

Not Your Grandfather's *Brunner*: Courts Should Modify Their Application of Undue Hardship to Aging Debtors

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1. Introduction

For nearly 30 years, the judicially created *Brunner* test has been the predominant standard courts apply to determine whether a debtor's circumstances constitute undue hardship under § 523(a)(8) of the Bankruptcy Code.¹ In *Brunner*, the Second Circuit adopted a three-prong test for undue hardship, under which a debtor must 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."² The Eighth Circuit, which applies a 'totality of the circumstances' test, and the First Circuit, which has not adopted a standard, are the only two minority jurisdictions.³

Regardless of the judicially created standard applied, a debtor who wishes to discharge their student loan debt in bankruptcy faces an uphill battle. This is partially because the Code's student loan exception to discharge is "self-executing."⁴ Procedurally, a debtor must file an adversary proceeding contesting the dischargability of their student loan debt. Assuming the creditor establishes that the contested loan is an educational debt covered by §523(a)(8), the

¹11 U.S.C. §523(a)(8); *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395 (2d Cir. 1987).

² *Brunner*, 831 F.2d at 396.

³ Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 497 (2012).

⁴ *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004).

student debtor carries the burden of proving each element of undue hardship by a preponderance of the evidence.⁵

Many legal scholars have discussed the undue hardship standard, proposed amendments to the bankruptcy code and recommended policies to alleviate student loan debt. This article posits that these discussions are often incomplete because they fail to address the effect of § 523(a)(8) and its judicial implementation on aging Americans. Perhaps surprisingly, Americans between the ages of sixty and sixty-nine experienced the largest percent increase of student loan debt held of any age group over the last five years.⁶

This article argues that courts evaluating undue hardship should consider the characteristics of an aging debtor's student loans in addition to their age. Until Congress revisits § 523(a)(8), debtors face strict applications of the undue hardship standard. Student loan debt is increasing among older Americans and characteristics of their student loans often indicate financial distress. Focusing on signs of financial distress may better inform senior debtors of likely discharge litigation outcomes.

2. Analysis

a. Courts strictly apply the undue hardship standard, making it difficult for even financially desperate debtors to escape student loans.

i. A certainty of hopelessness: uncertainty in litigation.

The second element of Brunner, whether “additional circumstances” exist to indicate that the debtor's situation is likely to persist, has been referred to as “the heart of the Brunner test.”⁷

⁵ 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. & POLICY REV. 295, 309 (2016).

⁶ Zack Friedman, *Student Loan Debt Statistics in 2018: A \$1.5 Trillion Crisis*, FORBES, Jun. 13, 2018, <https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/#553544487310>.

⁷ *In re Spence*, 541 F.3d 538, 544 (4th Cir. 2008).

According to the Fourth Circuit, this “demanding requirement” is only satisfied when a debtor establishes “exceptional circumstances” which create “a certainty of hopelessness” that the debtor will be able to repay their loans.⁸ While the Ninth Circuit similarly expresses the importance of the second prong of *Brunner*,⁹ the court has explicitly held that ‘additional circumstances’ do not need to be ‘exceptional.’¹⁰

Not only do courts apply strict tests for undue hardship, different judges apply the same test inconsistently.¹¹ This combination makes it difficult for debtors to obtain relief from student loan debt and leads to unpredictable litigation results. Bankruptcy courts also differ in the extent to which they consider age relevant to undue hardship. Some courts weigh age in favor of finding additional circumstances under the second prong of *Brunner* while others reason that age alone is not enough.¹²

An empirical study conducted by 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.¹³ The study compared the demographics, financial characteristics, and factual circumstances of debtors who received a

⁸ *Id.*

⁹ 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.”)

¹⁰ *In re Nys*, 308 B.R. 436, 444 (Bankr. App. 9th Cir. 2004), *aff’d*, 446 F.3d 938 (9th Cir. 2006).

¹¹ *Comments of Bankruptcy Scholars on Evaluating Hardship Claims in Bankruptcy*, 21 J. CONSUMER & COM. L. 114, 116 (2018) [hereinafter *Comments*].

¹² See *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2006); see also *Educ. Credit Mgt. Corp. v. Spence*, 341 B.R. 825, 828 (E.D. Va. 2006), *aff’d sub nom. In re Spence*, 541 F.3d 538 (4th Cir. 2008). (“[the debtor’s] age does not constitute an additional circumstance, especially where she does not have any age-related illnesses that affect her ability to work.”) (internal citations omitted.)

¹³ 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, 478-509 (2005).

discharge with those who were denied a discharge.¹⁴ The average debtor contesting the dischargeability of their student loans was forty-one years old, demonstrating that the typical debtor must repay their loans until they reach retirement when courts deny discharge.¹⁵

Furthermore, among full-time workers attempting to prove undue hardship, average earnings decreased among those over the age of fifty-five relative to litigants between the ages of thirty-five and fifty-four.¹⁶ Nevertheless, the impact of age on determinations of future inability to pay was not statistically significant.¹⁷

In an additional study, the authors commented that uncertainty in discharge litigation may adversely affect the fresh start of debtors seeking relief from educational debt.¹⁸ Debtors who most need relief likely cannot afford litigation.¹⁹ Even debtors who contest dischargeability are at a considerable disadvantage against an educational creditor with more resources and little incentive to settle.²⁰ Undue hardship litigation must be funded post-petition, further impeding an educational debtor's fresh start.

Congress should reevaluate § 523(a)(8) to address these concerns. But in the absence of Congressional action, courts should modify how they consider age when analyzing undue hardship.

¹⁴ *Id.* at 481-482.

¹⁵ *Id.* at 442-43.

¹⁶ *Id.* at 444.

¹⁷ *See id.* at 481-504.

¹⁸ Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 191.

¹⁹ *Id.*

²⁰ *Id.* at 192.

ii. Income-Driven Repayment plans are not a Viable Alternative to Bankruptcy Relief.

The availability of income-driven repayment plans does not preclude the need for relief from federally guaranteed student loans among older borrowers in bankruptcy. On the surface, income-driven repayment plans (IDR) seem to offer an administrative solution for financially distraught student borrowers. Monthly payments, which can be as low as zero, are based on a borrower's income and upon completion of a 20- or 25-year plan, a borrower can discharge any remaining loan balance.

Most courts consider the availability of IDR a factor which is not wholly dispositive in an undue hardship determination.²¹ Moreover, courts applying *Brunner* tend to incorporate the availability of IDR into the third prong of the test, whether the debtor has made a good faith effort to repay their student loans.²² Some courts have held that the a debtor's failure to enroll in a zero-payment IDR plan should not count against finding undue hardship.²³ Conversely, other courts have held that the availability of a zero-payment IDR option weighs in favor of denying discharge, reasoning that student loans subject to a nonpayment IDR do not affect a debtor's standard of living.²⁴

Regardless of the appeal of broad administrative relief, empirical evidence indicates that very few qualifying debtors take advantage of IDR.²⁵ In fact, the vast majority of borrowers who default on their student loans remain unenrolled in IDR.²⁶ Problematic implementation and

²¹ John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1337 (2018) [hereinafter Hunt].

²² *See id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See Comments, supra* note 10, at 117.

²⁶ CONSUMER FIN. PROT. BUREAU, *Update from the CFPB Student Loan Ombudsman: Transitioning from Default to an Income-Driven Repayment Plan* (May 16, 2017)

servicing practices create barriers that prevent student borrowers from obtaining relief through IDR.²⁷

Older student borrowers report that servicing delays and processing errors limit their ability to take advantage of IDR.²⁸ Additionally, seniors who enrolled in an IDR while working complain that their monthly payments are not adjusted when they transition to a fixed income.²⁹ Federal loan servicers have little incentive to inform older individuals of their rights under a plan.³⁰ Finally, some senior borrowers are improperly placed on plans suitable for individuals with growing incomes.³¹

For limited income seniors, the availability of an IDR plan that would result in negative amortization of student loan debt should not weigh against finding undue hardship.³² This includes zero-payment IDR plans.³³ An undue hardship litigant should only be punished for failing to enroll in a plan under which their student debt would continue to grow if the plan can be justified.³⁴ Educational creditors should have the affirmative burden of demonstrating sizable

https://files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf) (reporting that 1-50 borrowers who had recently completed rehabilitation after a default were enrolled in IDR during their first borrowing cycle following rehabilitation; while fewer than 1-10 had enrolled nine months later.)

²⁷*See id.* (“A combination of problematic servicing practices and government programs can prevent the most vulnerable student loan borrowers from accessing affordable repayment plans—increasing costs to taxpayers and failing to set up borrowers for success over the long term.”)

²⁸ 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 *Snapshot*].

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *See Hunt supra* note 21, at 1339-40.

³³ *See id.*

³⁴ *See id.*

recovery in order to justify plans under which a borrower would not even pay down the interest on their student loans.³⁵

Additionally, failure to enroll in IDR should only count against finding undue hardship if the debtor knew or should have known the plan was available.³⁶ Federal loan servicers have little incentive to help borrowers enroll in IDR. Linking the debtor's awareness of eligibility to discharge litigation may provide such an incentive.

b. Student loan debts are an increasing problem among the elderly.

The number of older individuals with student loan debt is increasing rapidly. Moreover, the elderly experience problems related to retirement, housing and healthcare as a result of student loan obligations. Additionally, data gathered from the Consumer Bankruptcy Project (CBP) dataset suggest that a surprising number of seniors in bankruptcy have student loan debt.

i. Trends and how student loans affect seniors.

A recent report from the CFPB “makes clear that the education debt crisis and the retirement crisis in this country are very closely linked.”³⁷ Elder debtors are the fastest growing age-segment of the student loan market with the number of consumers age 60 or older holding student loan debt quadrupling between 2005 and 2015.³⁸ Many seniors experience financial difficulties as a result of their student loan obligations.

³⁵ *See id.*

³⁶ *See id.* at 1349-50.

³⁷ Donna Rosato, *Older Americans are Sacrificing Retirement to pay off Student Debt*, CONSUMER REPORTS, (Jan, 05, 2017) <https://www.consumerreports.org/paying-for-college/older-americans-sacrifice-retirement-to-pay-off-student-debt/>.

³⁸ 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>.

Student loan obligations hinder senior student borrowers' ability to pay for necessities. A joint-survey conducted by the Association of Young Americans and the AARP revealed that 32% of seniors with student loans reported using retirement savings to help pay student loan debts while 31% reported that student loan debt had prevented them from purchasing a new home.³⁹ Additionally, CFPB data suggest that seniors with student loan debt are more likely to skip prescription medicine, doctors' visits, and dental care because they cannot afford it.⁴⁰

When a debtor defaults on a federally guaranteed student loan, their tax refund and some forms of Social Security benefits are subject to garnishment. While Supplemental Social Income (SSI) is protected from such offset, over 114,000 student borrowers over the age of fifty experienced at least some level of Social Security Disability Income (SSDI) garnishment as a result of their outstanding federal student loans in 2016.⁴¹ Furthermore, the number of student borrowers sixty-five and older who had their Social Security benefits offset to pay a federal student loan increased from 8,700 to 40,000 between 2005 and 2015.⁴²

As the number of aging individuals holding student loan debt has increased, problems associated with student loans have affected many seniors. Additional evidence suggests that these problems extend into bankruptcy.

ii. CBP: Data Concerning Student Loans in Bankruptcy.

I was granted access to the Consumer Bankruptcy Project (CBP) dataset to gather data on elder debtors holding student loan obligations.⁴³ For the purpose of this study, a joint filing was

³⁹ AARP, *The Three Generations Survey*, (Oct. 2018), <https://www.aarp.org/research/topics/economics/info-2018/three-generations-survey.html>.

⁴⁰ *Snapshot supra* note 12, at 13.

⁴¹ *See Comments, supra* note 10, at 117-18.

⁴² *Snapshot, supra* note 12, at 12-13.

⁴³ *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.)

considered elderly if at least one of the debtors was sixty-five or older. Additionally, student loans were defined as: “the sum of debts listed on Schedule F that were debts owed to a school or state educational authorities or a creditor whose name indicates the debt is a student loan (ie. “National Student Loan”); or any debt described as ‘educational’ or ‘student loan.’” The dataset consists of 895 debtors for whom age information is available, of whom 120 were sixty-five or older. Nineteen debtors did not file a Schedule F and were excluded from the calculations.

Only eleven or 9.4% of debtors over the age of 65 had student loan debt on Schedule F. Of those with student loan debt, the average owed was \$30,593 with a median figure of \$20,977. The percent of senior debtors who list student loan obligations on their Schedule F has increased from 3.28% reported in the 2007-2010 CBP iteration.

For comparison, data was gathered regarding debtors who are younger than sixty-five. Among younger debtors 239, or 31.5%, held an average of \$40,130 in student debt, median \$21,676. During the 2007-10 CBP iteration, 19.4% of younger debtors held at least some student debt.

c. With age, different factors indicate financial distress.

Courts should consider age and factors associated with how older debtors hold student loans in determining undue hardship. The Survey of Consumer Finance (SCF) collects survey data concerning educational loans at a household level.⁴⁴ This includes whether student loans were incurred on behalf of a child and provides insight into how educational debt affects older

⁴⁴ Jesse Bricker et al., *Education Debt Owed by Older Families in the 2016 Survey of Consumer Finance*, Board of Governors of the Federal Reserve System, (Dec. 21, 2018) [hereinafter Bricker] <https://www.federalreserve.gov/econres/notes/feds-notes/education-debt-owed-by-older-families-in-the-2016-survey-of-consumer-finances-20181221.htm>.

families.⁴⁵ About two-thirds of student debt held by older households was used to finance higher education for the older individual or their spouse.⁴⁶

Rather than simply considering age, courts should analyze characteristics of student loan debt which provide insight into financial well-being. For example, courts should consider how long a debtor has been repaying their student loan debt. SCF data suggest that the increase in student debt held by older families is partially attributable to existing loans not being paid.⁴⁷ The financial well-being of older households may be strained when debt is still being repaid many years after leaving school.⁴⁸ Considering the age of student debt and how much the principal of the loan has been paid down would properly focus on the financial distress caused by a debtor's student loans.

Even when loans were taken out relatively recently, courts should evaluate whether educational debt was accompanied by an increase in income. Courts are especially strict in considering whether age contributes to an undue hardship for non-traditional students. Even when a non-traditional student has not incurred new student loans in decades, courts typically conclude that age does not weight in favor of finding undue hardship.⁴⁹ Many courts dismiss payment of educational debts until an advanced age as “merely a consequence” of a non-traditional student's decision to take out student loans later in life.⁵⁰

⁴⁵ *See id.* (for the SCF, older households were defined as a family headed by a person 40 years or older.)

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See In re Fabrizio*, 369 B.R. 238, 249 (Bankr. W.D. Pa. 2007) (debtor 51, had taken out loans in his thirties.); *see also In re Chapelle*, 328 B.R. 565, 572 (Bankr. C.D. Cal. 2005).

⁵⁰ *See In re Fabrizio*, 369 B.R. at 249; *see also Jones v. Bank One Texas*, 376 B.R. 130, 139 (W.D. Tex. 2007) (“ . . . as [debtor] chose to go to school later in life, which resulted in the student loan debts persisting into her later age.”)

The amount of educational debt held by older households has consistently increased, in part, because families take out new loans.⁵¹ Of the debt incurred to pay for an older individual's school, 40% was taken out to pay for a program attended within the last five years.⁵² This indicates that older households are financing human capital investments well outside of traditional school-going ages.⁵³ The number of older individuals enrolled in higher education has increased.⁵⁴ This number is on track to continue to grow through 2023.⁵⁵

Courts reason that additional circumstances under the second prong of *Brunner* must be outside of the debtor's control. It is becoming increasingly common for aging individuals' skillsets to become obsolete.⁵⁶ Many older students return to school to improve their employment opportunities.⁵⁷ Additionally, aging individuals often face competition to keep their jobs.⁵⁸ For some companies, hiring younger talent is a cheaper alternative to retaining older workers.⁵⁹ In short, while attending school at an older age is a choice, it is a choice that is often motivated by a desire to keep a current job or remain competitive in today's technology driven economy.⁶⁰ When additional education is not accompanied by an increase in income, courts should not hold going back to school against vulnerable aging debtors.

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See Bricker, supra* note 42.

⁵⁴ *See* William J. Hussar & Tabitha M. Baily, *Projections of Education Statistics to 2023*, NAT'L CTR. FOR EDUC. STATISTICS, 25-28 (Apr. 2016), <https://nces.ed.gov/pubs2015/2015073.pdf>.

⁵⁵ *See id.*

⁵⁶ Laurie Quinn, *Back to College After 50: The New Normal?*, *Forbes*, (Jul. 1, 2018 <https://www.forbes.com/sites/nextavenue/2018/07/01/going-back-to-college-after-50-the-new-normal/#744c7ec31ff9>.)

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

3. Conclusion

The continued increase of student loan debt among the elderly highlights a need for courts to update how they consider age in relation to undue hardship. Not only do older students have less time to recover, student loan debt may adversely impact retirement savings. Courts should only weigh failure to enroll in IDR plans that would have led to substantial recovery against a senior debtor. Courts should focus on characteristics that indicate financial distress among the elderly; even nontraditional students may incur student debt later in life as a result of economic pressure in a rapidly changing job market.