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**Age as a Factor in Determining Discharge of a Debtor's Student Loan Debt**

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**Introduction**

Title 11 of the United States Code (the “Bankruptcy Code”) provides for debtors a “fresh start” by allowing the discharge of most debt.<sup>1</sup> To obtain a discharge of student loan debt, a debtor must demonstrate “undue hardship.”<sup>2</sup> If the debt is not discharged, it must still be paid.<sup>3</sup> The phrase “undue hardship” is not defined in the “Bankruptcy Code and congressional record provides little guidance as to what constitutes undue hardship . . . .”<sup>4</sup> Even though Congress created a single standard for discharging student loan debt; the circuit courts have adopted different tests to determine if the undue hardship standard is satisfied.<sup>5</sup>

Regardless of the test, some courts consider age in analyzing undue hardship.<sup>6</sup> On the other hand, some courts do not consider a debtor's age when determining if student loan debt

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<sup>1</sup> See 11 U.S.C. § 523(a)(8) (2018); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

<sup>2</sup> See 11 U.S.C. § 523(a)(8).

<sup>3</sup> See *In re Bell*, 633 B.R. 164, 171 (Bankr. W.D. Va. 2021).

<sup>4</sup> *In re Hicks*, 331 B.R. 18, 23 (Bankr. D. Mass., 2005) (citing *Nash v. Conn. Student Loan Found.*, 330 B.R. 323, 324 (D. Mass. 2005).

<sup>5</sup> See *id.* (noting that the First and Eighth Circuits have adopted a different test than the rest of the circuits for determining the discharge of student loan debt).

<sup>6</sup> See *In re Nitcher*, 606 B.R. 67, 74 (Bankr. D. Or. 2019).

should be discharged, even if the debtor has been paying their debt back for a long time.<sup>7</sup> This memorandum addresses the relationship between the discharge of student loans in bankruptcy and how long a court will allow a debtor to remain obligated on his/her student loans. Part I outlines the two different tests bankruptcy courts use to determine if student loan debt should be discharged based on the “undue hardship” standard. Part II examines instances when a bankruptcy court has or has not taken into consideration age as a factor when discharging student loan debt.

## **Discussion**

### **I. The Different Standards for Determining “Undue Hardship”**

#### *A. The Brunner Test*

In *Brunner v. N.Y. State Higher Educ. Serv.*, the United States Court of Appeals for the Second Circuit established the *Brunner* test to give meaning to the words “undue hardship.”<sup>8</sup> The majority of circuit courts apply some version of the three-part test created by the Second Circuit in *Brunner*.<sup>9</sup> To satisfy the *Brunner* test, a debtor must prove:

“(1) that the debtor cannot maintain, based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.”<sup>10</sup>

All three elements of the *Brunner* test must be satisfied for the discharge of student loan debt to be granted.<sup>11</sup> Even though age is not a specific factor under the *Brunner* test, the fact that

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<sup>7</sup> See generally *In re Hull*, No. 18-32076, 2021 WL 1602880 (Bankr. W.D.KY. Apr. 23, 2021).

<sup>8</sup> 831 F.2d 395, 396 (2d Cir. 1987).

<sup>9</sup> See *id.* at 395; *In re Bell*, 633 B.R. 164, 171 (Bankr. W.D. Va. 2021).

<sup>10</sup> *Brunner*, 831 F.2d at 396.

<sup>11</sup> See *id.*

someone is “elderly” can be considered an additional circumstance under the second element.<sup>12</sup> Thus, this indicates age can be considered when discharging student loan debt.

### *B. The Totality of the Circumstances Test*

The United States Court of Appeals for the First and Eighth Circuits have adopted the totality of the circumstances test created by the Eighth Circuit in *Long v. Educ. Credit Mgmt. Corp.*<sup>13</sup> Generally, the totality of the circumstances test is usually a more flexible approach than the *Brunner* test because additional facts and circumstances unique to the debtor’s case tend to be considered.<sup>14</sup> The totality of the circumstances test weighs the relevant factors, unlike the *Brunner* test where the factors are mandatory requirements.<sup>15</sup> To receive a discharge of student loan debt under the totality of the circumstances test, the court broadly considers: (1) the debtors past and present financial resources, and those the debtor can reasonably rely on for the future, (2) a determination of the reasonably necessary living expenses of the debtor and the debtor’s dependents, and (3) “any other relevant facts and circumstances surrounding each particular bankruptcy case.”<sup>16</sup>

## **II. Age may be a Factor in Determining the Discharge of Student Loan Debt**

### *A. When Age is a Relevant Factor Under Brunner*

Age can be an influential factor when deciding whether to discharge student loan debt. In *In re Wolfson*, a Delaware Bankruptcy Court discharged student loan debt of a debtor that was

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<sup>12</sup> See *id.*

<sup>13</sup> See 322 F.3d 549, 554–55 (8th Cir. 2003); *In re Parvizi*, No. 18-30578-EDK, 2021 WL 1921121, at \*5 (Bankr. D. Mass. May 13, 2021).

<sup>14</sup> See *In re Hicks*, 331 B.R. 18, 26 (Bankr. D. Mass. 2005); see also *In re Bell*, 633 B.R. at 172.

<sup>15</sup> See *In re Bell*, 633 B.R. at 172.

<sup>16</sup> See *Long*, 322 F.3d at 554–55; see also *Andrews v. S.D. Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 1981).

only 35 years old.<sup>17</sup> Here, the debtor satisfied the first element of the *Brunner* test because he was unemployed, had no income and made efforts to maximize his income by conducting an extensive job search.<sup>18</sup> The second prong of the *Brunner* test was also satisfied. The Court held that it did not want the debtor to remain obligated on his student loan debt because it would have been virtually impossible for this debtor to pay it off.<sup>19</sup> Even though the debtor was young, the court decided it would be an undue hardship to force the debtor to pay off this debt for his anticipated lifetime.<sup>20</sup> The bankruptcy judge here agreed with the “fresh start” policy of the Bankruptcy Code by not wanting to “impose a lifetime yoke” on the debtor.<sup>21</sup> Finally, the third element of the *Brunner* test was satisfied because the debtor never had discretionary income to “make meaningful payments” on his student loan debt and therefore could not be criticized for failing to enter into an income-based repayment plan.<sup>22</sup> Thus, the Delaware Bankruptcy Court considered age as a factor under the second element of the *Brunner* test as it took into consideration that if the debtor’s student loans were not going to be discharged, the debtor would likely be paying them back for his anticipate lifetime.<sup>23</sup>

In *In re Nitcher*, the Oregon Bankruptcy Court mentions that the second factor of the *Brunner* test allows for the consideration of age.<sup>24</sup> The debtor here was a 38-year-old law school graduate.<sup>25</sup> Even though the debtor was young, the Oregon Bankruptcy Court still decided to

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<sup>17</sup> *In re Wolfson*, No. 19-11618 (LSS), 2021 WL 6498863 (Bankr. D. Del. Jan. 14, 2021).

<sup>18</sup> *See id.* at \*6–7.

<sup>19</sup> *See id.* at \*8–11.

<sup>20</sup> *See id.* at \*9–11

<sup>21</sup> *Id.* at \*10; *see In re Price*, 573 B.R. 579, 607 (Bankr. E.D. Pa. 2017).

<sup>22</sup> *Id.* at \*12.

<sup>23</sup> *See id.* at \*13.

<sup>24</sup> *In re Nitcher*, 606 B.R. 67, 74 (Bankr. D. Or. 2019) (“A court may consider a number of factors, not limited to the following: the debtor’s age . . .”).

<sup>25</sup> *Id.* at 73.

partially discharge the debtor’s student loan debt finding that his “current state of affairs [was] likely to persist for a significant period.”<sup>26</sup>

*B. When Age is not a Relevant Factor Under the Brunner Test*

Some courts may not take age into consideration when determining if a debtor’s student loan debt should be discharged, especially when there are more pressing considerations to analyze.<sup>27</sup> In *In re Hull*, the bankruptcy court for the Western District of Kentucky held that approximately 50-year-old debtor did not meet any of the elements under the *Brunner* test age, and never turned to the consideration of her age when determining that her student loan would not be discharged.<sup>28</sup> The debtor failed the first element of the *Brunner* test because the debtor earned well above the poverty level for Kentucky, indicating that she was able to maintain a minimal standard of living.<sup>29</sup> Additionally, she failed to meet the second element of the *Brunner* test as the bankruptcy court could not find a “certainty of hopelessness in either her current circumstances or her future prospects” because the debtor agreed her financial situation would improve in the future, earned a high yearly income, and spent large amounts of money on trips and gifts.<sup>30</sup> An additional circumstance, such as age, was not addressed in this opinion.<sup>31</sup> Finally, the third element of the *Brunner* test was not met because the debtor “failed to demonstrate a good faith effort to repay her student loans.”<sup>32</sup> Thus, despite that the debtor was close to fifty years old, age was not a consideration when determining if the debtor should remain obligated on

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<sup>26</sup> *Id.* at 77, 79 (explaining that “Nitcher’s young age and advanced education” made this analysis difficult).

<sup>27</sup> *See e.g., In re Hull*, No. 18-32076, 2021 WL 1602880 (Bankr. W.D.KY. Apr. 23, 2021).

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at \*5.

<sup>30</sup> *Id.* at \*6.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at \*7.

her student loan debt, and the Kentucky bankruptcy court decided to keep the debtor obligated to her repayment of her student loan debt for her anticipated lifetime.<sup>33</sup>

*C. When Age is a Relevant Factor Under the Totality of the Circumstances Test*

A bankruptcy court in the Northern District of Iowa found that the debtor’s age was a critical factor when deciding whether the debtor’s student loan debt should be discharged.<sup>34</sup> The Court considered the question of “whether discharge is necessary in light of available IBR [income based-repayment] plans.”<sup>35</sup> A typical IBR plan can require payment for over 20 to 25 years.<sup>36</sup> The debtor is now 50 years old, however upon completion of a hypothetical IBR plan, the debtor would be between 69 and 74 years old.<sup>37</sup> The Iowa Bankruptcy Court decided to discharge the debtor’s student loan debt because it did not want to disregard the Bankruptcy Code’s policy of giving the debtor a “fresh start”.<sup>38</sup> The *Ashline* Court mentions it would be unfair for the debtor to remain obligated on her student loan debt because even if she was able to timely pay her IBR obligations, pay her other expenses, and save for retirement, she would still have to pay a tax bill “in the amount of all remaining principal, interest, and other charges due— at a time when Debtor is nearing 70 years of age or older.”<sup>39</sup> Thus, the Court found the debtor’s age to be a significant factor and decided to discharge the debtor’s student loan debt.<sup>40</sup>

In *Educ. Credit Mgmt. Corp. v. Jespersen*, the Eighth Circuit also considered age as a factor when determining whether discharge of a debtor’s student loans is appropriate.<sup>41</sup> The

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<sup>33</sup> *See id.*

<sup>34</sup> *See In re Ashline*, 634 B.R. 799, 804–5 (Bankr. N.D. Iowa. 2021).

<sup>35</sup> *Id.* at 804.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 805.

<sup>39</sup> *See id.*

<sup>40</sup> *Id.*

<sup>41</sup> 571 F.3d 775 (8th Cir. 2009).

Eighth Circuit, in upholding the decision of the Minnesota Bankruptcy Court found that because the debtor was only 43 years old and an attorney, such facts weighed against him in discharging his student loan debt.<sup>42</sup> Since he was young and showed a promising career, the debtor was not facing an undue hardship.<sup>43</sup>

*D. When Age is not a Relevant Factor Under the Totality of the Circumstances Test*

Courts that follow the totality of the circumstances test have decided cases where age is not a consideration when deciding to discharge student loan debt.<sup>44</sup> In *In re Nielsen*, the debtor failed to satisfy the elements under the totality of the circumstances test, and thus the debtor's student loan debts were not discharged.<sup>45</sup> The debtor has "steady employment in his chosen field" with an ability to advance in the future, maintains reasonable and necessary living expenses, receives "substantial tax refunds," and has a "retirement fund and equity in his home."<sup>46</sup> Thus, the Bankruptcy Appellate Panel in the Eighth Circuit, in concluding that the debtor remain obligated on his repayment of his student loan for his anticipate lifetime, did not take the debtor's age into account.<sup>47</sup>

## CONCLUSION

Courts have reached differing conclusions on whether they are going to keep a debtor bound to their student loan debt for their anticipate lifetime, or a significant portion of their lifetime. Age is a factor sometimes considered when determining if the debtor should remain

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<sup>42</sup> See *id.* at 779–80 (noting the other factors that weighed against the debtor were his "good health, number of degrees, marketable skills, and lack of substantial obligations to dependents . . .").

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., *In re Nielsen*, 473 B.R. 755 (B.A.P. 8th Cir. 2012).

<sup>45</sup> *Id.* at 762.

<sup>46</sup> *Id.* at 760, 762.

<sup>47</sup> See *id.* at 762.



bound to repay their student loan debt. However, age is not always an influential factor. Some courts will consider age heavily, while some courts may not consider age at all.