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**The Role a Debtor's Age Plays When Determining Whether to Discharge Student Loan
Debt**

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Introduction

Title 11 of the United States Code (the "Bankruptcy Code") generally provides for a broad discharge of pre-petition debts, resulting in a "fresh start" for debtors post-bankruptcy.¹ However, section 523 of the Bankruptcy Code provides that a debtor may not be discharged from student loans unless there is a showing of "undue hardship."²

"Undue hardship" is a term of art largely dependent on the circumstances of the debtor.³ One common circumstance is the age of the debtor. The effect of a debtor's age on their ability to pay can vary, so the role age plays in undue hardship analyses is unclear. This memorandum examines the role age plays in the undue hardship analysis. Part I examines section 523 and discusses how courts generally approach undue hardship analyses. Part II explores what role age plays in undue hardship analyses. Lasty, Part III discusses how courts approach the discharge of student loans when age is considered as a factor.

¹ See 1 COLLIER ON BANKRUPTCY ¶ 1.2 (Matthew Bender & Co. eds., 16th ed. 2021)).

² See 11 U.S.C. § 523(a)(8) (2018).

³ See 3 NORTON BANKRUPTCY LAW & PRACTICE § 57:53 (William L. Norton III, 3d ed. (2022)).

I. Section 523(a)(8) “Undue Hardship” Analysis

Section 523(a)(8) of the Bankruptcy Code generally prevents discharge of a loan that is “made, insured, or guaranteed by a governmental unit, or made by under any program funded in part or in whole by a governmental unit or nonprofit institution.”⁴ A court may, however, discharge student loans should the debtor show that “excepting the debt from discharge would impose an undue hardship on the debtor and the debtor’s dependents”⁵

There’s no singular definition of what constitutes an “undue hardship.” Instead, it is a “term of art whose interpretation is left to the discretion and judgement of the court.”⁶ The general rule “is that each case . . . must be examined on the facts and circumstances surrounding that particular bankruptcy.”⁷ Proving undue hardship is not meant to be easy for debtors. The term is not meant to include “‘the garden variety’ hardship or unpleasantness but must be long term in nature.”⁸

To determine whether there is an undue hardship, the courts have generally adopted one of two different tests. Most courts use what is known as the *Brunner* test, which was established by the United States Court of Appeals for the Second Circuit in *Brunner v. N.Y. State Higher Educ. Services Corp.*, 831 F.2d 395 (2d Cir. 1987).⁹ Other courts use what is known as the “totality of the circumstances” test.¹⁰ Both include age as a factor to be considered.¹¹ Thus, it

⁴ 11 U.S.C § 523(a)(8)(a).

⁵ 11 U.S.C § 523(a)(8).

⁶ 3 NORTON BANKRUPTCY LAW & PRACTICE § 57:53 (William L. Norton III, 3d ed. (2022)).

⁷ *Id.*

⁸ *Id.* (quoting *In re Berthiaume*, 138 B.R. 516 (Bankr. W.D. Ky. 1992)).

⁹ *See id.* at 57-2.

¹⁰ *See id.*

¹¹ *See* 9D AM. JUR. 2d *Bankruptcy* § 3618 (2022) (discussing how age is one of factors considered under the “additional circumstances” prong of the *Brunner* test); *In re Tyer*, 384 B.R. 230, 234 (Bankr. N.D. Iowa 2008) (stating how age can be a factor courts consider under the “totality of the circumstances” test).

clear that age is a factor considered by court in undue hardship analyses. However, it is not clear how courts approach undue hardship analyses when age is a factor.

II. The Role Age Plays in the Undue Hardship Analysis

Courts routinely look at numerous circumstances in a debtor's life when deciding whether there is hardship. When doing so, courts have been explicit in stating that age is an appropriate factor to consider.¹² However, courts have been clear that a debtor's age alone is not enough to warrant an undue hardship finding.¹³ Therefore, age can shape the analysis when it shapes other circumstances in a debtor's life. This often appears in two circumstances: (1) when it affects a debtor's ability to obtain or maintain work, and (2) when it limits the benefits of a repayment plan.

i. *Ability to Obtain or Maintain Work*

Courts will often focus on age when it limits a debtor's ability to obtain or maintain work. A debtor's ability to maintain a job is key to their economic prospects. Consequently, courts are more willing to find undue hardship where age limits a debtor's ability to work. This rationale was set forth in *Wallace v. Nelnet, Inc. (In re Wallace)*.¹⁴ *Wallace* featured a sixty-three-year-old debtor who had been unemployed for four months.¹⁵ The record showed that after receiving her degree, she had a long history of being unable to hold down a job, and was only able to keep positions for a short period of time with significant breaks in-between.¹⁶ The Arkansas bankruptcy court ruled that under the totality of the circumstances test, the debtor was

¹² See *In re Fahrer*, 308 B.R. 27, 35 (Bankr. W.D. Mo. 2004) (“The age of the Debtor is a factor the court may take into consideration in assessing whether repayment of the debt constitutes an undue hardship.”).

¹³ See *In re Houshmand*, 320 B.R. 917, 921 (Bankr. W.D. Mo. 2004) (“The mere fact that Debtor has reached normal retirement age does not mean that the debt should be discharged.”).

¹⁴ 557 B.R. 129 (Bankr. E.D. Ark. 2016).

¹⁵ *Id.* at 134.

¹⁶ *Id.* at 134–37.

entitled to a discharge.¹⁷ The court reasoned that obtaining future employment was unlikely for the debtor and largely out of her control.¹⁸ The court also reasoned that even if she was able to become employed, “it would only be a short time before she would reach age of retirement”¹⁹ Thus, the court was mindful of how reaching retirement age can limit one’s future employment prospects.

Additionally, courts have also granted student loan discharges where employment prospects were equally as unlikely but were the result of factors more in the debtor’s control.²⁰

ii. *Ability to Work for Younger Debtors*

In re Wallace stands in contrast to a case like *Chapelle v. Educ. Credit. Mgmt. Corp. (In re Chapelle)*, where the debtor was significantly younger and still had potential for employment opportunities.²¹ In *Chapelle*, the debtor had obtained a legal degree, but failed to obtain legal employment because she believed she would be unable to pass the bar exam.²² Although she was unable to make use of her law degree and her employment history had been unstable, the court denied discharge.²³ The California bankruptcy court reasoned that she was still thirteen years from retirement and had good job prospects as a paralegal.²⁴

Wallace and *Chapelle* display how age can affect the evaluation of debtor’s job prospects. While both debtor’s faced challenging financial situations and had troubles maintaining work, age was a large factor in deciding whether there was an undue hardship. Older

¹⁷ *Id.* at 146.

¹⁸ *Id.* at 140–41, 142.

¹⁹ *Id.* at 141.

²⁰ See *In re Bronsdon*, 435 B.R. 791 (B.A.P 1st Cir. 2010) (ruling the court did not err in granting discharge for sixty-four-year-old debtor who had been unable to pass the bar exam).

²¹ 328 B.R. 565 (Bankr. C.D. Cal. 2005).

²² *Id.* at 568.

²³ *Id.* at 574.

²⁴ *Id.* at 572.

debtors, who were closer to retirement and had less promising employment prospects, had more favorable outcomes in undue hardship proceedings.

ii. Consequences of Participation in Repayment Plans

Additionally, age affects undue hardship analyses when it limits the beneficial effects of entering an Income-Driven Repayment Plan (IDR). An IDR “permits the debtor to pay a percentage of her income for twenty to twenty-five years and provide for cancellation of any outstanding balance at the end of the repayment period.”²⁵ It is not uncommon for courts to deny discharges for eligible debtors because these programs are meant to keep loan payments manageable.²⁶

Courts will find undue hardship, however, when an IDR results in overly burdensome tax liability for older debtors. When an IDR payment period ends, the remaining debt is discharged, and the debt is treated as income for tax purposes.²⁷ This classification can create a heavy tax burden on debtors.²⁸ Consequently, in these scenarios, courts have declined to rely on IDRs and granted discharges to avoid such heavy tax burdens for debtors beyond their working years.²⁹ Therefore, age can play a large role when examining the benefits of IDRs. While they might favor denying discharge for younger debtors, the timeline can be unfavorable to older debtors, thus encouraging discharge.

²⁵ John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1291 (2018).

²⁶ *See In re Nelson*, 404 B.R. 892 (Bankr. E.D. Wisc. 2009) (denying discharge for a fifty-seven-year-old debtor because the debtor was eligible for an IDR).

²⁷ *See In re Brooks*, 406 B.R. 382, 395 (Bankr. D. Minn 2009).

²⁸ *See id.*

²⁹ *See id.* at 396 (“The debt would continue to increase until it was finally discharged, potentially leaving her with an extreme tax liability at age seventy-three.”).

iii. *Limitations on Considering Age*

Lastly, there are circumstances where courts have declined to consider age. Courts have been explicit in denying consideration of the age in which debtor took out the loans.³⁰ This aligns with the principle that undue hardship analyses “look to the present and future, not to the distant past.”³¹ Therefore, while age can be considered when looking at the present and future circumstances of the debtors, courts have drawn the line when considering age in the past.

II. How do the Courts Approach the Discharge of Student Loans When Age is a Factor

When courts conclude that the debtor is faced with an undue hardship, the courts can then discharge whatever debts the debtor owes. When age is among the reasons why discharge is warranted, it can often shape the way a court grants relief to the debtor. Of course, when there is an undue hardship, the court can simply grant a full discharge right then in the moment.³² However, sometimes debtors have the ability pay in the moment, which prevents an undue hardship finding. Nevertheless, courts sometimes recognize that debtors can be faced with undue hardship in the future. In the face of such changing circumstances, courts can grant partial discharges.

A partial discharge is applied when the debtor is unable to show that there would be an undue hardship for repayment of the student loans in their entirety, but payments of portions of the loans would be an undue hardship.³³ A partial discharge was ordered in *Parvizi v. U.S. Dep’t of Educ. (In re Parvizi)*.³⁴ In *In re Parvizi*, a fifty-one-year-old debtor was seeking discharge for

³⁰ See *In re DeRose*, 316 B.R. 606, 609 (Bankr. W.D.N.Y. 2004) (“[T]he age that the student/debtor [was] when the debts were incurred must have no relevance whatsoever to the Prong 2 inquiry . . .”).

³¹ *In re Bene*, 474 B.R. 56, 61 (Bankr. W.D.N.Y. 2012).

³² See *In re Ackley*, 463 B.R. 146 (Bankr. D. Me. 2011).

³³ See e.g., *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168 (9th Cir. 2004) (holding that the district court did not err in ruling that portions of the loans that created undue hardship can be discharged).

³⁴ No. 18-30578-EDK, 2021 WL 1921121 (Bankr. D. Mass. May 13, 2021).

student loan debt after deciding later in life to go to medical school.³⁵ The Massachusetts bankruptcy court declined her petition for discharge, relying heavily on the fact that she qualified for the REPAYE program, a government repayment program that limited her monthly payment.³⁶ However, the court acknowledged that when the repayment program ended, there would be large tax consequences that result from the forgiveness of the loan.³⁷ At that point, the debtor would be in her mid-seventies and beyond her working life.³⁸ Therefore, to address the debtor's circumstances, the court granted a partial discharge.³⁹ There would be no discharge during the remainder of the repayment program, yet what was left over at the end of the program was discharged.⁴⁰

Partial discharges are not just granted in circumstances where government repayment plans are at issue. They have also been granted in cases when a debtor is beyond or very close to the end of their working life.⁴¹ However, not all courts allow for partial discharges. Some take a stricter view that if undue hardship cannot be shown, then no part of a loan can be discharged.⁴²

The use of partial discharges offers courts a flexible remedy to address the reality that debtors' circumstances are often not fixed. While some debtors can pay at the time, factors can create future undue hardships that are not present in the moment. Age can often be one of those factors, and partial discharges allow courts to adjust accordingly.

³⁵ *Id.* at *1.

³⁶ *Id.* at *6.

³⁷ *Id.* at *7.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See In re Randall*, 628 B.R. 772 (Bankr. D. Md. 2021) (denying immediate discharge for sixty-eight-year-old debtor because of her current ability to pay but discharged any loan debt past twelve thousand dollars because close to retirement age).

⁴² *See In re Dunlap*, No. 15–30795, 2016 WL 93805, at *2 (Bankr. W.D.N.C. Jan. 6, 2016) (“If any one of the requirements [of the *Brunner* test] is not satisfied, no part of the loan can be discharged.”).

IV. Conclusion

Aging is an unavoidable factor that surrounds a debtor's ability to pay student loans. Age is consistently considered by courts, and for older debtors especially, it can be a large influence on undue hardship determinations. However, age alone isn't enough for debtors seeking discharge. For age to affect the analysis, it must shape other key circumstances in a debtor's life. If it influences a debtor's ability to work, or diminishes the benefits of an IDR, courts have been willing to grant full or partial discharges.