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"Good Faith" and the Discharge of Educational Loans in Chapter 13: Forging a Judicial Consensus

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RECENT DEVELOPMENT

"Good Faith" and the Discharge of Educational Loans in Chapter 13: Forging a Judicial Consensus

I. INTRODUCTION

In the Bankruptcy Reform Act of 1978[1] Congress sought to accomplish many goals, some of which appear internally incompatible. For example, Congress enacted section 523(a)(8) to limit the dischargeability of educational loans in Chapter 7 liquidations.[2] At the same time, however, Congress enacted the new Chapter 13 to encourage consumer debtors—including student borrowers—to elect repayment plans whenever feasible.[3] Chapter 13 contains a "superdischarge" provision,[4] which offers debtors a much broader discharge than the discharge that is available under section 523(a)

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1. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (relevant sections codified as amended at 11 U.S.C.).

2. 11 U.S.C. § 523(a)(8) (1982). The section provides for the nondischargeability of any debt:

> (8) for an educational 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 a nonprofit institution of higher education, unless—
>
> (A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; . . .

Id.

3. 11 U.S.C. §§ 1301-1330 (1982). According to the legislative history, "[T]he purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period." H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977). The plan must meet the requirements of § 1325(a) to receive court confirmation. *See infra* note 77 (text of provision). Several articles discuss the provisions of Chapter 13. *See, e.g.*, Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271 (1981); Hughes, *Chapter 13's Potential for Abuse*, 58 N.C.L. REV. 831 (1980); Lee, *Chapter 13 nee Chapter XIII*, 53 AM. BANKR. L.J. 303 (1979); Note, *"Good Faith" and Confirmation of Chapter 13 Composition Plans: Analysis and a Proposal*, 65 MINN. L. REV. 659 (1981).

4. 11 U.S.C. § 1328(a) (1982). The section provides:

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
>
> (1) provided for under section 1322(b)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title.

Id. The two exceptions relate to long term debts and alimony or support payments, respectively.

in straight bankruptcy. While section 523(a)(8) excepts educational loans from discharge, section 1328(a) of Chapter 13 does not except them from discharge.

This Article examines the tension that seems to exist between these two Bankruptcy Code provisions. Part II discusses the nature of federal educational loan programs. Part III reviews the legislative history of section 523(a)(8) to evaluate Congress' intent and purpose. Part III then inspects the history and operation of section 1328(a), Chapter 13's "superdischarge" provision, to see whether the two sections are reconcilable. Part IV analyzes recent decisions that attempt to reconcile these two code provisions through the good faith requirement of section 1325(a). Part V considers the appropriateness of excepting educational loans from discharge in bankruptcy. Part V concludes that a court asked to confirm a repayment plan that will result in the discharge of educational loans best serves Congress' purposes by analyzing the totality of circumstances when making an inquiry into the "good faith" of a proposed plan. Finally, part V discusses the way recent congressional legislation implements the "totality of circumstances" test.

II. Educational Loan Programs

For prospective college students, finding the resources to finance a college education can be a difficult task. Although students theoretically have access to the loan market, in practice, most students lack the resources necessary to participate as borrowers. Students are trapped in a "catch-22" situation: they desire an education because it can lead to greater financial security, but lack the financial resources to purchase the education and the collateral to secure loans to finance the education. Congress designed federal educational loan programs[5] to fill this void. These programs enable students who do not have access to the private lending market to borrow funds either directly from the federal government or from private lenders who receive federal guarantees.

5. These programs include the National Direct Student Loans, *see infra* notes 6-14 and accompanying text, and the Guaranteed Student Loans, *see infra* notes 15-29 and accompanying text. *See* The National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580, 1581 (repealed 1972); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1236.

A. National Direct Student Loan Program

The federal government has assisted college students in financing their educational endeavors since Congress passed the National Defense Education Act of 1958,[6] which created the National Direct Student Loan (NDSL) program.[7] The federal government funds the NDSL program through annual appropriations of loan capital.[8] To participate in the program, an institution of higher education must agree to contribute one dollar for every nine dollars that the government contributes.[9] These capital contributions create a loan fund from which an institution may lend to students who demonstrate financial need.[10] A student may borrow up to $6000 for undergraduate studies, with a $12,000 limit on combined graduate and undergraduate studies.[11] Six months after ceasing studies on at least a half-time basis, a student borrower must begin to repay any loans; he may then take up to ten years to complete repayment.[12] Finally, the loan program administrator may give a student borrower an unlimited forbearance in the event of financial distress,[13] and the borrower may defer payments in a variety of other situations.[14]

B. Guaranteed Student Loans

The Higher Education Act of 1965[15] established the Guaranteed Student Loan (GSL) program[16] and expanded the government role in financing higher educational opportunities. The government does not provide capital for GSLs as it does for NDSLs. Instead,

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6. Pub. L. No. 85-864, 72 Stat. 1580, 1581 (repealed 1972).

7. Following the Education Amendments of 1972, Pub. L. No. 92-318, § 137(b), 86 Stat. 235, 272-73, Congress transferred current funding and other provisions to the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified in scattered sections of 20 U.S.C.). Since 1972, the loans under the program have been named National Direct Student Loans (NDSLs). The NDSL statutes are codified in 20 U.S.C. §§ 1087aa to 1087ii (1982).

8. 20 U.S.C. § 1087aa(b) (1982).

9. *Id.* § 1087cc(a)(2). Although colleges and universities comprise the great majority of institutions of higher learning, the statute allows proprietary institutions and unaccredited institutions to participate as well. *Id.* § 1141(a).

10. *Id.* § 1087dd(b).

11. *Id.* § 1087dd(a)(2).

12. *Id.* § 1087dd(c)(1)(A).

13. *Id.* § 1080(c).

14. *Id.* § 1087dd(c)(2)(A). The student borrower can defer repayment if he pursues studies at another institution, or serves in the Armed Forces, Peace Corps, or VISTA. *Id.*

15. Pub. L. No. 89-329, 79 Stat. 1219 (codified in scattered sections of 20 U.S.C.).

16. 20 U.S.C. §§ 1071 to 1087-4 (1982).

the Department of Education (DOE)[17] provides loan guarantees to encourage lenders to make private capital available for student loans.[18]

Two systems exist for "guaranteeing" student loans. These systems operate at both the state and federal level. Under the state agency program, a state,[19] or a private, nonprofit agency within the state,[20] acts as the direct insurer of student loans, while the DOE serves as secondary guarantor.[21] Under the Federal Insured Student Loan (FISL) program, the DOE acts as the direct insurer of loans.[22] To participate in the FISL program, lenders must show that they cannot receive insurance from a state or private agency.[23] Furthermore, an educational institution that desires to participate in the FISL program may lend only to students who are unable to obtain GSLs through a state agency program.[24] This provision indicates the DOE's preference to serve as a secondary guarantor rather than a primary guarantor. As of 1982, all fifty states had created state guarantee agencies.[25] Accordingly, state agencies currently provide the vast majority of guaranteed student loans.[26]

Under both the state and federal programs, the same terms apply. Borrowers need not show financial need, but may borrow only to the extent that educational costs exceed other financial aid.[27] Students may borrow up to $2500 in any academic year, with an aggregate limit of $12,500 for undergraduate studies. Students

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17. The Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979), 20 U.S.C. § 3411 (1982), created the DOE as an executive department. The Act transferred to the DOE all duties formerly held by the Secretary of Health, Education, and Welfare, and its predecessor, the Office of Education, under various higher education acts. *Id.* § 301(a)(2), 93 Stat. 677, 20 U.S.C. § 3441(a)(2).

18. 20 U.S.C. § 1071(a) (1982). The DOE also pays a portion of the interest on the loans while the student borrowers are enrolled in school. *Id.*

19. 20 U.S.C. § 1078(b) (1982).

20. *Id.* The DOE treats state agencies and private agencies the same under the GSL program, reimbursing the agencies for at least 80% of their losses resulting from defaults. *Id.* § 1078(c)(1)(A). If the state agency keeps default payments within a prescribed limit, thereby assuring the availability of loan funds, the DOE will pay a higher percentage of the losses. In some cases the DOE will pay up to 100% of the loss. *Id.* § 1078(c)(1)(B).

21. *Id.* § 1078 (c)(1)(A).

22. *Id.* § 1073.

23. *Id.* § 1073(b)(2).

24. *Id.* § 1073(b)(1).

25. NATIONAL COMMISSION ON STUDENT FINANCIAL ASSISTANCE, GUARANTEED STUDENT LOANS: A BACKGROUND PAPER, REPORT No. 1, at 30 (1982) [hereinafter cited as STUDENT FINANCIAL REPORT].

26. In 1981 for example, almost 95% of GSLs came through the state agency programs. *Id.* at 30; *see infra* note 30.

27. 20 U.S.C. § 1078(a)(2)(C)(v) (1982).

may further borrow up to $5000 for any academic year of graduate studies, with a total aggregate limit of $25,000.[28] The repayment schedule of GSLs parallels the NDSL schedule.[29]

C. Borrowers' Actions and Congressional Response

Growing participation in the federal student loan programs has generated a tremendous volume of loan commitments for the government.[30] By 1981, the federal government was guaranteeing almost eight billion dollars in GSLs annually, bringing its cumulative loan volume to almost thirty billion dollars.[31] Naturally, as the number of student borrowers began to grow, the number of students who sought to have loans discharged in bankruptcy also increased.[32] Congress responded to this perceived problem by enacting a provision that excepted educational loans from discharge in certain circumstances.[33] Although this provision excepted educational loans from discharge in Chapter 7 liquidation proceedings, Congress did not similarly restrict the discharge of educational

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28. *Id.* § 1075(a).

29. *See id.* § 1077(a)(2); *see supra* notes 13-14 and accompanying text (discussing forbearance and deferrals under tbe NDSL program).

30. The National Commission on Student Financial Assistance compiled data on yearly and cumulative loan volumes under the GSL program. *See* STUDENT FINANCIAL REPORT, *supra* note 25, at 25.

Trends in GSL Borrowing
Loan Volume
(millions of dollars)

	1966-69	1971	1973	1975	1977	1979	1980	1981
FISL	284	484	655	661	500	541	504	427
State Agency	1135	531	516	637	1037	2443	4336	7308
Total	1419	1015	1171	1298	1537	2984	4840	7735
Cumulative*	1419	3245	5640	8078	11443	16385	21225	28960

*The cumulative volume is the total amount lent in the given year and all preceding years. *Id.* The elimination of the $25,000 ceiling on loan recipients' income, Act of Nov. 1, 1978, Pub. L. No. 95-566, § 5(b)(1)(A), 92 Stat. 2402, 2403, is responsible for the dramatic increase in borrowing after 1977. Concerned about excessive government spending, President Reagan reinstituted some of the restrictions on the availability of student loans. *See* Act of Aug. 31, 1981, Pub. L. No. 97-35, § 532(a), 95 Stat. 358, 451. This provision required a showing of need for students whose family income exceeded a new ceiling of $30,000. Currently President Reagan is signaling tbat the goverument may need to make further cuts in student financial aid. *See* N.Y. Times, Feb. 5, 1985, at A16, col. 6.

31. *See* STUDENT FINANCIAL REPORT, *supra* note 25, at 25-26.

32. *See infra* note 175 and accompanying text.

33. Guaranteed Student Loan Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2099 (1976) (codified in 20 U.S.C. § 1071 (1976) (repealed 1978)). In 1978, Congress adopted almost identical language to § 523(a)(8) of the Bankruptcy Reform Act.

loans in repayment plans filed under Chapter 13.[34]

Congress' apparently inconsistent treatment of the dischargeability of educational loans in bankruptcy has caused much judicial confusion, especially in courts faced with an increasing number of composition plans[35] that offer nominal repayment of educational loans.[36] The 1984 Bankruptcy Code amendments,[37] by further encouraging the use of Chapter 13 composition plans, may exacerbate this problem. In addition, with an ever-increasing number of loans entering repayment status, the number of bankruptcies inevitably will increase, even if the percentage of bankruptcies remains constant.[38] These developments make this an appropriate time both to review the Bankruptcy Code provisions relating to educational loans and to ascertain the appropriate judicial response to the apparent inconsistencies between those provisions.

III. Congressional Action

A. *Chapter 7: Legislative History of Section 523(a)(8) of the Bankruptcy Reform Act*

Chapter 7 of the Bankruptcy Reform Act of 1978[39] governs liquidation proceedings, or straight bankruptcies. In a straight bankruptcy a debtor liquidates all nonexempt assets and distributes them to creditors.[40] In exchange, the debtor receives a discharge of all debts except obligations, such as educational loans, that section 523(a) specifically excepts from discharge.[41] Prior to the Reform

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34. See *infra* notes 172-98 and accompanying text for a discussion of the apparent tension between the discharge provisions in Chapter 7 and Chapter 13.

35. Repayment plans under Chapter 13 can be either full or partial payment plans. Partial payment plans also are known as composition plans. These terms will be used interchangeably.

36. *See, e.g., In re* Vensel, 39 Bankr. 866 (Bankr. E.D. Va. 1984); *In re* Hawkins, 33 Bankr. 908 (Bankr. S.D.N.Y. 1983); *In re* Mitruka, 19 Bankr. 516 (Bankr. E.D. Pa. 1982); *In re* Smith, 8 Bankr. 543 (Bankr. D. Utah 1981); *In re* Eichelberger, 6 Bankr. 705 (Bankr. S.D. Miss. 1980).

37. *See* 11 U.S.C. § 707(b) and Form 1 paras. 6 & 7 (as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 93-353, § 322, 98 Stat. 333, 357).

38. *See* Student Financial Report, *supra* note 25, at 26. The dramatic increase in borrowing from 1979-81, following the elimination of the income ceiling, *see supra* note 30, has expanded both the cumulative volume of loans, and the percentage not yet in repayment. Student Financial Report, *supra* note 25, at 24, 26.

39. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 701-66, 92 Stat. 2549, 2603-21 (codified at 11 U.S.C. §§ 701-66 (1982)).

40. For a list of exemptions, see 11 U.S.C. § 522(d)(1)-(11) (1982).

41. Other nondischargeable debts include debts for taxes and debts obtained by fraud. *See id.* § 523(a)(1)-(9).

Act, bankruptcy law did not except educational loans.[42] The only deterrent to student borrowers seeking to discharge loans in bankruptcy was the moral and social stigma associated with bankruptcy.[43] Because Congress believed this deterrent was insufficient to prevent student borrowing abuses of the bankruptcy laws, Congress undertook to restrict the availability of discharge.

1. The Guaranteed Student Loan Amendments of 1976 and the New Section 439A of the Higher Education Act of 1965

Section 523(a)(8) of the Bankruptcy Reform Act of 1978 traces its roots to a proposal of the Commission on the Bankruptcy Laws of the United States.[44] In 1973, the Commission submitted a report to Congress recommending sweeping changes in the bankruptcy laws.[45] The report included a proposal that excepted educational loans from discharge in bankruptcy.[46] That year, Congress acted to

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42. *See In re* Holzer, 33 Bankr. 627, 630 (Bankr. S.D.N.Y. 1983). Following the Guaranteed Student Loan Amendments of 1976, Pub. L. No. 94-452, § 127a, 90 Stat. 2081, 2099-2100 (repealed 1978), Congress excepted student loans from discharge through the Higher Education Act of 1965. For a discussion of the validity of using this Act to except loans from discharge, see *infra* note 57.

43. The stigma associated with bankruptcy can be significant. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 105-107 (1977) (statement of Rep. James G. O'Hara). Congressman O'Hara stated:

> [B]ankruptcy is a serious step . . . . [I]t involves the distribution of [a debtor's] assets and much of his income among his creditors . . . . [I]t is basically damaging to the credit and personal reputation of those forced to go through it . . . . [It] is not and has never been designed to be an 'easy way out' for the bankrupt. Bankruptcy, for most of those who enter into it, carries its own deleterious consequences.

Id. at 150. One commentator, however, has noted that the moral stigma appears to be less of a deterrent than in the past. Kosel, *Running the Gauntlet of "Undue Hardship": The Discharge of Student Loans in Bankruptcy,* 11 GOLDEN GATE U.L. REV. 457, 461 (1981).

44. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess, pt. II, 136 (1973) [bereinafter cited as Bankr. Comm'n Report]. Congress created the Bankruptcy Commission in 1970 to review the former bankruptcy laws and propose a revised bankruptcy act. S.J. Res. 88, Pub. L. No. 91-354, 91st Cong., 1st Sess. (1970). For further discussion of the legislative history of § 523(a)(8), see Ahart, *Discharging Student Loans in Bankruptcy,* 52 AM. BANKR. L.J. 201 (1978); Kosel, *supra* note 43; Pawlik, *Student Loan Bankruptcies: A Chapter 13 Revival?,* 5 J. EDUC. FIN. 452 (1980); Note, *Skipping Out on Alma Mater: Some Problems Involving the Collection of Federal Student Loans,* 15 COLUM. J.L. & SOC. PROBS. 317 (1980).

45. *See* Bankr. Comm'n Report, *supra* note 44, pts. I & II.

46. Section 4-506(a)(8) of the proposed Act read as follows:

> § 4-506. *Exceptions from Discharge; Determination of Dischargeability and Liability on Nondischargeable Debt.*
>
> (a) *Exceptions from Discharge.* A discharge extinguishes all debts of an individual debtor, whether or not allowable, except the following:
>
> . . . .
>
> (8) any educational debt if the first payment of any installment thereof was due on

limit the dischargeability of educational loans when it considered a bankruptcy reform bill patterned after the Bankruptcy Commission's proposed code.[47] The political process, however, delayed the new bankruptcy act until 1978.[48] Congress, nonetheless, remained concerned about educational loans and included a provision as part of the Guaranteed Student Loan Amendments of 1976 that added a new section 439A to the Higher Education Act of 1965 limiting the discharge of educational loans in bankruptcy proceedings.[49]

With this legislation Congress intended to attack the perceived abuse by student borrowers of the bankruptcy discharge provisions.[50] Section 439A restricted the discharge of an educa-

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a date less than five years prior to the date of the petition and if its payment from future income or other wealth will not impose an undue hardship on the debtor and his dependents; . . .

Bankr. Comm'n Report, *supra* note 44, pt. II, at 136.

The Bankruptcy Commission Report contains the following rationale for the exception to discharge:

> Examples of the abuse of the discharge in the case of educational loans have also come to the Commission's attention. Some individuals have financed their education and upon graduation have filed petitions under the Bankruptcy Act and obtained a discharge without any attempt to repay the educational loan and without the presence of any extenuating circumstance, such as illness. The Commission is of the opinion that not only is this reprehensible but that it poses a threat to the continuance of educational loan programs.

Id. pt. I, at 122-23 (footnotes omitted).

47. H.R. 10,792, 93d Cong., 1st Sess. (1973).

48. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

49. Guaranteed Student Loan Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (repealed 1978) (codified at 20 U.S.C. § 1087-3 (1976)). The provision reads in pertinent part:

> § 1087-3. *Five-year nondischargeability of certain loan debts; effective date.*
>
> (a) A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period . . . beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of the five year-period, such loan may be released only if the court in which the proceeding is pending determines that payment from future income or other wealth will impose an undue hardship on the debtor or his dependents.

Id. Congress repealed 20 U.S.C. § 1087-3 when it passed the Bankruptcy Reform Act of 1978. *See infra* note 73 and accompanying text.

50. *See* H.R. REP. No. 1232, 94th Cong., 2d Sess. 13-14 (1976). The Report of the House Committee on Education and Labor described the purpose of § 439A as follows:

> The Committee adopted an amendment which would have the effect of preventing the discharge of student loans through a bankruptcy proceeding if the bankruptcy petition were filed before the loan has been in repayment for five years. The amendment was adopted in the light of testimony that the bankruptcy rate involving student loans has increased significantly in the last several years and that in some areas of the country students are being counseled on filing for bankruptcy to discharge their obligation to repay guaranteed student loans.

Id. at 13.

tional loan for five years from the date repayment commenced.[51] Section 439A, however, did not apply to as broad a class of loans as the Commission proposal. Instead, the new section restricted only the discharge of insured or guaranteed loans.[52] Furthermore, section 439A lowered the standard for discharging an educational loan during the five-year delay period. The section allowed discharge if excepting the loan from discharge would cause "undue hardship on the debtor *or* his dependents."[53]

Following testimony and lengthy debate, Congress enacted section 439A as part of the Guaranteed Student Loan Amendments of 1976.[54] Curious circumstances surrounded the passage of

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The Senate Committee on Labor and Public Welfare described the purpose of § 439A as follows:

> [Section 439A is designed] to eliminate the defense of bankruptcy for a five-year period, to avoid the situation where a student, upon graduation, files for a discharge of his loan obligation in bankruptcy, then enters upon his working career free of the debt he rightfully owes. After a five-year period, an individual who has been faithfully repaying his loan may really become bankrupt. He should not be denied this right, and is not under the Committee bill.

S. Rep. No. 882, 94th Cong., 2d Sess. 32 (1976).

51. 20 U.S.C. § 1087-3 (1976) (repealed 1978) (quoted *supra* note 49). Congress apparently based its choice of the five-year period on a 1975 study by the New Jersey State Guarantee Loan Program which demonstrated that bankruptcy filings on the average occurred two and one-half years after the last loan. *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong. 1st and 2nd Sess. 1074 (1976) (statement of Edward T. York, Jr.) [hereinafter cited as *Bankruptcy Hearings*]. A private, nonprofit guarantee agency performed a study some years earlier which showed that 98% of bankruptcy filings occurred within five years of departure from school. *See* Letter from Elmer Staats, Comptroller General of the United States, to Representative Don Edwards (Dec. 23, 1976), *reprinted in* H.R. Rep. No. 595, 95th Cong., 1st Sess. 137 (1977). Furthermore, bankruptcies filed after the five-year period are more likely to occur because of exigent circumstances than because of a desire to escape a nettlesome obligation. *See* Kosel, *supra* note 43, at 465.

52. *Compare* 20 U.S.C. § 1087-3 (1976) (repealed 1978) (quoted *supra* note 49) *with* Bankr. Comm'n Report, *supra* note 44, pt. II, § 1-102(23), at 3.

53. 20 U.S.C. § 1087-3 (1976) (repealed 1978) (emphasis added) (quoted *supra* note 49). The Bankruptcy Commission proposal allowed discharges only if excepting the loan from discharge would cause undue hardship on the debtor *and* his dependents. Bankr. Comm'n Report, *supra* note 44, pt. II, § 4-506(a)(8), at 136. The legislative history contains no reference to the reason for this change. Furthermore, Congress provided no guidance for courts faced with interpreting the meaning of "undue hardship." The Bankruptcy Commission, however, had attempted to give the concept some substance. *Id.* at 140-41 & n.17. Several witnesses also spoke to the issue at the hearings on the Bankruptcy Reform Act. *Bankruptcy Hearings, supra* note 51, at 1069-70 (testimony of Rep. Ray Thornton), 1092-93 (testimony of Rep. Erlenborn), 1097 (testimony of Sheldon Steinbach). For a more complete discussion of "undue hardship" see Ahart, *supra* note 44; Kosel, *supra* note 43.

54. Guaranteed Student Loan Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (repealed 1978) (quoted *supra* note 49). For an analysis of the policy arguments in favor of and against the exception to discharge see *infra* notes 65-71, 172-189 and accompanying text.

this provision. Because the entire federal student loan program faced expiration and needed reauthorization, the House Committee on Education and Labor had to rush to the House floor the bill to which the provision was attached.[55] As a result, the provision never was referred to the House Judiciary Committee[56] and was implemented through the Higher Education Act of 1965, in title 20, rather than through the Bankruptcy Act, in title 11.[57] To give the House Judiciary Committee time to collect more data and review the provision in conjunction with the complete revision of the bankruptcy laws, Congress chose to delay the effective date of the exception to discharge until September 30, 1977.[58]

2. Section 523(a)(8) of the Bankruptcy Reform Act of 1978

When Congress finally turned its attention to the Bankruptcy Reform Act of 1978, Congress focused again on the discharge of educational loans in bankruptcy. In May 1977, the House Subcommittee on Civil and Constitutional Rights, armed with the GAO study that the Subcommittee had requested the previous year,[59]

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55. *See* Letter from Representative Edwards to Representative Erlenborn (June 16, 1977), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 152 (1977).

56. *Id.* In his letter to Representative Erlenborn, Edwards cited two other reasons for not seeking sequential referral at the time Congress considered and enacted § 439A. First, the data on student loan bankruptcies was incomplete and insufficient for reasoned decisionmaking. Second the Subcommittee was already beginning its major revision of the bankruptcy laws and chose to delay consideration of the matter until the Reform Act came before the Subcommittee. *Id.* To obtain better data on student loan bankruptcies, Representatives O'Hara and Edwards asked the General Accounting Office (GAO) to do a "thorough study of the problem." *Id.*; *see* Letter from Representatives Edwards and O'Hara to Comptroller General Elmer B. Staats (Dec. 23, 1976), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 134 (1977).

57. *See* 20 U.S.C. § 1087-3 (1976) (repealed 1978). If Congress had been in less of a hurry, it might have realized that the former Bankruptcy Act required exceptions to discharge to be contained within the Act. 11 U.S.C. § 1(15) (1976) (repealed 1979). This statutory conflict created mixed results in the courts. Some courts held that § 1(15) barred application of § 1087-3 in bankruptcy proceedings. *See* Note, *supra* note 44, at 336 n.144 (citing *In re* Vittek, 19 COLLIER BANKR. CAS. 2D (MB) 65 (N.D. Ohio 1978)). Other courts, less literal in interpreting the statutes, enforced § 1087-3, reasoning that it constructively amended the former Bankruptcy Act. *See* Note, *supra* note 44, at 336 n.144 (citing *In re* Payton, 19 COLLIER BANKR. CAS. 2D (MB) 147 (E.D. Pa. 1978)).

58. H.R. REP. No. 595, 95th Cong., 2d Sess. 132 (1977).

59. *Id.* at 134-45 (1977). Among other things contained in the GAO study, the statistics demonstrated that less than one percent of all matured loans were discharged in bankruptcy—a figure that compared favorably with statistics for the consumer finance industry. *Id.* at 133. Furthermore, the GAO found that educational loans constituted more than 80% of the debtor's total indebtedness in only 20% of the filings studied. *Id.* This statistic refuted the contention that student borrowers were filing for bankruptcy just to discharge educational loans.

unanimously agreed that educational loans merited the same treatment as other loans.[60] The Subcommittee reported out a bill containing a provision that would repeal section 439A of the Higher Education Act of 1965.[61] In July of the same year, the House Judiciary Committee considered the issue and, in accordance with the Subcommittee's position, rejected an amendment that would have made educational loans nondischargeable.[62] Because the House took no action on the measure before September 30, 1977, however, section 439A of the Higher Education Act automatically went into effect.[63] Nonetheless, the bill did not appear to have much staying power.

In February 1978, Congress breathed new life into the nondischargeability of educational loans in bankruptcy when the House considered an amendment that would add section 523(a)(8) to the Bankruptcy Code.[64] Proponents of the amendment argued that the unique nature of student loans mandated special treatment under the Bankruptcy Code.[65] Furthermore, the proponents maintained that the amendment was needed to keep student loan programs

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60. *Id.* at 132.

61. The Subcommittee deleted the exception to discharge in H.R. 7330. *See* Letter from Representative Edwards to Ronald J. Iverson (June 15, 1977), *reprinted in* H.R. REP. No. 595, 95th Cong., 2d Sess. 155-56 (1977). The deletion later became § 316 of H.R. 8200. H.R. REP. No. 595, 95th Cong., 2d Sess. 129 n.78 (1977).

62. H.R. REP. No. 595, 95th Cong., 2d Sess. 132 (1977). Opposition to the amendment came from the Consumer Bankers Association, the National Bankruptcy Conference, the National Student Lobby, and the National Student Association. *Id.* at 132-33. The vote in the House Judiciary Committee was 4 to 23. *Id.* at 132.

63. 124 CONG. REC. H1792 (daily ed. Feb. 1, 1978) (remarks of Rep. Dodd).

64. The original text of § 523(a)(8) appears in 124 CONG. REC. H1791 (daily ed. Feb. 1, 1978) (remarks of Rep. Ertel). The provision states:

> (8) for a loan insured or guaranteed under part B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1071 *et. seq.*) if—
>
> (A) such loan first becomes due—
>
> (i) within five years before the date of the filing of the petition; or
>
> (ii) after the date of the filing of the petition; and
>
> (B) excepting such debt from discharge under this paragraph will not impose an undue hardship on the debtor or a dependent of the debtor; . . .

Id. The present text of § 523(a)(8), which appears *supra* note 2, includes loans that a governmental unit *makes, insures, or guarantees*, not just loans that it insures or guarantees. Congress effected this change in the Act of Aug. 14, 1979, Pub. L. No. 96-56, § 3, 93 Stat. 387. Congress intended to incorporate loans that the government provided to profit-making institutions as well as loans made to nonprofit institutions under § 439A of the Higher Education Act prior to its repeal. *See* Wickham, *Chapter 7 or Chapter 13: Guiding Consumer Debtor Choice Under the Bankruptcy Reform Act*, 58 N.C.L. REV. 815, 819 n.24 (1980).

65. 124 CONG. REC. H1791-93 (daily ed. Feb. 1, 1978) (remarks of Reps. Ertel, Mottl, and Erlenborn).

intact.[66] Opponents of the measure, on the other hand, contended that excepting educational loans from discharge conflicted with the traditional policies of bankruptcy—the fresh start for debtors and the equal treatment of creditors.[67] Opponents also argued that the GAO report demonstrated that the bankruptcy "problem" had been blown out of proportion.[68]

Representative Michel focused on a different aspect of the controversy. He was less concerned with the dollar amounts at stake and more concerned with the question of individual and moral responsibility.[69] He emphasized the need to give moral support to the men and women who were responsible enough to repay federal loans, and he stated that the amendment did just that because it did not allow easy discharges to individuals not truly in need.[70] Representative Ford argued that any federal program designed to put millions of students through college would have associated costs.[71]

When the debate ended, the Committee of the Whole passed the amendment,[72] which later became part of the Bankruptcy Reform Act of 1978.[73] Congress had made clear its intent: educational

66. 124 CONG. REC. H1791 (daily ed. Feb. 1, 1978) (remarks of Rep. Ertel).

67. 124 CONG. REC. H1793 (daily ed. Feb. 1, 1978) (remarks of Rep. Dodd). Representative Dodd claimed that the exception to discharge discriminated against the class of student borrowers. *Id.*

68. 124 CONG. REC. H1792-93 (daily ed. Feb. 1, 1978) (remarks of Rep. Dodd), H1795-96 (daily ed. Feb. 1, 1978) (remarks of Rep. Ford).

69. 124 CONG. REC. H1795 (daily ed. Feb. 1, 1978) (remarks of Rep. Michel).

70. *Id.* Representative Michel stated that even a few well-publicized bankruptcies are sufficient to erode the morale of responsible student borrowers. *Id.*

71. *Id.* (remarks of Rep. Ford); *see also* H.R. REP. No. 595, 95th Cong., 2d Sess. 134 (1977) ("It is inappropriate to view the program as social legislation when granting the loans, but strictly as business when attempting to collect. Such inconsistency does not square with general bankruptcy policy.").

72. The vote was 54 to 26 in favor of the amendment. 124 CONG. REC. H1798 (daily ed. Feb. 1, 1978). At the same time, the Committee rejected, by a vote of 34 to 21, an amendment that would have limited the exception to discharge to debtors whose educational loans equaled more than 65% of total indebtedness. *Id.*

73. Bankruptcy Reform Act, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (1978). The effective date of the Bankruptcy Reform Act was October 1, 1979. *Id.* § 402(a), 92 Stat. 2682 (1978). Section 402(d), however, provided that § 317 repealed § 1087-3 on the date of enactment, November 6, 1978. *Id.* § 402(d), 92 Stat. 2682 (1978). Thus, Congress created a "gap" period, during which educational loans were apparently dischargeable. Section 403(a), however, provided that courts should treat cases commenced prior to the effective date of the Bankruptcy Reform Act as if Congress had not passed the Bankruptcy Reform Act. Obviously, this procedure led to some confusion. *See* Note, *supra* note 44, at 343 n.189 (comparing *In re* Edson, 1 COLLIER BANKR. CAS. 2D (MB) 8 (D. Nev. 1979) (holding that Congress did not repeal § 1087-3) with *In re* Utterback, 1 COLLIER BANKR. CAS. 2D (MB) 151 (N.D. Tex. 1979) (holding that Congress repealed § 1087-3)).

loans were unique. Students could no longer discharge the obligation to repay the loans, and aid the continued vitality of the loan programs, without a showing of undue hardship. To determine whether Congress carried forth this purpose, an examination of Chapter 13 is necessary.

B. Chapter 13: The Legislative History of Section 1328(a)

Chapter 13 governs repayment plans of debtors who have a regular income.[74] The foundation of any repayment plan is the debtor's future income, not his present assets.[75] Unlike a Chapter 7 liquidation, which the court can process with little involvement, a Chapter 13 repayment plan requires judicial confirmation.[76] A debtor seeking confirmation of a Chapter 13 plan must demonstrate that his plan meets the six requirements of section 1325(a).[77]

Apparently, when Congress passed the Ertel Amendment in February, no one adjusted the repeal date of § 1087-3 to coincide with the effective date of the Bankruptcy Act. *See* 125 CONG. REC. H2758 (daily ed. May 7, 1979) (remarks of Rep. Edwards). Congress attempted to rectify this oversight through the Act of Aug. 14, 1979, Pub. L. No. 96-56, § 1, 93 Stat. 387, 387, which added a provision similar to § 1087-3 to tbe former Bankruptey Code, but even this action was of limited success because it applied only prospectively. Act of Aug. 14, 1979, Pub. L. No. 96-56, § 2, 93 Stat. 387, 387. Most courts have enforced the nondischargeability of educational loans during the "gap" period. *See, e.g.,* Carnegie v. Georgia Higher Educ. Assistance Corp., 691 F.2d 482 (11th Cir. 1982); *In re* Williamson, 665 F.2d 683 (5th Cir. 1982); Wisconsin Higher Educ. Aids Bd. v. Lipke, 630 F.2d 1225 (7th Cir. 1980); *In re* Adamo, 619 F.2d 216 (2d Cir.), *cert. denied sub nom.* Williams v. New York State Higher Educ. Servs. Corp., 449 U.S. 843 (1980).

74. 11 U.S.C. §§ 1301-1330 (1982). Chapter 13 is entitled "Adjustment of Debts of an Individual with Regular Income."

75. *See id.* § 1322(a)(1) (1982) (providing "for the submission of all or such portion of future earnings or other future income of the debtor . . . as is necessary for the execution of the plan").

76. *In re* Yee, 7 Bankr. 747, 756 (Bankr. E.D.N.Y. 1980). A debtor seeking to discharge *educational* loans, however, would need court approval under both Chapter 7, because of the "undue hardship" provision, and Chapter 13.

77. 11 U.S.C. § 1325(a)(1)-(6) (1982). Section 1325(a) provides:

(a). . .[T]he court shall confirm a plan if—

(1) The plan complies with the provisions of this chapter and with other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

When a debtor completes payments on a confirmed plan, the debtor is entitled to a discharge of all debts, except as provided for in section 1328(a).[78] A Chapter 13 composition plan thus provides distinct advantages to the income earning debtor with outstanding educational loans. First, he can continue to use nonexempt assets because he does not need to liquidate them.[79] Second, the debtor is spared the stigma of bankruptcy[80] and receives greater protection of his credit standing than under straight bankruptcy.[81] Third, the debtor benefits from a "bonanza" discharge in section 1328(a), which even allows for the discharge of educational loans.[82] A paradox exists between section 523(a)(8), which limits the dischargeability of educational loans in straight bankruptcy, and section 1328(a), which provides for the unlimited dischargeability of educational loans in Chapter 13 cases. This section examines the legislative history of section 1328(a) to try to find an explanation

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(B)(i) the plan provides that the the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

Id.

In the educational loan context, creditors most frequently contest whether a debtor's proposed plan satisfies one or more of three tests: (1) the good faith test, § 1325(a)(3); (2) the best interests of creditors test, § 1325(a)(4); or (3) the feasibility test, § 1325 (a)(6). *See, e.g., In re* Scher, 12 Bankr. 258 (Bankr. S.D.N.Y. 1981) (challenging good faith and feasibility); *In re* DeSimone, 6 Bankr. 89 (Bankr. S.D.N.Y. 1980) (challenging good faith, best interests of creditors, and feasibility).

78. 11 U.S.C. § 1328(a) (1982). For the text of § 1328(a), see *supra* note 4. Section 1328(a) does not except educational loans from discharge. *Id.*

If the debtor fails to complete payments under the plan, then § 1328(b) and (c) control the discharge of debts. 11 U.S.C. § 1328(b), (c) (1982). Discharges are limited under § 1328(b). A court may grant a discharge to a debtor only if the failure to complete payments is attributable to circumstances beyond the debtor's control and the value of property distributed under the plan on each unsecured claim "is not less than the amount . . . paid on such claim if the estate of the debtor had been liquidated." 11 U.S.C. § 1328(b)(1), (2) (1982). Section 1328(b) limits the extent of the discharge. For example, § 523(a) debts are excepted from discharge. 11 U.S.C. § 1328(c)(2) (1982). Thus, a debtor failing to complete payments on a confirmed plan would still have to demonstrate "undue hardship" to have educational loans discharged.

79. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977).

80. *Id.*

81. *Id.*

82. *See In re* Scher, 12 Bankr. 258, 273 (Bankr. S.D.N.Y. 1982). *Compare* 11 U.S.C. § 1328(a) (1982) *with* 11 U.S.C. § 523(a)(8) (1982). Under § 1328(a) the only nondischargeable debts are alimony, 11 U.S.C. § 523(a)(5), and long term debts, 11 U.S.C. § 1322(b)(5).

for this apparent contradiction.

1. Section 6-207(b) of the Bankruptcy Commission Proposal

In an effort to encourage delinquent debtors to use Chapter 13,[83] the Bankruptcy Commission decided to facilitate greater use of partial payment plans.[84] To achieve this goal, the Commission proposed to eliminate some of the unfavorable distinctions between partial payment plans and full payment plans.[85] Although its recommendations would have put partial payment plans nearly on a par with full payment plans, the Commission retained the distinction concerning discharges. Under the Commission proposal, a debtor could receive a discharge of educational loans, a debt listed in section 4-506(a), only if the debtor completed payments on a full payment plan. Conversely, a debtor who had satisfied the requirements for confirmation of a partial payment plan and completed payments would not have received a discharge of his educational loans under the Commission proposal.[86] Thus, when Congress received the proposal, it was entirely consistent with the purpose of section 523(a)(8).

83. Bankr. Comm'n Report, *supra* note 44, pt. I, at 159. The disparate use of former Chapter XIII among the various jurisdictions prompted the Commission's revision. *Id.* at 157.

84. Under former Chapter XIII, partial payment plans were much less attractive to debtors than full payment plans for two reasons. First, § 656(a)(3), 11 U.S.C. § 1056(a)(3) (1976) (repealed 1978), barred confirmation of a partial payment plan if the debtor "had been granted a discharge, or had . . . a wage earner's plan by way of composition confirmed under this title." 11 U.S.C. § 32(c)(5) (1976) (repealed 1978); *see* Perry v. Commerce Loan Co., 383 U.S. 392 (1966). Second, debts excepted from discharge in straight bankruptcy would remain nondischargeable even after completion of a confirmed partial payment plan. 11 U.S.C. §§ 1060-1061 (1976) (repealed 1978).

85. The Bankruptcy Commission endorsed three proposals designed to place partial payment plans on a par with full payment plans. First, the Commission advocated eliminating creditor approval of a plan. Bankr. Comm'n Report, *supra* note 44, pt. II, at 207. Second, the Commission proposed removing the bar to confirmation of partial payment plans found in 11 U.S.C. § 1056(a)(3) (1976) (repealed 1978); Bankr. Comm'n Report, *supra* note 44, pt. II, at 207-08. Third, the Commission suggested that conduct which formerly would have barred a discharge, other than overuse of the bankruptcy system, no longer should prevent confirmation of either a full payment or partial payment plan. *Id.* at 207-09; *see* Hughes, *supra* note 3, at 838-39.

86. Section 4-506(a)(8) would prohibit discharging educational loans in straight bankruptcy. Under § 6-207(b) this prohibition would apply to partial payment plans as well.

2. Section 1328(a) of the Bankruptcy Reform Act of 1978: "Something Happened on the Way to the Floor!"

In enacting Chapter 13 of the Bankruptcy Reform Act of 1978,[87] Congress shared the Bankruptcy Commission's enthusiasm for encouraging repayment plans.[88] Congress designed Chapter 13 "to enable an individual . . . to develop and perform under a plan for the repayment of his debts over an extended period."[89] Expecting that some plans would provide for the full repayment of debts, while others might offer creditors only "a percentage of their claims,"[90] Congress adopted the Commission strategy of encouraging the use of Chapter 13 by facilitating partial payment plans.[91] Congress not only implemented the Commission proposals that placed partial payment plans on more of a par with full payment plans,[92] it went one step further: Congress broadened the range of discharges available upon completion of payments on a partial payment plan.[93] Although the Commission proposal provided for the nondischargeability of educational loans for partial payment

87. 11 U.S.C. §§ 1301-1330 (1982).

88. According to the legislative history, "[T]he premises of the bill . . . are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under chapter 13." H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977). Witnesses speaking before Congress evinced a desire to work out a repayment plan, if at all possible, rather than face the trauma of straight bankruptcy. *See id.* at 117.

89. *Id.* at 118.

90. *Id.*

91. *See* Hughes, *supra* note 3, at 840.

92. *See supra* note 85. Congress departed from the Commission proposal regarding a repayment plan's effect on a later discharge in straight bankruptcy. The Commission proposal suggested a two-year period following the discharge of debts in a partial payment plan during which courts would deny a straight bankruptcy discharge absent a showing of undue hardship. Bankr. Comm'n Report, *supra* note 44, pt. II § 4-505(a)(7), at 132-33. The Reform Act tightened this provision considerably, perhaps manifesting Congress' understanding of the difference between a substantial repayment and a nominal repayment. *See* Hughes, *supra* note 3, at 841.

Section 727(a)(9) of the Reform Act, 11 U.S.C. § 727(a)(9) (1982), bars discharge in straight bankruptcy if the debtor has received a discharge in a Chapter 13 partial payment case, commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; . . .

Id. The apparent purpose of § 727 was to promote full repayment plans and to discourage offers of nominal repayment. S. REP. No. 989, 95th Cong., 2d Sess. 13 (1977).

93. Unlike the Commission proposal that would have applied all the exceptions to discharge in straight bankruptcy to partial payment plans, § 1328(a) prohibits only the discharge of alimony and long-term debts. *See supra* notes 78, 82 and accompanying text.

plans[94]—a standard consistent with the congressional concern expressed in section 523(a)(8)—no parallel provision in Chapter 13 of the Reform Act prohibits the discharge of educational loans in such a case.

Thus, the superdischarge of section 1328(a) grants a debtor with a regular income a discharge of his educational loans upon completing payments[95] on a Chapter 13 plan that satisfies the requirements of section 1325(a).[96] By providing for the broad discharge of debts in section 1328(a), regardless of whether the debtor offered a full payment or a nominal payment of debts, Congress effectively, and perhaps unwittingly, encouraged student debtors to seek discharges of educational loans through nominal payment plans under Chapter 13. Yet, the legislative history fails to explain Congress' rationale for omitting from Chapter 13 partial payment cases the exceptions to discharge that apply in liquidation proceedings.[97] The language of section 1328(b), Chapter 13's hardship provision, which applies section 523(a) in its entirety to plans in which the debtor does not complete payments,[98] further confuses the issue. In light of the extensive debate over section 523(a)(8) and the application of section 523(a) to cases under section 1328(b), the absence of a stated rationale for the broad dischargeability in section 1328(a) would seem to indicate that Congress inadvertently created this apparent tension between section 523(a)(8) and section 1328(a).[99] Because the courts are left to cope with this tension, an analysis of the various judicial attempts to resolve this problem is important.

IV. Judicial Reaction

Courts faced with a Chapter 13 payment plan involving educational loans must address problems that do not exist in a Chapter 7 straight bankruptcy involving similar debts. If a debtor attempts to discharge educational loans in a Chapter 7 case, the role of the

94. *See supra* note 86 and accompanying text.

95. *See* 11 U.S.C. § 1328(a) (1982) (quoted *supra* note 4).

96. *See* 11 U.S.C. § 1325(a) (1982) (quoted *supra* note 77).

97. Both the House and Senate versions of the Reform Act, H.R. 8200 and S. 2266, excluded the application of § 523(a) to a completed Chapter 13 plan, with the exceptions discussed *supra* note 82. Although Congress thus rejected the Commission approach and the approach of the prior Act, *see supra* note 86 and accompanying text, the reports on each bill fail to explain the rationale for the exclusion. *See* Hughes, *supra* note 3, at 842 n.55.

98. *See* 11 U.S.C. § 1328(b) (1982).

99. *See* Hugbes, *supra* note 3, at 843.

bankruptcy court is relatively straightforward.[100] The court must apply section 523(a)(8) and must find "undue hardship" before discharging any educational loans under the statute.[101] The language of section 1328(a), on its face, is also straightforward. Unlike section 523(a)(8), however, section 1328(a) allows the discharge of educational loans upon completion of payments regardless of whether full repayment, substantial repayment, or only nominal repayment occurs.[102]

Despite the clear language in section 1328(a), it still poses problems. First, section 1328(a) arguably conflicts with section 523(a)(8), which states that educational loans must be nondischargeable.[103] Second, section 1328(a) erodes the debtor's only remaining legal inducement to attempt substantial repayment of educational loans. Whether payment is five or fifty percent, the statute seems to require confirmation if the plan satisfies the requirements of section 1325(a).[104] Because section 1328(b) imposes the exceptions to discharge from section 523(a) when a debtor fails to complete payments, Chapter 13 creates an incentive for debtors to pursue a nominal repayment plan.[105]

As student debtors began seeking to discharge educational loans by filing Chapter 13 petitions with minimal repayment offers, lending institutions began looking for ways to challenge these composition plans. Realizing that the restrictions of section 523(a)(8) applied to Chapter 13 petitions only if the debtor failed to complete payments,[106] lending institutions turned to the best interest

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100. *See* 11 U.S.C. § 523(a)(8) (1982).

101. Courts have bad problems defining "undue hardship" on a case by case basis. *See* Kosel, *supra* note 43, at 466-76 (discussing various standards for undue hardship).

102. The plan must satisfy the requirements of § 1325(a), which does not address expressly the amount of repayment. *See supra* note 77 and accompanying text. If the creditor would receive notbing in straight bankruptcy, which is often the result with student borrowers who have few if any nonexempt assets, a nominal payment can satisfy this test.

103. The legislative history, however, fails to explain this apparent inconsistency. *See supra* notes 65-73, 87-99 and accompanying text.

104. *See* 11 U.S.C. § 1325(a) (1982) (discussed *supra* note 77 and accompanying text).

105. In *In re* McMinn, 4 Bankr. 150 (Bankr. D. Kan. 1980), the court pointcd out that tbe strict discharge provisions in § 1328(b), wbich apply when a debtor cannot complete payments, create a disincentive to offer substantial plans that may be more difficult to complete. *Id.* at 152.

106. For a discussion of Chapter 13's hardship exception, 11 U.S.C. § 1328(b) (1982), see *supra* note 78 and accompanying text.

Notably, only one bankruptcy court has imposed the undue hardship standard of § 523(a)(8) in a Chapter 13 case. In *In re* Gaston, 25 Bankr. 571 (Bankr. S.D. Ohio 1982), the debtor proposed a plan tbat offered unsecured creditors four percent of their claims. Kent State University challenged confirmation, maintaining that a nominal repayment of of creditors test and the good faith test of section 1325(a) to challenge educational loan discharges in Chapter 13.[107] Most of the litigation has focused on the appropriate definition and proper application of the good faith requirement in section 1325(a)(3).[108]

Courts take three principal approaches to interpreting Chapter 13. Some courts take a strict construction stance, looking only to the statutory language to resolve disputes. Other courts read a "substantial and meaningful payment" test into section 1325(a).

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four percent violated the good faith requirement of § 1325(a)(3) because the debtor's primary intent was to erase the educational debt through the broader discharge available in Chapter 13. *Id.* at 572. The court looked to the Sixth Circuit for a definition of good faith, noting that because Chapter 13 is subject to abuse, the court "must look closely at the debtor's conduct before confirming a plan." *Id.* (quoting Memphis Bank and Trust Co. v. Whitman, 692 F.2d 427, 432 (6th Cir. 1982)). The bankruptcy court asserted that it could find bad faith when a debtor with a potential income capacity that would be sufficient to satisfy educational loan obligations seeks to discharge those loans in Chapter 13. The court held that the debtor could not receive confirmation without first establishing undue hardship under § 523(a)(8) and demonstrating that the discharge of educational loans was not the primary purpose of the suit. 25 Bankr. at 572-73. The court denied confirmation of the plan because the debtor failed to meet this burden of proof. *Id.* at 573. The same court had established this two-pronged burden of proof in three previous cases in which creditors challenged the discharge of educational loans under the good faith and best interest of creditors test. *See* Wright State Univ. v. Novak, 25 Bankr. 459, 461 (Bankr. S.D. Ohio 1982) (debtor failed to sustain burden of proof in a plan offering one percent repayment of student loan); Ohio Student Loan Comm'n v. Wilkinson, 24 Bankr. 474, 476 (Bankr. S.D. Ohio 1982) (joint petition filed in bad faith when plan proposed no repayment of educational loan); Ohio Student Loan Comm'n v. Willis, 24 Bankr. 293, 295 (Bankr. S.D. Ohio 1982) (plan offering 14% payment on educational loan confirmed because it constituted debtor's "best effort" and because failure to discharge loans would constitute undue hardship).

107. *See* 11 U.S.C. § 1324 (1982) (authorizing creditors to object to confirmation of the plan).

Section 1325(a)(4), the best interest of creditors test, provides that a plan must pay as much to creditors as "would be paid on such claim if the estate of tbe debtor were liquidated under Chapter 7." 11 U.S.C. § 1325(a)(4) (1982). Creditors concluded tbat because educational loans were not dischargeable under Chapter 7, proposed Chapter 13 composition plans did not pay creditors as much as they would receive under Chapter 7. *See In re* Syrus, 12 Bankr. 605, 607 (Bankr. D. Kan. 1981). In *Syrus*, however, the court rejected this contention, stating that a judgment that a debt is nondischargeable does not guarantee full payment. *Id.* The court concluded that the proper valuation of the § 1325(a)(4) standard was the "liquidation value of all nonexempt property minus the chapter 7 administration expenses." *Id.*; *see In re* Yee, 7 Bankr. 747, 759 (Bankr. E.D.N.Y. 1980); *cf. In re* McMinn, 4 Bankr. 150 (Bankr. D. Kan. 1980) (holding that for purposes of the best interest of the creditors test, the legal right to sue on a nondischargeable debt has value in determining the amount that the debtor would have to pay in straight bankruptcy). More recently, in *In re* Ali, 33 Bankr. 890 (Bankr. D. Kan. 1983), the bankruptcy court implicitly overruled *McMinn* by holding that the judge should consider these interests in determining good faith under § 1325(a)(3) rather than in examining the best interest of the creditors under § 1325(a)(4). *Id.* at 894.

108. *See, e.g., In re* Dalby, 38 Bankr. 107 (Bankr. D. Utah 1984); *In re* Hawkins, 38 Bankr. 908 (Bankr. S.D.N.Y. 1983); *In re* Perez, 20 Bankr. 879 (Bankr. E.D.N.Y. 1982); *In re* Syrus, 12 Bankr. 605 (Bankr. D. Kan. 1981).

Finally, some courts look to the "totality of the circumstances" to decide cases. This part of the Recent Development examines these three approaches in an attempt to determine which test best serves Congress' intent.

A. The Literal Construction

In re Eichelberger,[109] one of the earliest good faith decisions, best typifies the strict construction approach to section 1328(a) in the context of educational loans. The case concerned a debtor seeking to discharge educational loans in a Chapter 13 zero payment plan.[110] The court first acknowledged that section 523 applies to a Chapter 13 case to the extent that the section is consistent with the provisions of Chapter 13.[111] Analyzing section 1328(a), however, the court concluded that the prohibition on the discharge of educational loans in section 523(a)(8) does not apply "when the debtor makes all payments provided for by the plan pursuant to section 1328(a)."[112] Believing that Congress intended to grant debtors a greater scope of relief in Chapter 13 than in Chapter 7, the court approved the plan even though it provided no payment to the creditors on the educational loan.[113]

A year after *Eichelberger*, the court in *In re Scher*[114] also literally construed the language of sections 1325(a) and 1328(a). In *Scher*, the debtor filed a Chapter 13 petition with a plan offering fourteen percent repayment on educational loans composing over eighty percent of the debtor's unsecured debts.[115] Critical of judicial use of good faith as a vehicle to defeat minimal payment plans, the court engaged in an in depth discussion of legislative history.[116]

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109. 6 Bankr. 705 (Bankr. S.D. Miss. 1980).

110. *Id.* at 706. In a zero payment plan unsecured creditors receive nothing. Zero payment plans satisfy the best interest of creditors test in "no asset" cases, however, because unsecured creditors would receive nothing in a "no asset" liquidation. Thus the creditor is not receiving "less than" he would have received in a Chapter 7 liquidation. *See* 11 U.S.C. § 1325(a)(4) (1982).

111. 6 Bankr. at 707. The provisions of § 523 are "applicable to Chapter 13 cases when not inconsistent with the letter of the Chapter 13 provisions." 11 U.S.C. § 103 (1982).

112. 6 Bankr. at 707-08.

113. *Id.* at 708. According to the court, "[t]he argument that the plan is not filed in good faith is warrantless, for the debtors are merely taking advantage of a law which Congress enacted." *But see In re* Iacovoni, 2 Bankr. 256 (Bankr. D. Utah 1980) (rejecting zero payment plan that the debtor proposed to discharge educational loans as inconsistent with congressional intent in Chapter 13); *see infra* notes 122-43 and accompanying text (discussing *Iacovoni*).

114. 12 Bankr. 258 (Bankr. S.D.N.Y. 1981).

115. *Id.* at 259.

116. *Id.* at 265-80.

The court concluded that, in light of the extensive debate in Congress, the legislature clearly drafted section 1328(a) with full knowledge of the import of the "bonanza" discharge.[117] The court stated that Congress never indicated in Chapter 13 a minimum amount that debtors need to offer to unsecured creditors.[118] Furthermore, according to the court, the legislative history does not provide a definitive answer to the good faith question.[119] In sum, the court found "no support in the scheme of Chapter 13, nor in its language, nor in its legislative history . . . for judges to read some kind of percentage [payment] for unsecured creditors into Chapter 13 where Congress did not do so."[120] Accordingly, the court held that the debtor's plan satisfied the good faith requirement.[121]

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117. *Id.* at 272-73. The court further noted that because Congress wrote § 1328(a) so clearly, many of the best intentioned "bankruptcy judges have tried to fashion some approach by which student borrowers who have thereby gleaned from our society all that it has to offer will be brought to book." *Id.* at 272.

118. *Id.* at 273.

119. *Id.* at 273-74. Citing Senate and House Reports, the court found that, at best, the legislative history acknowledged that a 100% payment to unsecured creditors was necessary in appropriate cases. The court declared that "[a]t worst, the legislative history, in isolated references, expresses the hope that debtors left on their own would choose to pay, if not in full, at least a substantial portion of their debts." *Id.* at 275 (footnote omitted).

120. *Id.* The judge noted that he felt no "more comfortable with these cases than [his] esteemed colleagues." Regardless of whether people agree or disagree that Chapter 13 has achieved its purposes, the Chapter does not leave judges free "to find want of good faith in order to defeat a plan because of private notions of what is right or wrong." *Id.*

121. *Id. In re* Rowe, 17 Bankr. 870 (Bankr. E.D. Va. 1982), presents another case applying a literal construction. In *Rowe*, the debtors offered 32% payment on unsecured debts composed primarily of educational loans. The court was concerned about the apparent discrepancy between Congress' resolute action to make educational loans nondischargeable in straight bankruptcy and Congress' complete lack of action regarding educational loans in Chapter 13. Nonetheless, the court premised its decision on the belief that "the provisions of § 523[(a)(8)] do not apply in a Chapter 13 case." *Id.* at 871 (emphasis omitted). Feeling "bound by the law" as stated in § 1325(a) and § 1328(a), the court concluded that the debtor had satisfied the good faith standard. *Id.* Concerning the tension between § 523(a)(8) and § 1328(a), the court stated:

> The Court is, as it ought to be, bound by the law. Any remedy lies with Congress. Like the shoe shop with a sign that reads 'We have an arrangement with the bank. We cash no checks and they repair no shoes.' I have an arrangement with Congress: I pass no laws and they repair no shoes.

Id.; *see also In re* Crawford, 10 Bankr. 815 (Bankr. M.D. Ala. 1981) (acknowledging dischargeability of student loans following completion of payments of confirmed plan). Other cases have adopted a strict construction of section 1328(a) outside the context of educational loans. *See, e.g., In re* Seely, 6 Bankr. 309 (Bankr. E.D. Va. 1980) (intentional tort); *In re* Keckler, 3 Bankr. 155 (Bankr. N.D. Ohio 1980) (debt based on forgery).

Judge Conrad Cyr also has argued in favor of a strict construction. *See* Cyr, *supra* note 3. Judge Cyr criticized on two grounds courts that ignored "important principles of statutory construction" to imbue good faith with "a radically new meaning" that required some minimum "substantial" or "meaningful" payments. *Id.* at 275-77. First, Judge Cyr believed

B. *The Activist Approach: The Substantial and Meaningful Payment Test*

Concerned about the tension between the discharge allowable under section 1328(a) and the nondischargeability of educational loans under section 523(a)(8), some courts have rejected the literal application of section 1325(a). Unwilling to give educational loan recipients the opportunity to escape their obligations by offering minimal payments under Chapter 13, these courts have read into the good faith standard a requirement of "substantial and meaningful payments."

In re Iacovoni[122] is the landmark case applying the "substantial and meaningful payments" test. The case concerned a debtor seeking to discharge educational loans in a zero payment plan.[123] The *Iacovoni* court extensively discussed two questions relevant to the discharge of educational loans in Chapter 13: (1) whether the court could confirm a plan providing no payments to unsecured creditors;[124] and (2) what degree of repayment the court required to confirm a Chapter 13 partial payment plan.[125]

To determine whether a court could confirm a zero payment plan under Chapter 13, the court first looked to the requirements of section 1325(a).[126] The court acknowledged that a debtor whose assets were entirely exempt seemingly could receive confirmation of a plan that provided no payments to unsecured creditors because the debtor would satisfy the "best interest" test.[127] Nonetheless, after careful consideration of the legislative history, the court concluded "that a plan without payment leaves much of the chap-

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this approach was inconsistent with the language of Chapter 13, because embellishing the meaning of "good faith" runs roughshod over the best interests test in § 1325(a)(4). *Id.* at 277-78. Furthermore, the courts' varied intrusions into the statutory scheme eroded "the uniformity to be expected in the administration of an important law of commerce." *Id.* at 277.

Judge Cyr acknowledged that this judicial activism was a response to the "distressing abuses of the liberal debtor relief provisions" of Chapter 13. *Id.* at 279. He preferred a legislative solution—an ability to pay test—to the judicial legislation taking place through the application of the good faith test. *Id.* at 281-88. See *infra* notes 199-205 and accompanying text for a discussion of congressional amendments arguably consistent with Judge Cyr's recommendations.

122. 2 Bankr. 256 (Bankr. D. Utah 1980).

123. In *Iacovoni* the court consolidated several cases. This discussion focuses on only the named case. The common thread running through all the consolidated cases was a zero payment plan for unsecured creditors. *Id.* at 258.

124. *Id.* at 261-65.

125. *Id.* at 265-68.

126. *Id.* at 262. See *supra* note 77 for the text of § 1325(a).

127. *Iacovoni*, 2 Bankr. at 262.

ter without meaning . . . . [C]onfirmation of such a plan [would vitiate] the concept of Chapter 13."[128] In reaching this conclusion, the court looked at several factors. First, the court found that the purpose of Chapter 13 is to encourage repayment.[129] Because Congress phrased the entire statute in terms of "payments made" by the debtor,[130] the court believed Congress intended that a debtor should escape from loan obligations through the more favorable discharge provision in Chapter 13 only if he has attempted substantial repayment.[131] The court further stated that the requirement of a regular income would be meaningless if not to assure the debtor's ability to make payments.[132] If a substantial payment plan is not feasible for a debtor, the proceeding properly belongs in Chapter 7, not Chapter 13.[133]

Having concluded that zero payment plans do not conform to the purposes of Chapter 13, the court turned to the good faith standard in section 1325(a)(3) to determine the appropriate level of payment.[134] The court found that "good faith" historically had little inherent meaning.[135] The court, therefore, looked to the intent and purpose of Chapter 13 as a whole to ascertain the appropriate meaning of good faith and the degree of payment necessary to constitute good faith for confirmation purposes.[136] Again, the court focused on Congress' perception that substantial amounts would be repaid under Chapter 13 plans.[137] The court noted that Congress tried to create a system that allowed a debtor to propose a "reasonable plan for . . . repayment"[138] of " 'most, if not all' of the claims against the debtor."[139] The court concluded that the spirit and purpose of Chapter 13 called for a substantial or mean-

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128. *Id.*

129. *Id.* at 262-63; *see supra* notes 84-94 and accompanying text.

130. *Iacovoni*, 2 Bankr. at 263.

131. *Id.* at 266-67.

132. *Id.* at 262.

133. *Id.*

134. *Id.* at 265.

135. *Id.*; *cf. In re* Perez, 20 Bankr. 879, 882 (Bankr. E.D.N.Y. 1982) (holding that "the term good faith is not new to bankruptcy law"). The *Perez* court's definition of good faith is similar to the *Iacovoni* court's interpretation: the proposed plan must not abuse the "provisions, purpose, or spirit" of Chapter 13. *Id.* (quoting 9 COLLIER ON BANKRUPTCY ¶ 9.20, at 319 (J. Moore 14th ed. 1978)); *see In re* Yee, 7 Bankr. 747, 756 (Bankr. E.D.N.Y. 1980) (stating that good faith "is not new to bankruptcy law. . . ."; the term requires an inquiry into whether an abuse of the purpose or spirit of Chapter 13 has occurred).

136. 2 Bankr. at 266.

137. *Id.*

138. *Id.* at 267 (citing S. REP. No. 989, 95th Cong., 2d Sess. 13 (1978)).

139. 2 Bankr. at 266.

ingful repayment.[140]

Understanding that implementing this standard would require flexibility, the court kept its legislative hat on and outlined relevant factors that courts should consider in determining whether a debtor offered a plan in good faith.[141] First, courts should examine the debtor's budget and future income potential to get an idea of the feasibility of a proposed plan. Next, courts should consider the repayment percentage and the dollar amount of outstanding debts. Finally, courts should review the nature of the debts that the debtor is discharging to determine whether he is using Chapter 13 to escape obligations, or to make a legitimate effort to repay debts.[142] Using these factors to analyze the debtor's plan, the *Iacovoni* court denied confirmation because the debtor's otherwise nondischargeable educational loans constituted a large share of the total debt and the payment plan did not offer substantial or meaningful repayment commensurate with the debtor's ability to pay.[143]

The court in *In re Yee*[144] adopted an approach similar to the approach that the court used in *Iacovoni.* In *Yee* a debtor sought confirmation of a plan offering seven percent repayment on educational loans.[145] After originally denying confirmation,[146] the court,

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140. *Id.* at 267. The court carefully distinguished this test from the "best effort" standard in § 727(a)(9). *Id.* The court stated:

> '[T]o prevent chapter 13 plans from turning into mere offers of composition plans under which payments would equal only the nonexempt assets of the debtor,' the debtor must always meet the standard of a "good faith" proposal, which, in light of Section 727(a)(9), requires something less than "best effort," and, in light of the foregoing analysis, may be defined as a good faith effort to make meaningful payment to holders of unsecured claims.

Id. (quoting S. REP. No. 989, 95th Cong., 2d Sess. 13 (1978)).

141. *Iacovoni,* 2 Bankr. at 267.

142. *Id.*

143. *Id.* at 267-68.

144. 7 Bankr. 747 (Bankr. E.D.N.Y. 1980).

145. *Id.* at 750.

146. In the previous hearing the Court found that, "in view of the debtor's excellent education, substantial income, and lack of dependents, the minimal payment plan proposed was not filed in good faith." *Id.* Although the court did not find the best effort test appropriate, the court concluded that "good faith" means, "a *bona fide* effort to discharge outstanding obligations. The token payments offered by the debtor do not represent a *bona fide* effort." *Id.* (emphasis in original).

The debtor sought rehearing, or in the alternative, a conversion to a Chapter 7 case pursuant to 11 U.S.C. § 1307(c) (1982). 7 Bankr. at 750. Section 1307(c) states:

> Except as provided in subsection (e) of this section, on request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause. . . .

11 U.S.C. § 1307(c) (1982).

on rehearing, embarked on an extensive examination of the legislative history and judicial treatment of Chapter 13.

The court began its analysis by recognizing that section 1328(a), unlike section 523(a)(8), allows the discharge of educational loans. The court then considered whether the statute empowered a court to deny confirmation of a Chapter 13 plan that "proposes minimal . . . payments to creditors, and which would result in the discharge of student loans of substantial magnitude."[147] As in *Iacovoni*, the court found this power in the good faith requirement of section 1325(a)(3). Unlike *Iacovoni*, however, the *Yee* court looked to prior bankruptcy law for a definition of good faith. Although it took a different route than the *Iacovoni* court, the *Yee* court reached substantially the same conclusion.[148] The *Yee* court found that to best serve congressional intent,[149] courts should assess the good faith of a proposed plan by reviewing whether payments are substantial under the circumstances and whether the debtor's primary purpose in filing the plan was to discharge educational loans.[150] In applying this standard, the *Yee* court denied confirmation of the debtor's proposed plan because payment was not substantial and because the debtor's principal objective in filing under Chapter 13 was to escape the obligation to repay educational loans in their entirety.[151] Several other courts

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147. 7 Bankr. at 751.

148. *See id.* at 757-58. The court stated:

> No rational legislative policy would totally bar student loans from discharge in straight bankruptcy but permit their avoidance automatically upon payment of a pittance to creditors. The difference in treatment between student loans in Chapter 7 and in Chapter 13 is defensible only if the Chapter 13 plan either calls for payments of all debts in full, as Congress thought most plans would do, or, if it calls for less than full payment, [sic] that a court determine that, in light of the surrounding circumstances, including the substantiality of the payments made, that it merits confirmation, nevertheless.

Id. Although use of the language "in light of the circumstances" seems close to the totality of circumstances test, the court cited as authority several cases applying a minimum payment standard. Hence, *Yee* is best characterized as a substantial and meaningful payment case.

149. The court, in the context of legislative intent, discussed remedial legislation then before Congress. *Id.* at 758.

150. *See id.*

151. *Id.* at 758-59. Upon denying confirmation, the court converted the debtor's claim to a Chapter 7 liquidation proceeding pursuant to the debtor's request. *Id.*

In re Littell, 6 Bankr. 85 (Bankr. D. Or. 1980), presents an interesting reversal of the conversion concept. The debtors filed a Chapter 7 action seeking to discharge educational loans because of undue hardship. Although the court concluded that repayment of the complete obligation would impose undue hardship, the court held that, with reasonable effort, the debtors could make some payment because they both had regular incomes. Thus, by have followed *Iacovoni* and *Yee* and read into the good faith standard the requirement that payments must be meaningful or substantial under the circumstances.[152]

C. *The Totality of Circumstances Test*

Recently, many courts have moved away from strictly construing Chapter 13 and have not required substantial payment to unsecured creditors. Although these courts consider the nature of the debt and the amount of repayment, they do so in a flexible framework, reviewing the "totality of circumstances" to determine whether the debtor's proposed plan abuses "the principles, purpose, or spirit" of Chapter 13.[153]

Although several United States courts of appeal have adopted this test,[154] only the Eighth Circuit, in *In re Estus*,[155] has applied the test in the context of educational loans. In *Estus* educational loans composed thirty percent of the unsecured debt. The debtor's Chapter 13 plan offered no payments to unsecured creditors, and a

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judicial fiat, the court converted the case to a Chapter 13 proceeding, and while discharging one loan, required the debtors to make payments on the other loan constituting a 12% total repayment. *Id.* at 89. No other court has taken this approach.

152. *See, e.g., In re* Hawkins, 33 Bankr. 908, 913-14 (Bankr. S.D.N.Y. 1983) (denying plan proposing 12% payment to unsecured creditors as contrary to the purposes of Chapter 13, when the plan "proposes to discharge an obligation that is based in [sic] public policy and that the debtor has a reasonable opportunity to fulfill"); *In re* Mitruka, 19 Bankr. 516, 518-19 (Bankr. E.D. Pa. 1982) (denying plan as not proposed in good faith because 5.5% payments were not "meaningful"); *In re* Ponanski, 11 Bankr. 661, 663 (Bankr. D.R.I. 1981) (rejecting plan proposing 22% repayment on predominantly educational loans because not proposed in good faith); *In re* Smith, 8 Bankr. 543, 547-48 (Bankr. D. Utah 1981) (denying confirmation of a plan proposing discharge of loans, two-thirds of which were otherwise nondischargeable educational loans, with a repayment of 16% because the debtor did not meet "good faith" requirement and because the proceeding did not belong in Chapter 13); *In re* Murallo, 4 Bankr. 666, 668-69 (Bankr. D. Conn. 1980) (because Congress "did not intend the liberal provisions of Chapter 13 to be used as a disguised Chapter 7 [l]iquidation," court rejected 10% repayment plan for providing less than substantial payments to creditors); *In re* DeSimone, 6 Bankr. 89, 91 (Bankr. S.D.N.Y. 1980) (rejecting a plan because "a repayment of $360 towards a $23,370.05 [debt] is contrary to the statutory scheme and legislative history with respect to Chapter 13."). *But see In re* Syrus, 12 Bankr. 605, 608 (Bankr. D. Kan. 1981) (confirming a plan as proposed in good faith where debtor offered 70% repayment to unsecured creditors on educational loans).

153. *See* State Educ. Assistance Autb. v. Johnson, 43 Bankr. 1016, 1019 (E.D. Va. 1984) (quoting 9 COLLIER ON BANKRUPTCY ¶ 9.20 at 319 (J. Moore 14th ed. 1978)).

154. *See, e.g.*, Public Fin. Corp. v. Freeman, 712 F.2d 219 (5th Cir. 1983); Flygare v. Boulden, 709 F.2d 1344 (10th Cir. 1983); *In re* Kitchens, 702 F.2d 885 (11th Cir. 1983); Deans v. O'Donnell, 692 F.2d 968 (4th Cir. 1982); *In re* Barnes, 689 F.2d 193 (D.C. Cir. 1982); *In re* Goeb, 675 F.2d 1386 (9th Cir. 1982); *In re* Rimgale, 669 F.2d 426 (7th Cir. 1982).

155. 695 F.2d 311 (8th Cir. 1982).

creditor challenged the plan for lack of good faith.[156] Referring to several circuit court decisions rejecting the substantial and meaningful payment test,[157] the Eighth Circuit agreed that "good faith does not impose a rigid and unyielding requirement of substantial payment to unsecured creditors."[158] The court held that to perform a proper inquiry into good faith, courts should consider "whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13."[159] To reach a decision, courts must make a case by case analysis into the totality of circumstances. The court proceeded to enumerate a nonexhaustive list of relevant factors.[160] Af-

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156. *Id.* at 312.

157. *See* cases cited *supra* note 154.

158. 695 F.2d at 316. The court noted that requiring a per se minimum payment "to unsecured creditors as an element of good faith would infringe on the desired flexibility of Chapter 13." Conversely, the court found that it could not conclude perfunctorily that a debtor acts in good faith whenever he satisfies the minimal requirements of the best interest of creditors test in section 1325(a)(4). *Id.* The bankruptcy judge in *In re* Perez, 20 Bankr. 879 (Bankr. E.D.N.Y. 1982), fleshed out this reasoning more clearly. In discussing the tension resulting from de minimus payments, the court stated:

> For example, the best interest of creditors test will only require a *diminimus* [sic] repayment percentage when the debtor's chapter 7 proceeding would be a no asset case. Thus to deny confirmation for lack of good faith and base the denial exclusively on the proposed repayment percentage would be in fact to implicitly repeal the best interests of creditors test. Similarly, to allow the nondischargeability of a debt in chapter 7 to bar confirmation of a chapter 13 plan for lack of good faith in effect reads the liberal discharge provisions of section 1328(a) out of chapter 13.
>
> Moreover, a similar result obtains from the view that a proposed plan may not be denied confirmation for lack of good faith where the plan meets all of the other requirements of chapter 13. That approach writes the good faith provision out of chapter 13 thereby ignoring the rule of construction that calls for a statute to be read so as to give meaning to each provision. Clearly, the good faith provision should not be read in derogation of other provisions of the Code, but neither should other provisions be read so as to remove from consideration factors properly within the good faith inquiry.

Id. at 882. The court implicitly applied a totality of circumstances analysis in concluding that the debtor, who proposed a 25% repayment of debts comprised exclusively of educational loans, did not propose the plan in good faith. Specifically, the court noted that the debtor had discharged all other debts in a recent Chapter 7 proceeding and that the payments under the plan were similar to the debtor's regular monthly payments, except that plan payments continued for a much shorter period of time. *Id.* at 883.

159. 695 F.2d at 316.

160. *Id.* at 317. The court listed the following factors:

> (1) the amount of the proposed payments and the amount of the debtor's surplus;
> (2) the debtor's employment history, ability to earn and likelihood of future increases in income;
> (3) the probable or expected duration of the plan;
> (4) the accuracy of the plan's statcments of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
> (5) the extent of preferential treatment between classes of creditors;
> (6) the extent to which secured claims are modified;

ter a cursory examination of the facts in light of these factors, the court found an apparent lack of good faith.[161]

Lower courts are applying the "totality of circumstances" test with ever greater frequency.[162] Most recently, the United States Bankruptcy Court for the Eastern District of Virginia applied the test in *In re McAloon*.[163] The debtors filed a Chapter 13 plan offering twenty-five percent payment on unsecured debts composed of seventy-seven percent educational loans.[164] The creditor objected to confirmation of the plan, alleging lack of good faith because confirmation would allow the debtors to discharge the educational loans while retaining property that the debtors acquired after they

(7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;

(8) the existence of special circumstances such as inordinate medical expenses;

(9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

(10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and

(11) the burden which the plan's administration would place upon the trustee.

Id. In the cases cited *supra* note 154, the courts looked at similar factors.

161. 695 F.2d at 317. Because the lower courts had not made specific findings regarding the totality of circumstances, the court remanded for further proceedings. *Id.*

162. *See, e.g., In re* Vensel, 39 Bankr. 866 (Bankr. E.D. Va. 1984) (within court's sound discretion to find that 11% repayment on educational loans composing 53% of unsecured debt constitutes good faith); *In re* Ali, 33 Bankr. 890 (Bankr. D. Kan. 1983) (after reviewing 11 factors, court found that in light of exceptional medical expenses and possible dischargeability of educational loans in Chapter 7, the debtor proposed his zero payment plan in good faith); *In re* Martini, 28 Bankr. 932 (Bankr. S.D.N.Y. 1983) (In confirming a plan offering 10% repayment on educational loans as proposed in good faith, the court examined the amount of payment proposed as one of many elements of the good faith inquiry. Furthermore, the debtor could have waited a few months and received a complete discharge.); *In re* Severs, 28 Bankr. 61 (Bankr. S.D. Ohio 1982) (confirming a plan offering 25% repayment on educational loans because testimony evinced a sincere desire to repay "as much as possible," and creditors offered no evidence of bad faith). *But see* State Educ. Assistance Auth. v. Johnson, 43 Bankr. 1016 (E.D. Va. 1984) (district court vacating and remanding because bankruptcy court bad failed to make determination of good faith according to totality of circumstances test concerning plan offering 5% repayment on unsecured debt comprising 80% educational loans); *In re* Dalby, 38 Bankr. 107 (Bankr. D. Utah 1984) (after reviewing several factors, court found good faith lacking when plan called for 30% repayment on unsecured debt comprising 96% educational loans); *In re* Gunn, 37 Bankr. 432 (Bankr. D. Or. 1984) (reviewing *Estus* factors and finding lack of good faith because debtors had assumed lifestyle beyond their means); *In re* Johnson, 36 Bankr. 67 (Bankr. S.D. Ill. 1984) (no good faith when plan offered 10% repayment of educational loans composing over 84% of unsecured debts); *In re* Hawkins, 33 Bankr. 908 (Bankr. S.D.N.Y. 1983) (reviewing *Estus* factors and finding lack of good faitb when debter easily could satisfy loan obligation to State of Maine by returning to practice veterinary medicine there); *In re* Canda, 33 Bankr. 75 (Bankr. D. Or. 1983) (no good faith when debtor is judgment proof and does not need Chapter 13); *In re* Perez, 20 Bankr. 879 (Bankr. E.D.N.Y. 1982) (discussed *supra* note 158).

163. 3 BANKR. L. REP. (CCH) ¶ 70,187 (Bankr. E.D. Va. 1984).

164. *Id.* at 86,273.

incurred the educational debt.[165] The court discussed the tension between section 523(a)(8) and section 1328(a), but noted that Congress liberalized the discharge available in Chapter 13 to encourage repayment plans.[166] The court then turned to the "totality of circumstances" test in making the good faith inquiry, believing that this test best implemented Congress' intent.[167] Noting that a per se substantial repayment requirement was inappropriate, the court emphasized the importance of preventing abuses of the purpose or spirit of Chapter 13.[168]

The court first found that the twenty-five percent repayment on unsecured debts largely consisting of educational loans did not alone constitute bad faith.[169] The court then analyzed the debtors' financial situation and employment history. Although the debtors' circumstances worsened as a result of some unwise purchases, the court ruled that the debtors were entitled to judicial protection while they attempted to solve their problems.[170] Finally, the court held that the forty-two month period of payments did not create an inference of bad faith. Accordingly, the court confirmed the debtors' plan.[171]

V. Analysis

To determine which judicial approach is most appropriate, courts need to understand the policy considerations motivating Congress' decision to except educational loans from discharge in Chapter 7. Furthermore, to the extent that Congress made a conscious decision to allow the discharge of educational loans in Chapter 13, courts must understand the policy considerations behind that decision. Before deciding which of the judicial approaches best serves congressional intent, therefore, it is necessary to determine the focus of that intent.

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165. *Id.* at 86,274-75.

166. *Id.* at 86,275.

167. *Id.* The court cited Deans v. O'Donnell, 692 F.2d 968 (4th Cir. 1982), as authority for the "totality of circumstances" test, but also mentioned *Estus*. *See* 3 Bankr. L. Rep. (CCH) at 86,275 n.3.

168. 3 Bankr. L. Rep. (CCH) at 86,275 (citing *Deans*, 692 F.2d at 972).

169. 3 Bankr. L. Rep. (CCH) at 86,275-76.

170. *Id.* at 86,276-77.

171. *Id.* at 86,277.

A. Legislative Intent

Two concerns were primarily responsible for Congress' initial action to limit the dischargeability of educational loans.[172] First, Congress perceived educational loans as unique obligations, "made without business considerations, without security, without cosigners, . . . as a mortgage on the debtor's future."[173] Second, several highly publicized bankruptcies,[174] involving the discharge of tens of thousands of dollars in educational loans, whirled Congress into a "chicken little" mentality. These isolated incidents and sparse supporting data were sufficient to spark congressional concern about student borrowers' eroding sense of obligation to repay educational loans and about the future solvency of the loan programs.[175] To

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172. The first limitation on dischargeability appeared in the Guaranteed Student Loan Amendments of 1976. *See supra* note 49.

173. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 133 (1977).

174. According to the legislative history, "a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans . . . generated the movement for an exception to discharge." *Id.* The discharge of educational loans in bankruptcy had attracted much media attention. *See Bankruptcy Hearings, supra* note 51, at 1076-1122 (references to various news articles); Letter from Representative Erlenborn to Representative Butler (June 14, 1977), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 156-57 (1977) (reference to article in N.Y. Times, Nov. 21, 1976, at A1, col. 4).

175. Proponents of the exception to discharge relied on a study performed by the Department of Health, Education and Welfare Office of Education that demonstrated an increase in the number of student borrowers discharging educational loans in bankruptcy.

Bankruptcy Claims Paid on GSL's

Fiscal Year	Number	Amount
1966-70	348	$0.4 million
1971	943	1.0 million
1972	1342	1.6 million
1973	2259	2.8 million
1974	2914	3.8 million
1975	4559	6.8 million
Total	12365	16.4 million

Bankruptcy Hearings, supra note 51, at 1077 (testimony of Edward T. York, Jr.) (Jan. 19, 1976). Mr. York testified that bankruptcies accounted for four percent of total losses and emphasized that the Office of Education expected bankruptcies to increase as collection efforts became more effective. *Id.* One congressman testified that student loan bankruptcies presented a problem of "serious proportions and consequences," which "[had] not yet reached catastrophic or crippling magnitude," but nevertheless required urgent action. *Id.* at 1091 (testimony of Rep. Erlenborn).

Opponents of the exception argned that because total losses from defaults and bankruptcies equaled 16% of the loans in repayment status, the loss due to the bankruptcies amounted to less than one percent of the mature loans. H.R. REP. No. 1232, 94th Cong., 2d Sess. 73-74 (1976) (individual view of Rep. O'Hara on H.R. 14070). Furthermore, although student loan bankruptcies had increased in absolute tcrms, they had not increased as a percentage of loan volume. *Bankruptcy Hearings, supra* note 51, at 981 (statement of Judge

Congress, the "sky was falling" on the student loan programs.

Congress next reviewed the dischargeability of educational loans when it considered the Bankruptcy Reform Act of 1978. This time, Congress was of sounder mind and had access to more statistical data. Armed with the GAO study of bankruptcy losses in the student loan programs, which Congress had requested during the previous debates on the dischargeability of educational loans,[176] the House Judiciary Committee realized that Congress' previous concerns were unfounded. Specifically, the GAO report showed that "the percentage of claims paid due to bankruptcy has remained relatively stable."[177] In addition, the percentage of matured educational loans discharged in bankruptcy compared favorably with the percentage in the consumer finance field, indicating that perhaps Congress had overreacted to the declining sense of obligation among student borrowers.[178] Finally, the GAO report demonstrated that bankruptcy losses were nominal when compared with losses resulting from poor operation of the loan programs.[179]

Beyond pointing out this new statistical data, critics of the exception to discharge argued that they could find no reason for discriminating against student borrowers and placing them on a par with felons.[180] In addition, legislators challenged the categorization of educational loans as unique. These legislators found educational loans analogous to medical loans, which are not made for business reasons, and do not give rise to tangible assets available for repossession. Like educational loans, medical loans enable individuals to return to society as productive members, yet medical loans are not dischargeable.[181] With these thoughts in mind, the House Judiciary

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Clive W. Bare) (Dec. 10, 1975); H.R. REP. No. 1232, 94th Cong., 2d Sess. 73 (1976) (individual view of Rep. O'Hara on H.R. 14070). Judge Bare stated that "bankruptcy losses do not appear to present any great threat to the program." *Bankruptcy Hearings, supra* note 51, at 981 (statement of Judge Clive W. Bare) (Dec. 10, 1976). In addition, one congressman criticized the proposal for attempting to remedy a " 'scandal' which exists primarily in the imagination." H.R. REP. No. 1232, 94th Cong., 2d Sess. 73 (1976) (individual view of Rep. O'Hara on H.R. 14070).

176. *See supra* note 56.

177. Letter from Elmer B. Staats to Representative Edwards (Dec. 23, 1976), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 135 (1977).

178. H.R. REP. No. 595, 95th Cong., 1st Sess. 133 (1977).

179. *See* Letter from Elmer B. Staats to Representative Edwards (Dec. 23, 1976), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 135 (1977).

180. H.R. REP. No. 595, 95th Cong., 1st Sess. 151 (1977) ("Treating students . . . as . . . suspected frauds and felons is no substitute for improving the administration of the program.").

181. Letter from Representative Edwards to Representative Erlenborn (June 16,

Committee voted twenty-three to four to eliminate the exception to discharge.[182]

Not content to let the matter rest, the original proponents offered on the House floor an amendment to incorporate the exception to discharge into Chapter 7 of the Bankruptcy Code.[183] The legislative history does not explain why the amendment did not except educational loans from Chapter 13. Once again, each side gave its views and statistics on the issue. Speaking in favor of the amendment, one legislator acknowledged that program losses due to bankruptcies were not the real problem. Maintaining that the problem was moral, not financial, the legislator focused on the irresponsible attitude that student loan bankruptcies symbolized.[184] Another legislator countered that educational loan programs were "conceived as a social welfare program, both for the students involved and for the nation as a whole."[185] As with any general social legislation, associated costs result.[186] Furthermore, the vast majority of the loss was attributable to program mismanagement, not to bankruptcies.[187] Despite this range of sound arguments for treating educational loans the same as other dischargeable loans, Congress enacted the exception to discharge.[188] The rationale for this decision, however, remains unclear.[189]

The House never discussed the ramifications of a Chapter 13 discharge during the debate on educational loans. Indeed, in light of the House Judiciary Committee vote to eliminate the exception to discharge for educational loans, it is not surprising that Congress did not include educational loans in the discharge exceptions

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1977), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 153-54 (1977).

182. *See supra* note 62 and accompanying text.

183. *See supra* note 64 and accompanying text.

184. *See supra* notes 69-70 and accompanying text. Unfortunately, Representative Michel failed to comprehend that regardless of the debtor or the type of debt, the fundamental premise of bankruptcy law implicitly fosters individual irresponsibility. His rationale for selecting students as his target remains obscure when his comments apply to any person who takes advantage of the bankruptcy laws.

185. Letter from Representative Edwards to Representative Erlenborn (June 16, 1977), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 154 (1977).

186. H.R. REP. No. 595, 95th Cong. 1st Sess. 134 (1977); *see supra* note 71.

187. Congressman Dodd indicated that over 90% of program losses were attributable to defaults—an administrative problem that the bankruptcy laws could not cure. 124 CONG. REC. H1792-93 (daily ed. Feb. 1, 1978) (statements by Rep. Dodd).

188. *See supra* note 172 and accompanying text.

189. In light of the weak statistical support for excepting educational loans from discharge, the only reason for passage of the amendment must have been the perceived political need to curb "serious abuses" of the bankruptcy laws. *See supra* note 174 and accompanying text.

in section 1328(a). Yet, this omission does create an apparent conflict. Courts faced with a confirmation decision regarding a Chapter 13 partial payment plan that concerns educational loans, nonetheless, should review the policy considerations outlined in Chapter 7. Courts also must consider an additional factor. Because Congress created incentives in Chapter 13 to encourage debtors with regular income to file a Chapter 13 petition rather than opt for liquidation, courts must consider the extent to which the availability of a discharge of educational loans in section 1328(a) operates as an incentive to debtors to elect Chapter 13. Because the evaluation of whether an educational loan is dischargeable requires a different equation in Chapter 13 than in Chapter 7, courts can read the two chapters so that each is consistent with the other.

The structure and legislative history of Chapter 13 clearly indicate that one of Congress' express and overriding policy concerns in reforming the Bankruptcy Code was to facilitate greater use of Chapter 13.[190] The dischargeability of educational loans encourages greater use of Chapter 13. In contrast, Congress' policy rationales for excepting educational loans from discharge in straight bankruptcy are of questionable validity. The resulting discriminatory treatment of student borrowers conflicts with the twin policies of the bankruptcy laws—a fresh start for the debtor and equal treatment of all debts and creditors.[191] Furthermore, the special treatment that Congress gives "unique" educational loans is difficult to justify when similarly structured medical loans do not receive like protection.[192] Finally, the GAO report specifically discredited the argument that student loan bankruptcies posed any risk to the financial stability of the loan programs.[193] Thus, the only remaining foundation for limiting the discharge of educational loans rests in the political and moral dimension—Congress' desire to halt the well-publicized "serious abuses" and thereby lend moral support to students demonstrating individual responsibility by repaying their loans.[194] When an educational loan debtor seeks confirmation of a Chapter 13 plan, therefore, courts clearly should give greater weight to Congress' express decision to foster repayment plans under Chapter 13 than to Congress' weakly supported decision to except educational loans from discharge in liquidations. Accord-

190. *See supra* notes 84-94 and accompanying text.
191. H.R. REP. No. 595, 95th Cong., 1st Sess. 133-34 (1977).
192. *See supra* text accompanying note 181.
193. *See supra* notes 56, 177-79 and accompanying text.
194. *See supra* notes 184-89 and accompanying text.

ingly, courts should circumscribe the broad discharge available in Chapter 13 by denying confirmation of a student loan debtor's proposed plan only when the proposed plan would constitute a "serious abuse" of Chapter 13 by offering payments not commensurate with the debtor's ability to pay.

B. *Judicial Approach*

The judiciary has attempted to resolve the conflict between section 1328(a) and section 523(a)(8) through the good faith inquiry that courts must make before confirming a proposed partial payment plan. A review of the various approaches reveals that the "totality of circumstances" approach best serves congressional intent because this approach both encourages the use of Chapter 13 and provides a means of limiting "serious abuses" of Chapter 13.

The courts adopting the "literal" construction[195] virtually have read the good faith requirement out of section 1325(a) by confirming any plan that satisfies the other requirements of section 1325(a).[196] Although the literal approach fosters the use of Chapter 13, this approach does not allow for an inquiry into whether a plan constitutes a "serious abuse" of the spirit or purpose of Chapter 13. The courts adopting the "substantial and meaningful payments" test,[197] on the other hand, assure that no "serious abuses" of Chapter 13 will occur. But, by requiring a "minimum" percentage of payment these courts discourage the use of Chapter 13 by circumscribing too tightly the flexibility that Congress intended to provide debtors in Chapter 13.

The "totality of circumstances" approach[198] avoids the shortcomings of both the literal approach and the substantial and meaningful payments approach. First, courts applying the totality of circumstances test do not discourage a debtor from selecting Chapter 13, because the test does not require a minimum percentage repayment. Second, by reviewing all factors relevant to the design, feasibility, and intent of a proposed plan when making a good faith inquiry, these courts also assure that a debtor's plan does not abuse "the principles, purpose, or spirit" of Chapter 13.

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195. *See supra* notes 109-21 and accompanying text.

196. *See supra* note 158 (*Perez* court's discussion of statutory construction).

197. *See supra* notes 122-52 and accompanying text.

198. *See supra* notes 153-71 and accompanying text.

C. *1984 Amendments*

In the Bankruptcy Amendments and Federal Judgeship Act of 1984[199] Congress affirmed that courts should continue to use the totality of circumstances approach when deciding whether to confirm a Chapter 13 partial payment plan.[200] Although Congress did not rectify the discrepant treatment of educational loans in section 523(a)(8) and section 1328(a), Congress did amend section 1325(b).[201] Under the amended section 1325(b), if an unsecured creditor holding an allowable claim objects to confirmation of a proposed plan, the court may approve the plan only if it provides the creditor the entire amount of the claim, or if it "provides that all of the debtor's projected disposable income . . . will be applied to make payments under the plan."[202]

To date, there have not been any cases interpreting or applying the new section 1325(b), but its operation is easy to discern. In determining whether a debtor's proposed plan calls for a debtor to apply all disposable income toward payments under the plan, courts will need to review carefully the proposed budget of the debtor. The statute defines disposable income as income "not reasonably necessary . . . for the maintenance or support of the debtor or a dependent of the debtor."[203] In evaluating the debtor's budget, the proposed payments, and the amount of income reasonably necessary to cover maintenance and support expenses, courts will make virtually the same inquiry they have been making under the totality of circumstances approach. Instead of relating this judicial review to the good faith inquiry under section 1325(a)(3), however, courts now have express authority to make this review under the revised section 1325(b).

By requiring debtors, including educational loan debtors, to contribute all disposable income toward payments under a Chapter 13 plan, section 1325(b) promotes both of the policies furthered by the totality of circumstances approach. First, section 1325(b) does not discourage debtors from electing Chapter 13 because it does not require a minimum percentage repayment. A debtor may offer either nominal or substantial payments as long as the payments

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199. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

200. *See id.* at § 317, 98 Stat. 333 (1984) (amending 11 U.S.C. § 1325(b) (1982)).

201. *Id.*

202. *Id.*

203. *Id.*

constitute all the debtors' disposable income.[204] Second, section 1325(b) will prevent abuses of the purpose and spirit of Chapter 13 because the disposable income formula ensures that the payments under a debtor's plan will be commensurate with a debtor's ability to pay.

The new section 1325(b) does create some potential problems, especially concerning the requirement in section 1325(a)(6) that the debtor "be able to make all payments under the plan."[205] By requiring that all disposable income "be applied to make payments under the plan," section 1325(b) would seem to require the maximum feasible repayment. Yet, section 1325(a)(6) prohibits courts from affirming a plan if the debtor will not be able to make all payments. While section 1325(a)(6) suggests a range of acceptable payments, not to exceed the maximum feasible amount that the debtor will be able to repay, section 1325(b) suggests that only the maximum feasible amount is acceptable for confirmation. If courts construe section 1325(b) literally, debtors engaged in repayment plans are likely to be thrust into section 1328(b)[206] hardship status upon suffering any financial setback because they will lack the financial "cushion" needed to meet both their support needs and the payments under the plan. Courts can assist debtors in avoiding this dilemma by continuing to review the debtor's budget and proposed payments with the flexibility of the totality of circumstances approach.

VI. Conclusion

Nearly one decade ago, fearing potential losses from student loan bankruptcies, Congress responded to perceived abuses of the bankruptcy laws by limiting the dischargeability of educational loans in Chapter 7 bankruptcies. For reasons not explained in the legislative history, Congress did not place a corresponding limitation in the discharge provision of Chapter 13, thus creating an apparent tension that the courts have resolved through various

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204. For example, if a debtor applies all disposable income to payments to be made under a Chapter 13 plan, but the payments would result in a repayment of only five percent of an objecting unsecured creditor's claim, the court, nevertheless, must confirm the plan. If a debtor's plan proposed payments resulting in a repayment of 50% of an objecting unsecured creditor's claim, however, the court nonetheless would be compelled to deny confirmation of the plan if the debtor did not commit *all* disposable income to the plan.

205. 11 U.S.C. § 1325(a)(6) (1982). Section 1325(a) provides that a "court shall confirm a plan if . . . (6) the debtor will be able to make all payments under the plan and to comply with the plan." *Id.*

206. *See supra* notes 78, 98 and accompanying text.

approaches.

When considering whether to confirm a Chapter 13 partial payment plan that involves educational loans, courts have increasingly used the totality of circumstances approach to determine whether the debtor's plan was proposed in good faith or constituted an abuse of the purpose and spirit of Chapter 13. This approach best serves the dual interests of encouraging Chapter 13 plans and limiting the occasions of abuse. The new section 1325(b) admittedly negates the need for courts to engage in this type of inquiry through the mechanism of the "good faith" requirement. Nonetheless, when making "disposable income" determinations under section 1325(b), courts still should employ the flexible approach found in the totality of circumstances test.

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