEN REPAYMENT PLAN APPLICATION ISSUES (Aug. 2016) (available at https://files.consumerfinance.gov/f/documents/201608_cfpb_StudentLoanOmbudsmanMidYearReport.pdf).
177. *See id.*
178. *See* Hunt, *supra* note 23, at 1321–22.
179. *See id.*
180. *See id.* at 1320–21.
181. *See id.*
182. *See id.* at 1322–23.
183. *See id.*
184. *Id.* at 1325.

the availability of an IDR necessarily precludes discharge.[185] Most courts consider a debtor's IDR options as relevant evidence to the third element of *Brunner*, whether the debtor has made a "good faith effort" to repay their student loans.[186] Courts applying the totality of the circumstances test consider the availability of an IDR a relevant factor.[187] Like other parts of the judicially created *Brunner* test, the extent to which courts should consider the availability of IDR in an undue hardship analysis is unclear.

One study advocates that the fresh start principle applies to student borrowers even where an IDR would make payments affordable.[188] *Barrett v. Educational Credit Management Corp.* provides an example of a circuit expressly discussing the Code's aim to provide a fresh start in the context of a debtor's failure to enroll in an IDR plan.[189] The Sixth Circuit held that while enrollment may have been probative of the debtor's intent to repay their student loans, the decision not to enroll was not entirely dispositive of the "good faith" prong of the *Brunner* test.[190] Additionally, lower courts have reasoned that "[s]ection 523(a)(8) places the discretion to determine the dischargeability of student loans with the bankruptcy judge, who 'must not turn to the ICRP (income contingent repayment plans, broader category which includes [IDR]) as a substitute for the thoughtful and considered exercise of that discretion.'"[191]

The above study proposes factual situations in which an individual should not be expected to participate in an IDR.[192] Stated differently, the fact that a person has not enrolled in an IDR should not count against them under *Brunner* in certain circumstances.[193] For example, an IDR should not weigh against a debtor when IDR payments would result in negative amortization.[194] Payments under an IDR plan are linked

185. *Id.*
186. *See id.* at 1328.
187. *See id.*
188. *See id.*
189. *Id.* at 1320 (discussing Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 364 (6th Cir. 2007)). *But see id.* (discussing Frushour v. Educational Credit Management Corp & Educational Credit Management Corp v. Jejsperson: both reasoning differently).
190. *In re* Barrett, 487 F.3d 353, 364 (6th Cir. 2007).
191. *In re* Larson, 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010) (citing *In re* Durrani, 311 B.R. 496, 509 (Bankr. N.D. Ill. Eastern Division 2004)).
192. *See* Hunt, *supra* note 23, at 1329.
193. *See id*.
194. *See id*. at 1339–40.

to a debtor's income and may be insufficient to cover the interest accruing on the underlying student loan debt.[195] As a result, a debtor's student debt balance may actually increase while they are enrolled in an IDR.[196] A debtor's lack of awareness about the availability of IDRs is relevant in some circumstances.[197]

2. ALTERING BURDEN SHIFTING WHEN LITIGATING IDR: IMPOSING THE INITIAL BURDEN OF DEMONSTRATING THAT RECOVERY WOULD BE ACHIEVED UNDER AN IDR ON CREDITORS

Requiring the creditor to show that an IDR would increase their financial recovery is a proposed method of implementing the prohibition on counting negative amortized IDR payment plans against the debtor.[198] This effectively relieves financially distressed debtors of the burden of demonstrating that they were justified in not enrolling in an IDR. Moreover, it does not make sense for a debt that is growing to count against a debtor's ability to discharge unless creditors are able to demonstrate the loan serves their interest in repayment.[199]

Procedurally, creditors are already required to prove that the contested loan meets the description of a category excepted from discharge before the burden shifts to the debtor to prove undue hardship.[200] With respect to whether an IDR is considered under the third prong of *Brunner*, creditors should have the affirmative burden of showing their recovery interest justifies weighing a plan that would still leave the debtor with a negatively amortized loan against their discharge.

These recommendations, if followed, would especially impact how an IDR is considered for older student debtors. Even over the life of an IDR (twenty to twenty-five years) creditors are not likely to recover much from limited income, retirement-age individuals.[201] If creditors want the availability of an IDR for elder debtors to count in discharge litigation, they should bear the burden of showing: (1) an IDR

195. *See id.*
196. *Id.*
197. *Id.* at 1349–50.
198. *Id.* at 1339–40.
199. *See id.*
200. *See* Taylor & Sheffner, *supra* note 28, at 309.
201. *See* Jesse Bricker et al., *Education Debt Owed by Older Families in the 2016 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Dec. 21, 2018), available at https://www.federalreserve.gov/econres/notes/feds-notes/education-debt-owed-by-older-families-in-the-2016-survey-of-consumer-finances-20181221.htm [hereinafter Bricker] (discussing data from the Survey of Consumer Finance (SCF) and its implications for older households).

would lead to increased recovery in instances where the debtor's payment would not cover interest (negative amortized debt); and (2) the debtor was aware or should have been aware of the IDR options available.

Debtors at and nearing retirement should be concerned with financially preparing to retire. Even the average thirty-eight-year-old debtor in bankruptcy would reach retirement age by the time their IDR was complete.[202] Age should be taken into account when considering available administrative relief in discharge litigation.

a. Empirical Evidence

Empirical studies have shown that the rationale for excepting student loans is flawed.[203] Moreover, studies have highlighted various problems with applications of the undue hardship standard and discharge litigation caused by section 523(a)(8). The studies also show how student debt impacts the elderly both during and after bankruptcy.

i. Empirical Studies Pertaining to How Undue Hardship Is Applied

An empirical study conducted by professors Rafael I. Pardo and Michelle R. Lacey suggests that undue hardship discharge outcomes are best explained by the inconsistent application of the same standard rather than differences in debtor circumstances.[204] The authors concluded that judges purporting to use the same undue hardship test apply the standard differently to similarly situated debtors.[205] The study compared the demographics, financial characteristics, and factual circumstances of debtors who received a discharge to those who were denied a discharge.[206] Statistical analysis revealed that the identity of the judge deciding a debtor's case and other non-legal factors were much better predictors for the outcome of undue hardship litigation than factors that should have been legally relevant.[207]

202. *See* Pardo Assessment, *supra* note 131, at 442–43.

203. *See id*. at 428–29 (stating "(1) preserving the financial solvency of the student aid system and (2) preventing abuse of the bankruptcy system." The article/study concluded that those seeking discharge of student loans were not abusing the system.).

204. *Id.*

205. *See id.*

206. *Id*. at 481–82.

207. *See id.*

Factors that should have indicated in the bankruptcy court's ruling did not inform the case's outcome. Therefore, litigants likely have little guidance on how their case will come out before filing an adversary proceeding.

ii. Findings Related to Age

Pardo and Lacey's study also noted that the average debtor contesting the dischargeability of their student loans was forty-one-years-old, while the average age of debtors filing for bankruptcy was thirty-eight.[208] Those seeking to discharge student debts were not recent graduates attempting to discharge their student debts "on the eve of a lucrative job opportunity"; instead, they were middle-aged debtors who struggled to pay their debts for years.[209]

Furthermore, among full-time workers attempting to prove undue hardship, average earnings decreased among those over the age of fifty-five relative to those between the ages of thirty-five and fifty-four.[210] These results indicate that when courts deny discharge, the typical debtor must repay their loans until they reach retirement, assuming retirement is at sixty-five.[211] Nevertheless, results demonstrated that the relationship between age and determinations of future inability to pay is not statistically significant.[212]

Legal conclusions on future inability to pay are significant in undue hardship determinations. Future inability to pay, the second prong of *Brunner*, has been described by the Fourth Circuit as "the heart of *Brunner*."[213] The Ninth Circuit, which applies the second prong of *Brunner* in a distinguishably softer manner,[214] has also discussed the importance of the second prong, noting that it is the part of the *Brunner* test which embodies Congress's legislative intent found in section

208. *Id*. at 442–43.

209. *Id*. at 443 ("[O]ur age data exceed that of both these populations persuades us that the undue hardship debtors were not recent graduates seeking an immediate discharge of their educational debt.").

210. *Id*. at 444.

211. *Id*.

212. *Id*. at 481–504.

213. Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544 (4th Cir. 2008).

214. *See* Nys v. Educ. Credit Mgmt. Corp. (*In re* Nys), 308 B.R. 436, 444 (B.A.P. 9th Cir. 2004), *aff'd*, 446 F.3d 938 (9th Cir. 2006).

523(a)(8).[215] The extent to which courts consider age when determining a debtor's future ability to pay student loan debt should materially affect litigation outcomes.

According to nationwide evidence, income growth slows as workers age.[216] Census data indicates that incomes plateau among workers between their late thirties until their early sixties.[217] While individuals who continue working past the average age of retirement have higher average incomes, this is generally because those who decide to forgo retirement typically have high paying jobs that make the decision not to retire economically beneficial.[218] This indicates that those approaching retirement typically do not experience income growth and that those reaching retirement age have not experienced substantial income growth for almost thirty years proceeding retirement.[219] Courts should consider the need to adequately prepare for retirement and the ability seniors had to prepare when evaluating undue hardship for seniors on the verge of retirement.[220]

Empirical evidence also supports the assertion that retirees and those quickly approaching retirement were not contemplated in previous amendments to section 523.[221] While the trend of elder student debtors is rather current, their needs have not been addressed in the Code.[222] The increasing problem of student debt among seniors in bankruptcy demonstrates that Congress should reevaluate section 523 to account for current trends.

Absent congressional action, it is appropriate for courts that apply partial discharge to afford one based on age. It is further appropriate for age to be weighed more heavily in favor of aging debtors in undue hardship determinations.

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215. *See* Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1089 (9th Cir. 2001) (stating that second prong of Brunner test is "intended to effect the clear congressional intent exhibited in § 523(a)(8) to make the discharge of student loans more difficult than that of other non-excepted debt").

216. Andy Kiersz, *Here's What the Typical American Worker Earns at Every Age*, BUSINESS INSIDER (Nov. 20, 2018, 9:51 AM), https://www.businessinsider.com/typical-salary-americans-at-every-age-2018-6 [hereinafter Kiersz].

217. *Id*.

218. *See* Bricker, *supra* note 201.

219. *See* Pardo Assessment, *supra* note 131, at 444–45. *See also* Kiersz, *supra* note 216.

220. *See* Bricker, *supra* note 201.

221. *See* Pardo Assessment, *supra* note 131, at 444–45.

222. *See id.* at 423–25 (discussing the legislative history of 523 and its inapplicability to debtors).

iii. Empirical Evidence Concerning Those Who Do Litigate

In an additional study, Pardo and Lacey commented that this uncertainty may adversely affect the fresh start of debtors seeking relief from educational debt.[223] Debtors who most need relief likely lack the resources to pursue discharge litigation.[224] Even debtors who contest dischargeability are at a considerable disadvantage against an educational creditor with more resources and little incentive to settle.[225] The fact that this litigation must be funded post-petition, and is not subject to the bankruptcy discharge, only further impedes an educational debtor's fresh start.[226]

Additionally, debtors face great uncertainty about the likely outcome of an undue hardship discharge determination.[227] The inconsistency with which courts apply the same undue hardship standard provides little guidance to litigants who are deciding whether to attempt to fund post-petition litigation.[228]

This uncertainty calls the statutory provision requiring an adversary proceeding into question because those who are truly the worst off have difficulty obtaining relief. This uncertainty also raises concerns about the balance of power in settlement negotiations.

Financially distraught seniors should not be forced to come up with funds while in bankruptcy to finance expensive litigation in an effort to prove their financial situation is dire enough to warrant a student loan discharge.[229] Arguably, raising a presumption of undue hardship for a percent of student loan debt based on age would provide funds. It may also reduce costs of litigation, as the parties have more clarity as to how courts will come out when seniors file an adversary proceeding to challenge the dischargeability of their student loan.

223. *See* Pardo Litigation, *supra* note 101, at 190–91.
224. *See id*.
225. *See id*.
226. *See id*.
227. *See id.* at 185.
228. *See id.*
229. *See id.* at 211–12. ("[O]ne would expect that flat-fee arrangements are also rare insofar as post-bankruptcy student-loan debtors are unlikely to be able to make the large, lump-sum payment that would be required under such an arrangement.").

iv. Empirical Evidence Concerning Lack of Filing

A different study conducted by Jason Iuliano, an assistant professor of law at Villanova University, reached a different conclusion, and suggested that the lack of student debtors attempting to discharge is the main problem with student loans in bankruptcy.[230] The study collected data on adversary proceedings from the Public Access to Court Electronic Records ("PACER") and used CBP data to estimate the number of debtors nationwide who were in bankruptcy with student loan debt.[231] Only 0.1% of eligible debtors filed an adversary proceeding attempting to discharge student loans.[232]

Among those who did file, 39% received at least some relief, with the majority of that group settling their case outside of court (27%).[233] The study argued that inconsistency in application and the harshness of *Brunner* itself were not the reason for lack of discharge.[234] Lack of funds to pursue litigation and the underlying belief that student loans are not dischargeable were offered as possible explanations.[235]

Granting a partial discharge based on age and possibly even raising a presumption of undue hardship for a percentage of a debtor over the age of sixty-five's student loan obligation may inform seniors of their chances of succeeding in litigation. This may encourage them to file an adversary proceeding. It also may shift the balance of power in settlement agreements in favor of debtors.

b. Collection Practices and the Softening of *Brunner*

The American Bankruptcy Institute ("ABI") proposed changes in how the federal government attempts to collect on student loans in a report to the Department of Education in March 2018.[236]

230. *See* Iuliano, *supra* note 153, at 525.
231. *Id*. at 501–05.
232. *Id*. at 525. *See also* Taylor & Sheffner, *supra* note 28, at 315.
233. *See* Iuliano, *supra* note 153, at 511. *See also* Taylor & Sheffner, *supra* note 28, at 314.
234. *See* Iuliano, *supra* note 153, at 522–23.
235. *Id*.
236. *See generally American Bankruptcy Institute's Commission on Consumer Bankruptcy Recommendations to the Department of Education: Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings*, AM. BANKR. INST. (May 21, 2018), https://s3.amazonaws.com/abi-consumercommission/statements/DOE_Comments_and_Letter_from_Commission.pdf) [hereinafter ABI].

In order to avoid costly litigation that produces little recovery, bright-line rules for automatic undue hardship were proposed.[237] One recommendation was a presumed inability to earn more than the federal poverty guideline for debtors who are disabled under the Social Security Act and those who receive veterans disability benefits.[238] Furthermore, a presumption of undue hardship would be raised for borrowers with an average household income below 175% of the poverty line in the seven years before filing bankruptcy.[239] An increase to 200% of the poverty line was proposed for "retirees on fixed incomes and persons providing support for an elderly, chronically ill, or disabled household or family member."[240]

If adopted, these bright-line guidelines would benefit seniors who are disabled as well as seniors who live near the poverty line.[241] These individuals would likely not be able to afford costly litigation.[242] With respect to federal student loans, Congress and the courts are not the only government actors involved; the Department of Education is often a creditor and has some control over federal loan servicers.[243] Collection efforts for federally guaranteed student loans could be adjusted so that attempts to discharge loans among the elderly are not allowed or collection attempts once a debtor reaches retirement age are forbidden.[244]

237. *Id*. at 4–5.
238. *Id*. at 4.
239. *Id*.
240. *Id*. at 4–5.
241. *See id*.
242. *See* Pardo Litigation, *supra* note 101, at 190–91.
243. *See* Matt Carter, *Government Will Stop Sending Collection Agencies After Student Loan Borrowers,* CREDIBLE (May 25, 2018), https://www.credible.com/news/student-loans/government-will-stop-sending-collection-agencies-after-student-loan-borrowers/ [hereinafter Carter].
244. *See id.*

c. Softening *Brunner*

There is some evidence that courts are softening the undue hardship standard.[245] In fact, the Tenth Circuit has cautioned district courts against harsh applications of *Brunner*.[246] Additionally, bankruptcy courts have become increasingly critical of the *Brunner* test.[247]

An example of the trend away from strict applications of undue hardship can be seen in how some courts interpret the classification of a debtor's loans. Some courts interpret the Code narrowly and find that the debtor's loans are not excepted under section 523.[248] The court in *In re Essungui* discussed the majority view, which interprets Congress's intent under BAPCPA to broaden the types of loans covered.[249] Some courts applying this view have held that loans a debtor used to pay for necessities while studying for the bar exam were covered by section 523.[250] The court reasoned, however, that the minority approach relied on the appropriate statutory interpretation.[251] Specifically, section 523(A)(ii), the portion under which the case was litigated, excepts "an obligation to repay funds received as an educational benefit" from discharge.[252] The language "funds" and "educational benefit" differ from

245. Paul B. Porvaznik, *Is Discharging Student Loan Debt in Bankruptcy Getting Easier*?, 102 ILL. B.J. 540, 542 (2014) ("The seventh circuit paid lip service to *Brunner* but applied a more flexible, fact-specific test . . . ."). *See also* Seth J. Gerson, *Separate Classification of Student Loans in Chapter 13*, 73 WASH. U.L.Q. 269, 288 (1995) (discussing how courts have dealt with student loans under a Chapter 13 Plan); David M. Holliday, Annotation, *Chapter 13 Plan that Separately Classifies Student Loan Debt as Unfair Discriminatory Treatment of Class of Unsecured Claims Under § 1322(b)(1) of Bankruptcy Code (11 U.S.C.A. § 1322(b)(1))*, 6 A.L.R. Fed. 2d 507 (originally published in 2005) (discussing how student loan payments may be structured consistent with the Chapter 13 prohibition of preferencing unsecured creditors, section 1322(b)). *But see* Amanda M. Foster, *All or Nothing: Partial Discharge of Student Loans Is Not the Answer to Perceived Unfairness of the Undue Hardship Exception*, 16 WIDENER L.J. 1053 (2007).

246. *See Educational Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1308 (10th Cir. 2004) (stating that some courts apply *Brunner* too rigidly). *See generally*, Kurtis K. Wiard, Comment, *Brunner's Folly: The Road to Discharging Student Loans Is Paved with Unfounded Optimism [Buckland v. Educ. Credit Mgmt. Corp. (In Re Buckland), 424 B.R. 883 (Bankr. D. Kan. 2010)]*, 52 WASHBURN L.J. 357, 378 (2013) (discussing the contours of the 10th Circuit application of undue hardship).

247. *See* Long v. Educ. Credit Mgmt. (*In re* Long), 322 F.3d 549 (8th Cir. 2003) (rejecting Brunner in favor of keeping the 8th Circuit's totality of circumstance approach). *See also In re* Janet Rose Roth, 490 B.R. 908 (B.A.P. 9th Cir. 2013).

248. *See* Essangui v. SLF V 2015 (*In re* Essangui), 573 B.R. 614, 617 (Bankr. D. Md. 2017).

249. *Id*. at 621.

250. *Id*.

251. *Id*. at 622–24.

252. 11 U.S.C. § 523(a)(8)(A)(ii) (2018); *See id.*

the use of "educational benefit overpayment or loan" and "educational loan" appearing elsewhere in section 523.[253]

Additional softening of the standard has taken place at the appellate level. The Eleventh Circuit's decision in *In re Acosta-Conniff* concluded that undue hardship determinations are a finding of fact only reviewable for clear error, rather than a legal conclusion subject to de novo review.[254] This reasoning reduces the litigation costs, decreases the opportunity for appeal by educational creditors, and leaves bankruptcy judges with more discretion to make impactful decisions.[255]

Rethinking how elderly debtors' student loans are treated in bankruptcy could resolve many of these concerns.

IV. Recommendation

This Note makes several recommendations. First, section 523 should be reconsidered.[256] Second, courts should consider age in granting a partial discharge. Moreover, courts that do not grant a partial discharge should still emphasize debtor age in the second and third prongs of *Brunner*. These recommendations are aimed to provide relief to a vulnerable group, provide more balanced settlement negotiations, and better inform senior litigants of potential undue hardship litigation outcomes.

A. Revisit Statutes Considering How Student Debt Impacts Aging Borrowers

The statutory provisions of section 523 do not adequately consider the needs of a vulnerable group who increasingly hold student loan debt. Many of the problems discussed in this Note could easily be solved by repealing section 523 or adding an exception for seniors and individuals who have held student loan debt for decades.

253. *See In re* Essangui, 573 B.R. at 622–24.

254. *See* ECMC v. Acosta-Conniff (*In re* Acosta-Conniff), 686 F. App'x 647, 649 (11th Cir. 2017) ("A bankruptcy court's findings as to each of the three prongs of the Brunner test are factual findings that should be reviewed by the district court for clear error; not under a *de novo* standard of review."). *See also* Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 854 (9th Cir. 2013) (holding that a bankruptcy court's finding of 'good faith' should be reviewed clear error, not *de novo* when applying the *Brunner* test. . . . but the debtor also failed the bar exam three times and was only awarded a partial discharge.)

255. *See* ABI, *supra* note 236.

256. *See infra* Part III b) (discussing problems with the justifications for 523(a)(8).

While bills to address some of these concerns are often introduced, they do not gain traction.[257] Political difficulties make a legislative solution unlikely.[258] Nevertheless, bankruptcy courts may offer relief by altering how they apply legislative student loan discharge standards to the elderly.

B. Partial Discharge: Courts Should Consider Age Directly and Weigh It Heavily

Courts should consider age heavily when determining whether a partial discharge is appropriate. For courts applying the Sixth Circuit partial discharge approach to student loan debt, this is as simple as emphasizing a debtor's age.[259] Courts could even hold that a percentage of student loans should always be discharged for advanced age debtors.[260]

For courts applying an approach similar to the Ninth Circuit, a partial discharge is only appropriate to the extent educational debts cause an undue hardship.[261] Nevertheless, these courts can still use age to determine when a partial discharge is appropriate.[262] Additionally, these courts can weigh age more heavily with respect to the second prong of *Brunner*, future ability to repay, and not hold the availability of an IDR against seniors under the third prong, good faith effort to repay.[263] These later considerations could lead to larger amounts of debt being discharged among the elderly.

Though weighing age so heavily may be underinclusive in providing relief to debtors in need generally,[264] it has several benefits. It could provide more clarity in litigation and increase the amount seniors can discharge in negotiated settlements with educational lenders, which is how most debtors currently obtain relief.[265]

257. Legislative history of the two most recent bills proposed indicates neither one made it out of Committee. *See* H.R. 2366, 115th Cong. (2018). *See also* H.R. 2527, 115th Cong. (2018).

258. *See* Dynarski, *supra* note 171, at 3–5 (discussing studies from developed countries on how the availability of student loans influences the decision to attend college).

259. *See In re* Hornsby, 144 F.3d 433, 438 (6th Cir. 1998).

260. *See id*. at 440.

261. *See In re* Saxman, 325 F.3d 1168, 1174 (9th Cir. 2003).

262. *See In re* Modeen, 586 B.R. 298, 305 (Bankr. W.D. Wis. 2018).

263. *See infra* Part III discussion of IDR. *See also supra* Part III discussion of inability to pay.

264. *See* Pardo Litigation, *supra* note 101, at 233 (arguing that emphasis on medical conditions is necessarily underinclusive of those who need relief).

265. *See infra* Part III discussion of litigation.

There may be additional concerns about adverse incentives created by this policy. Some may argue that students will have an incentive to intentionally not pay student debts, thereby triggering the contingent liability of their guarantors. The guarantor, an individual at an advanced age, would have a better chance of discharging their liability in bankruptcy than the student borrower.[266]

Nevertheless, cosigning liability comes up in the context of private loans and private lenders face these concerns with other types of loans in the bankruptcy context.[267] Lending practices could account for adverse incentive concerns.

Some courts do not offer partial discharge as a remedy.[268] Those courts may nevertheless weigh age more heavily in undue hardship determinations, especially when considering future ability to pay and whether an IDR evidences good faith.

Finally, educational creditors should alter their collection methods so that the age of seniors and the age of their student loan debt is considered when pursuing repayment.[269]

V. Conclusion

When it was enacted, section 523 was not intended to apply to the elderly.[270] When it was decided, *Brunner* was not intended to apply to retirees.[271] While young debtors may be able to improve their financial circumstances and eventually make student loan payments, time and the ability to increase income before retiring often work against older student debtors.

Elder federal student loan borrowers are more likely to default on their loans than those in other age groups.[272] Student loan obligations,

266. *See* Strauss, *supra* note 10.
267. *Id.*
268. Hevin M. Lewis, *Bankruptcy and Student Loans*, CONG. RES. SERV. 1, 31–32, https://www.everycrsreport.com/files/20190718_R45113_656d02c947cdce0533e4c5dfb7cc6c8a3d5629b3.pdf (last updated July 18, 2019).
269. *See* Carter, *supra* note 243.
270. *See infra* Section II.
271. *See* Pardo Assessment, *supra* note 131 and accompanying text.
272. Abha Bhattarai, *Student debt now affects a staggering number of elderly Americans*, WASH. POST (Jan. 16, 2017, 6:42 AM), https://www.washingtonpost.com/news/business/wp/2017/01/16/student-debt-now-affects-a-staggering-number-of-elderly-americans/?noredirect=on&utm_term=.d03769ed259a).

when they are not discharged, prevent the elderly from saving for retirement and allow their creditors to seize government benefits which they rely on.

Vera Thomas, a chronically ill sixty-two-year-old who had been unemployed for two years, had no income and relied on food stamps when she filed for bankruptcy in 2017.[273] The bankruptcy court granted her a discharge with respect to her credit card debt, medical bills, and car loan, but not her student loan debt.[274] The federal government contested Thomas's adversarial proceeding for discharge and argued that her situation was not hopeless enough for the court to discharge her $7800 student loan debt.[275]

The judge who denied her adversarial motion indicated that in fifteen years on the bench, he had never discharged a student loan over the objection of the lender.[276] The current treatment of aging Americans like Thomas, illustrates the need for change.

273. Tim Chen, *Student Loans Have Become Our Modern-day Debtors' Prisons*, USA TODAY (June 5, 2018, 5:00 AM), https://www.usatoday.com/story/opinion/2018/06/05/student-loans-crisis-allow-bankruptcy-investigate-abuses-column/640460002/.

274. *Id*.

275. *Id*.

276. *Id.*