UNDULY HARSH: THE NEED TO EXAMINE EDUCATIONAL VALUE IN STUDENT LOAN DISCHARGE CASES INVOLVING FOR-PROFIT TRADE SCHOOLS

I. INTRODUCTION

In 1991, Troy Speer saw a television advertisement for Texas Aero Tech that promised him an education and a future.[1] Troy received assurances from both the advertisement and the personnel of Texas Aero Tech that the school assists students in job placement after their completion of the program.[2] As a result, he enrolled in a year-long program for auto mechanics and repair, borrowing $13,230 in educational loans from Educational Credit Management Corporation ("ECMC") to pay for the program.[3]

Troy completed the program, but failed the first part of a multipart exam that the Federal Aviation Association requires.[4] He learned that only three or four out of the fifty graduates from his class had passed the exam and secured employment.[5] Disheartened and discouraged, Troy did not attempt to retake the exam.[6] Instead, he wrote a letter to his legislative representative expressing his concern over the school's misrepresentations to him about job placement.[7] The letter was never investigated.[8]

Troy had a great amount of difficulty repaying his loans.[9] At first, he was unemployed and filed for deferment on them.[10] He did not have the necessary qualifications to gain work as a skilled laborer, and as a result, he worked odd jobs before securing full-time employment as a carpenter for a construction

1. Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 187 (Bankr. W.D. Tex. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Speer*, 272 B.R. at 187.
7. *Id.* at 188.
8. *Id.*
9. *Id.* at 188-90.
10. *Id.* at 188. A deferment temporarily suspends the borrower's monthly payments due to unemployment, economic hardship, and other financial difficulties. Interest continues to accrue during a deferment, but the student is not responsible for paying it. YouCanDealWithIt.com, Student Loan Deferment & Forbearance, http://www.youcandealwithit.com/cant_pay_student_loan/loan_deferment_forbearance.shtml (last visited Apr. 4, 2007).

company.[11] His salary, however, was too low to allow him to make any payments toward the loan, and he filed for forbearance shortly thereafter.[12]

By 1999, ECMC began to garnish ten percent of Troy's wages.[13] His already strapped budget broke, causing him to file for bankruptcy.[14] Even worse, the garnishment of Troy's wages failed to decrease his loan debt.[15] Instead, his debt continued to grow because the garnished wages, $145 per month, were insufficient to pay the interest on the loan, let alone the principal.[16] By May 21, 2001, Troy's $13,000 in loans had grown to over $24,000.[17]

The Bankruptcy Court for the Western District of Texas presided over Troy's bankruptcy case. In reviewing his financial situation, it determined that Troy's stepfather was able to sum up Troy's situation best:

> [Troy] has no social life. He is in constant turmoil over how to pay for unexpected expenses. He has had back surgery. His living quarters are substandard. He has not seen his child in over 3 years. He needs several teeth pulled. He has very few clothes. He is in a constant state of financial purgatory and sees no way out. His only outlets for entertainment are his cable television and his dog.[18]

Furthermore, the court noted that the education Troy received did not benefit him and left him with no ability to repay the loans.[19]

In defending its recovery of the loan, ECMC suggested ways in which Troy might be able to repay it.[20] First, ECMC offered Troy two potential repayment options.[21] Both options would last for twenty years, and with interest, the amount of repayment would exceed $50,000 on $13,000 in loans.[22] Second, ECMC suggested that Troy should get a part-time job on top of his forty-hour work week performing hard labor.[23] Additionally, ECMC also suggested that he remove his cable television, one of his two outlets for entertainment (the other being his dog).[24]

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11. *Speer*, 272 B.R. at 188.

12. *Id.* A forbearance suspends the monthly payments that a borrower must pay, typically due to a temporary hardship. Interest continues to accrue during a forbearance, and the student is responsible for making interest payments. YouCanDealWithIt.com, Student Loan Deferment & Forbearance, *supra* note 10.

13. *Speer*, 272 B.R. at 188. The Higher Education Act of 1965 permits garnishment of up to fifteen percent of a debtor's wages as a consequence of the debtor's default on an educational loan. 20 U.S.C.A. § 1095a(a)(1) (West, Westlaw through Mar. 2007 amendments).

14. *Speer*, 272 B.R. at 188.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 190 (quoting Troy's stepfather's testimony).

19. *Speer*, 272 B.R. at 192.

20. *Id.* at 190-91.

21. *Id.* at 190.

22. *Id.*

23. *Id.* at 190-91.

24. *Speer*, 272 B.R. at 195.

Should Troy have to repay his loans? He is clearly in a desperate situation; he has not benefited from an education that cost $13,000, and he may now have to pay well over $50,000. Troy's loans were discharged, particularly because the court found that Troy did not receive any benefit from his education and will never be employed in the field that he had studied at Texas Aero Tech.[25] Many jurisdictions, however, would not have considered whether Troy benefited from his education in determining whether the court should discharge his loan,[26] potentially leaving him struggling in a life sentence of debt.

Over the past few years, stories like Troy's have cropped up in the news with more and more frequency.[27] Primarily, prospective students have difficulty in accessing the information they need to make an informed decision as to whether to attend a for-profit trade school.[28] The current federal requirements have allowed for-profit trade schools to shade the truth, or worse, to outright lie as to their true job placement statistics, yet the schools stay within the confines of the law.[29] As a result, students respond to admissions staffs' ploys but very rarely are able to recover any damages for the misrepresentations on which they rely.[30]

Moreover, students have extreme difficulty in persuading a court to discharge their educational loans in a bankruptcy proceeding, particularly due to the requirement that a student has suffered an "undue hardship" to qualify for

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25. *Id.* at 197-98.

26. *See, e.g.*, Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 n.3 (Bankr. S.D.N.Y. 1985) (determining that courts should not consider educational value in determining whether debtor suffered undue hardship and court should thus discharge debtor's educational loan), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (agreeing with *Brunner* court in rejecting prior test's approach that considered educational benefit to debtor).

27. *See, e.g.*, Eryn Brown, *Can For-Profit Trade Schools Pass an Ethics Test?*, N.Y. TIMES, Dec. 12, 2004, § 3, at 5 (discussing marketing tactics of for-profit trade schools, including incentives and disincentives placed on personnel and high tuition required at these schools); Brent Hunsberger, *Burden of Loans Crushes Students*, OREGONIAN, Aug. 14, 2005, at E1 (discussing issues with federal and private loans at for-profit trade schools and overwhelming burden placed on students attending these schools); *60 Minutes: For-Profit College: Costly Lesson* (CBS television broadcast Jan. 30, 2005), *available at* http://www.cbsnews.com/stories/2005/01/31/60minutes/main670479.shtml (discussing for-profit trade schools' misrepresentations to prospective students and crushing student loan burden that follows).

28. See *infra* Part III.A.2.a for a discussion of the difficulty students have in receiving the necessary information to decide whether to attend a for-profit trade school.

29. *See* DEANNE LOONIN & JULIA DEVANTHÉRY, NAT'L CONSUMER LAW CTR., MAKING THE NUMBERS COUNT: WHY PROPRIETARY SCHOOL PERFORMANCE DATA DOESN'T ADD UP AND WHAT CAN BE DONE ABOUT IT 25-41 (2005), *available at* http://www.nclc.org/news/ProprietarySchoolsReport.pdf (discussing that Department of Education only collects information on completion rates, not job placement rates, which results in accrediting agencies collecting job placement information); Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 758 (2001) (stating that admissions recruiters are normally savvy enough to avoid liability for misrepresentations); *60 Minutes: For-Profit College: Costly Lesson*, *supra* note 27 (quoting students who claim that for-profit college they attended "lied" about their job placement statistics).

30. *See* Linehan, *supra* note 29, at 763-81 (discussing lack of legal remedies for students who have been victims of misrepresentations by for-profit trade schools).

an educational loan discharge.[31] In interpreting what constitutes an undue hardship, the majority of the circuits have adopted the test established by the Southern District of New York in *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*.[32] The *Brunner* test is strict, and in establishing the standard, the court found that it should not review the value of the education that the student received in determining whether the student suffered an undue hardship.[33] Alternatively, the Ninth Circuit has determined that courts should consider educational value in determining whether the student suffered an undue hardship and the court should thus discharge the student's loan.[34] This Comment suggests that the federal circuit courts following *Brunner* should reexamine the definition of undue hardship and adopt the Ninth Circuit's approach, allowing courts to consider the educational value that the student received when determining the student's future ability to repay the loan, particularly in relation to for-profit trade schools.[35]

Part II.A will discuss the background of for-profit trade schools, including the educational objectives, costs, and marketing techniques, as well as the lack of remedies available to students to hold a for-profit trade school liable for its recruiter's misrepresentations. In Parts II.B.1 and II.B.2, respectively, the text and legislative intent of the educational loan discharge exception and the general bankruptcy policy in connection with the educational loan discharge exception will be discussed. Part II.B.3 discusses three tests that courts have developed in applying the educational loan discharge exception, with the *Brunner* test emerging as the dominant test. Part III.A explains why the Second Circuit and Seventh Circuit's approach of not considering educational value in deciding whether to discharge a loan is too harsh in the context of for-profit trade schools. Finally, Part III.B proposes the solution to this problem: adopting the Ninth Circuit's multivariable approach that considers the educational value a student

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31. *See* 11 U.S.C.A. § 523(a)(8)(A) (West 2004 & Supp. 2006) (defining educational loan discharge exception as not permitting discharge for "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit . . . or nonprofit institution," or for "an obligation to repay funds received as an educational benefit, scholarship or stipend," unless "excepting such debt from discharge under this paragraph will impose an *undue hardship* on the debtor and the debtor's dependents" (emphasis added)).

32. 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam). *See, e.g.*, Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 304-05 (3d Cir. 1995) (adopting *Brunner* test). See *supra* notes 159-61 and accompanying text for a listing of eight circuits that have adopted the *Brunner* test, one that has applied it without expressly adopting it, and one that has declined to adopt it.

33. *Brunner*, 46 B.R. at 755 n.3; *see also In re* Roberson, 999 F.2d 1132, 1136-37 (7th Cir. 1993) (agreeing with *Brunner* court in rejecting prior test's approach in considering educational benefit to debtor).

34. *See* Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 946-47 (9th Cir. 2006) (holding that courts should consider such factors as quality of education and lack of marketable job skills in determining whether it should discharge educational loan); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (noting that courts should consider benefit of education to debtor with respect to debtor's ability to repay loan).

35. See *infra* Part III for a discussion of the reasons why circuit courts should adopt the Ninth Circuit's approach rather than the Second Circuit and Seventh Circuit's approach.

received when determining whether the student suffered an undue hardship and whether the court should discharge the student's loan.

II. OVERVIEW

A. *For-Profit Trade Schools: The Bad, the Worse, and the Ugly*

1. The Bad: The Purpose, Proliferation, and Costs of Private, For-Profit Trade Schools

Thirty years ago, the Higher Education Amendments permitted for-profit trade schools to participate in the federally guaranteed student loan program.[36] As a result, the for-profit trade schools' market increased significantly.[37] The boom continued as Congress relaxed the federal financial aid regulations to permit greater entry into the for-profit trade school market.[38]

The rise of these for-profit trade schools suffered a brief and minor setback in 1992.[39] At that time, Congress passed an amendment to the Higher Education Act that restricted a school's eligibility to provide federal financial aid if the school's default rate[40] exceeded a set percentage, currently twenty-five percent, for more than three years.[41] The setback was short-lived, however; most recently, for-profit trade schools have hit an all-time high with enrollments of over 594,000

36. Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at scattered sections of 20, 29, and 42 U.S.C. (2000)).

37. *See* Armstrong v. Accrediting Council for Continuing Educ. & Training Inc., 168 F.3d 1362, 1365 (D.C. Cir. 1999) (stating that result of allowing for-profit trade schools to participate in federal loan program was that "large numbers of for-profit schools sprang up, admitted poorly prepared students, and offered shoddy programs"); Linehan, *supra* note 29, at 755 (linking rise in for-profit trade schools to change allowing these schools to participate in federal loan program). *But see* Eboni M. Zamani-Gallaher, *Proprietary Schools: Beyond the Issue of Profit*, NEW DIRECTIONS FOR INSTITUTIONAL RES., Winter 2004, at 63, 65 (stating that enrollment data was not collected prior to Higher Education Amendments).

38. *See Armstrong*, 168 F.3d at 1364-65 (noting that more liberal laws increased federal subsidy to lenders, increased aggregate loan limits, allowed students to receive federal loans despite not graduating from high school, and excluded federal loans from Truth in Lending Act).

39. *See id.* at 1365 (discussing negative impact of congressional changes to default rates on for-profit trade schools). Congress instituted the changes because default rates at for-profit trade schools had increased to thirty-nine percent. *Id.*

40. A school's default rate is "the percentage of a school's student borrowers who have defaulted on their federal student loans." U.S. Department of Education, Glossary Item: Cohort Default Rate, http://www.ed.gov/offices/OSFAP/fsacoach/glossary/cohort_default_rate.html (last visited Apr. 7, 2007).

41. Higher Education Act Amendments of 1992, Pub. L. No. 102-325, § 427, 106 Stat. 448, 549 (1992) (codified as amended at 20 U.S.C.A. § 1085(a)(2) (West 2000 & Supp. 2006)). These amendments also required for-profit trade schools to deliver at least half of their courses from a campus, a requirement known as the fifty percent rule. Sam Dillon, *Online Colleges Receive a Boost from Congress*, N.Y. TIMES, Mar. 1, 2006, at A1. Congress has recently passed a bill repealing the fifty percent rule, which allows schools to become completely Internet based. *Id.* This change will likely create another boom in the for-profit trade school market. *See id.* (stating that Department of Education is estimating costs of this new law as being $697 million over next ten years).

in 2002, the last year in which the National Center for Education Statistics published enrollment figures for for-profit trade schools.[42] In fact, the increase in enrollment has been so great that the total fall enrollment for degree-granting, for-profit trade schools more than doubled between 1992 and 2002.[43]

Originally, students utilized private, for-profit trade schools to learn the necessary skills for an occupation or a trade.[44] More recently, for-profit trade schools have taken on many characteristics that had previously been associated only with traditional scholarly training at colleges and universities, including offering some general education courses,[45] diverse fields of study,[46] and multiple degree levels.[47]

Despite a few similarities between for-profit trade schools and not-for-profit schools, the programs continue to have significant differences.[48] First, for-profit trade school students usually have great difficulty in transferring to not-for-profit colleges and universities, particularly because these not-for-profit schools will not accept the credits from the for-profit trade schools.[49] Although for-profit trade schools tend to have an accreditation, the accrediting body is different than

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42. *See* NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 2004 tbl.171 (2004), http://nces.ed.gov/programs/digest/d04/tables/dt04_171.asp (listing enrollment figures for fall semesters of degree-granting institutions between years of 1947 and 2002).

43. *See id.* (providing enrollment figures for years 1992 and 2002 and demonstrating that enrollment has increased more than 2.5 times during those ten years).

44. *See* Zamani-Gallaher, *supra* note 37, at 64 (discussing history and origin of for-profit trade schools and stating that these schools traditionally "prepared students for an occupation, trade, or vocation").

45. *See id.* at 65-66 (stating that for-profit trade schools are mirroring community colleges by offering some more traditional courses).

46. *See Proprietary Education: Threat, or Not?* UPDATE (NEA Higher Educ. Research Ctr., Wash., D.C.), Sept. 2004, at 3, *available at* http://www2.nea.org/he/heupdate/images/vol10no4.pdf (listing ten degrees most proprietary schools offer, including business, computer and information sciences, visual and performing arts, engineering-related technologies, health professions, personal services, mechanics and repairs, legal studies, education, and protective services).

47. *See* Zamani-Gallaher, *supra* note 37, at 66 (noting that for-profit trade schools now offer "two- and four-year degree training").

48. *See id.* at 66-67 (discussing differences between not-for-profit public and private postsecondary schools and for-profit postsecondary schools). The financial structure of the schools is different as well. *See* LOONIN & DEVANTHÉRY, *supra* note 29, at 11-12 (discussing for-profit trade school's role as a business). Five companies have consolidated the for-profit sector of education, comprising approximately seventy-four percent of for-profit school business. *Id.* These five publicly held companies are: Apollo Group, Education Management Corporation, Corinthian Colleges, Career Education Corporation, and ITT Educational Services. *Id.*

49. *See* Zamani-Gallaher, *supra* note 37, at 67 (stating that for-profit students are unable to transfer for several reasons, including lack of academic preparation, refusal of nonprofit school to accept credits, and increased work level that baccalaureate programs require); John Hechinger, *A Battle Over Standards at For-Profit Colleges*, COLLEGE J., WALL ST. J. ONLINE, Oct. 3, 2005, http://www.collegejournal.com/aidadmissions/newstrends/20051003-hechinger.html? (discussing that many students at for-profit colleges feel "misled" because they are unable to transfer their credits to traditional not-for-profit colleges).

the accrediting body for traditional schools.[50] Three thousand traditional colleges receive accreditation from eight regional accrediting agencies, while only ninety for-profit colleges receive accreditation from the same agencies.[51] Instead, "newer so-called national accrediting bodies," which do not place the same emphasis on academic credentials, accredit the more than three thousand for-profit trade schools.[52] As a result, the traditional schools are not willing to accept transfer credits from the for-profit trade schools.[53]

Second, for-profit trade schools are more limited than traditional schools in both location and diversity of the student body. The for-profit trade schools are typically located only in urban areas.[54] Furthermore, for-profit trade school students tend to have a much higher percentage of minority students attending their institutions than nonprofit colleges and universities.[55]

Finally, for-profit trade schools cost significantly more than public community colleges and public four-year universities,[56] and they rely more heavily on Title IV financial aid programs to help students pay for their education.[57] Over 85.7% of students at private, for-profit trade schools receive some form of Title IV financial aid, as opposed to 66.7% at private, not-for-profit institutions and 51.3% at public institutions.[58] Furthermore, students enrolled in for-profit trade school programs, whether two year or four year, are more likely to take out a loan to finance their education than they are if enrolled in a comparable program at a nonprofit institution.[59] On average, a student at a for-profit trade school will borrow $7900 annually to pay for her program.[60] More specifically, full-time students borrow an average of $9500 annually, and part-time students borrow an average of $7100 annually.[61] Therefore, while a few

50. *See* Hechinger, *supra* note 49 (discussing more liberal accrediting that occurs for for-profit schools).

51. *Id.*

52. *Id.*

53. *Id.*

54. Zamani-Gallaher, *supra* note 37, at 68.

55. *Id.*

56. *Id.* at 66 (stating that costs of for-profit trade schools are "substantially higher" than public schools).

57. *See* NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 2004 tbl.323 (2004), http://nces.ed.gov/programs/digest/d04/tables/dt04_323.asp (listing percentages of students receiving Title IV federal aid by type of institution for 1999-2000 academic year).

58. *Id.*

59. *See* RONALD A. PHIPPS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, STUDENTS AT PRIVATE, FOR-PROFIT INSTITUTIONS, at iv (1999), *available at* http://nces.ed.gov/pubs2000/2000175.pdf (noting that fifty-six percent of students at less-than-four-year, for-profit institutions received loans compared to nine percent of students at other institutions).

60. *See* National Center for Education Statistics, Average Total Amount of Financial Aid that Undergraduates in Private For-Profit Institutions Received in Various Types of Financial Aid Packages, by Student Characteristics: 2003–04, http://nces.ed.gov/das/library/tables_listings/show_nedrc.asp?rt=p&tableID=1421 (last visited Apr. 7, 2007) (listing average amount of loans and other financial aid students received in academic year for 2003-2004).

61. *Id.* For a program that is only two academic years, the average full-time student will borrow $19,000. At the current interest rate for federally guaranteed student loans of 7.14% (and some of

similarities now exist between for-profit trade schools and traditional schools, great differences exist in accreditation, location, student body population, costs, and financial aid.

2. The Worse: For-Profit Trade Schools' Marketing Techniques and Misrepresentations to Prospective Students

Recently, for-profit trade schools have come under fire for their use of deceitful marketing practices.[62] One scholar identified five typical misrepresentations that admissions recruiters pitch to potential students in an effort to increase enrollment.[63] The first four include misrepresentations as to (1) the time requirements to complete the program, (2) the content of and available facilities for the program, (3) the school's accreditation status, and (4) the school's ability to license students who complete the program.[64] Although not as flagrant as the former misrepresentations, the fifth misrepresentation, that the student will easily find employment after completion of the program, is far more common.[65]

The statement that students will find employment on completion of the for-profit trade school program is deceptive for many reasons. First, the representations of for-profit trade schools regarding job placement rates are misleading. While recruiting potential candidates, for-profit trade schools will often cite their job placement statistics as being above eighty percent.[66] The reported job placement data is misleading, however, because (1) the schools' calculation formula is flawed; (2) only a few campuses collect and report data for each trade school; (3) the schools self-report the data, making it impossible to

these loans may come from private educational loans that traditionally charge higher rates) with a ten-year repayment period, the borrower will owe $221.98 per month. If the program was four academic years, then $38,000 at 7.14% interest with a ten-year repayment period yields a monthly payment of $443.96. *See* YouCanDealWithIt.com: Student Loan Repayment, Debt Management, & Student Financial Planning, http://www.youcandealwithit.com/budgeting_tools/index.shtml (follow "Loan Repayment Calculator" hyperlink) (last visited Apr. 7, 2007) (calculating monthly payments based on loan amount, interest rate, and number of monthly payments).

62. *See* Brown, *supra* note 27 (discussing marketing tactics of for-profit trade schools, including incentives and disincentives that schools place on personnel). Two former admissions representatives of Florida Metropolitan University ("FMU") sent an e-mail to former FMU students alleging that FMU recruiters committed suspicious marketing practices. Allegedly, recruiters felt compelled to falsely promote the university to entice students to enroll because the university placed a great deal of pressure on recruiters to increase student enrollment. *See* Thomas W. Krause, *FMU Suing Two Former Admissions Employees*, TAMPA TRIB., Dec. 25, 2004, Metro at 1 (discussing deceitful marketing practices of for-profit trade schools). Although this case has not yet gone to trial, similar cases have had difficulty being proven in court. See *infra* Part II.A.3 for a discussion of the difficulty of filing a successful lawsuit against for-profit trade schools for fraud, misrepresentation, or breach of contract.

63. *See* Linehan, *supra* note 29, at 758-59 (discussing recruiting methods for-profit trade schools use to attract students).

64. *Id.*

65. *Id.* at 759.

66. LOONIN & DEVANTHÉRY, *supra* note 29, at 1.

verify; and (4) no policing mechanism exists to enforce the data collection and reporting mandates.[67]

Second, the for-profit trade schools' reported rate of job placement of eighty percent is likely inconsistent with their actual job placement rates.[68] The Department of Education collects only completion rate statistics from the for-profit trade schools, not job placement statistics.[69] These statistics, however, show that the largest five for-profit trade schools have *completion* rates of only seven percent, thirty-one percent, forty-seven percent, forty-nine percent, and fifty-nine percent.[70] Thus, if only a small percentage of students are completing the program, a placement rate of eighty percent is, at best, misleading.[71]

Third, students do not have easy access to job placement information.[72] The Higher Education Act requires for-profit trade schools to "provide[] an eligible program of training to prepare students for *gainful employment* in a recognized occupation"[73] in order for the school to maintain their institutional eligibility for federal financial aid.[74] As discussed above, the Department of Education only collects information on completion rates, not job placement rates.[75] Therefore, this mandate relies on accrediting agencies to collect the job placement information, but schools typically self-report the information to the agency and a student will likely find it impossible to access the information.[76]

Fourth, students are susceptible to believe they will find employment after completion of the program because achieving a better, higher-paying job is their primary reason for attending the trade school.[77] These students are relying on the schools as the "gatekeepers" to their chosen field and view the school as their means of climbing the ladder to success.[78] Many students who attend for-profit trade schools are the first generation in their families to obtain postsecondary education.[79] These first-generation students are more likely to

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67. *Id.* at 36-41.

68. *See id.* at 1 (finding that for-profit trade schools' reported job placement rates are "generally misleading and in many cases inaccurate").

69. *Id.* at 41.

70. *Id.* at 1. The schools' percentages in the respective order listed above are Apollo Group, Corinthian, Education Management, ITT, and Career Education Corporation. LOONIN & DEVANTHÉRY, *supra* note 29, at 1.

71. *See id.* (noting that for-profit trade schools' reported job placement rates are implausible considering low completion rates).

72. *See id.* at 28-29 (discussing difficulties in finding information on job placement statistics for for-profit trade schools).

73. 20 U.S.C. § 1002(b)(1)(A) (2000) (emphasis added).

74. *Id.* § 1085(a).

75. *See* LOONIN & DEVANTHÉRY, *supra* note 29, at 41 (describing federal requirements on for-profit trade schools in reporting job placement statistics).

76. *See id.* at 29-30 (stating that schools report their own data to accrediting agencies and that no accrediting agency considered job placement rates or completion rates to be public information).

77. Linehan, *supra* note 29, at 759.

78. *Id.* at 757-58.

79. *See* ANNE-MARIE NUNEZ & C. DENNIS CARROLL, NAT'L CTR. FOR EDUC. STATISTICS, FIRST-GENERATION STUDENTS: UNDERGRADUATES WHOSE PARENTS NEVER ENROLLED IN

have lower incomes than students who are not first generation,[80] and they report that being financially secure and being able to provide opportunities for their children were their primary goals in attaining postsecondary education.[81]

Finally, the admissions recruiters are normally savvy enough to avoid liability for these misrepresentations,[82] which results in a lack of remedies for those students who have accumulated a great deal of student loan debt in an attempt to get an education and a higher-paying job.[83] Also, because they are never held accountable for their misrepresentations, they can continue to employ these tactics on future students.

3. The Ugly: The Dearth of Remedies for Students against For-Profit Trade Schools

Typically, students who are victims of for-profit trade schools' misrepresentations are unable to receive a legal remedy.[84] First, common law tort remedies, including fraudulent misrepresentation, negligent misrepresentation, and educational malpractice, are extremely difficult to prove against for-profit trade schools and have resulted in few victories for students.[85] Second, in a common law breach of contract claim, the student will have great difficulty proving that a school's misrepresentations were specific or were an actual promise for which the student can recover.[86] Finally, state consumer protection statutes often do not permit recovery for students against for-profit trade schools for misrepresentations, and even if they do, the student may not be

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POSTSECONDARY EDUCATION 7 (1998), *available at* http://nces.ed.gov/pubs98/98082.pdf (stating that 66.8% of students at private, for-profit schools are first-generation students).

80. *Id.* at iii.

81. *Id.*

82. *See* Linehan, *supra* note 29, at 758 (discussing how school representatives use questionably false statements to maximize persuasiveness).

83. See *supra* notes 60-61 and accompanying text for a discussion of the average loan debt that students at for-profit trade schools incur and *infra* Part II.A.3 for a discussion of the lack of legal remedies for students who have been misled by for-profit trade schools.

84. *See* Linehan, *supra* note 29, at 763-80 (describing lack of legal remedies for students against for-profit trade schools for their misrepresentations). Linehan suggests that the reason for this lack of remedies is twofold: The students have far less "political clout" in lobbying for effective legislation from the state and federal governments than do the proprietary schools, and the majority of students at proprietary schools hail from "marginalized segments of society" and, as a result, may not be as visible or as important to legislatures. *Id.* at 763-64; *see also* Dillon, *supra* note 41 (noting powerful lobbyists for for-profit trade schools, including brother of President Bush's chief of staff).

85. Specifically, the courts utilize the academic abstention doctrine to refrain from deciding the cases. Based on the rationale of this doctrine, judges are reluctant to place this type of financial burden on an educational institution, create educational policy, or step on the toes of the regulatory agencies overseeing the proprietary schools. *See* Linehan, *supra* note 29, at 764-65 (discussing difficulties students have in proving tort suits against proprietary schools).

86. *See id.* at 772-74 (discussing shortcomings of common law breach of contract remedy against for-profit trade schools).

able to recover attorney's fees, which creates a disincentive to file a suit in the first place.[87]

Although students have difficulty establishing a legal remedy against the for-profit trade schools engaged in these misrepresentations, the schools may have to pay fines to the Department of Education for misrepresentations because the Department polices the schools' recruitment practices to a certain extent.[88] For example, in 2004, the Department of Education conducted a review of the University of Phoenix, a dominant force in the national for-profit trade school market, which resulted in many questions regarding the marketing and recruitment practices of the school.[89] Specifically, the Department of Education determined that the University of Phoenix had employed techniques to attract individuals regardless of their ability to qualify as students based on required federal "ability to benefit" tests.[90] Furthermore, the review stated that the school paid recruiters based on the number of students who enrolled,[91] which is in violation of federal financial aid requirements.[92] As a result of these findings, the University of Phoenix settled with the Department of Education for $9.8 million, though the school maintained that it had not committed any wrongdoings.[93]

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87. *See id.* at 775-78 (discussing difficulties in establishing sufficient claim under state consumer protection statutes).

88. *See, e.g.*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., UNIVERSITY OF PHOENIX'S PROCESSING OF STUDENT FINANCIAL AID DISBURSEMENTS FOR THE HIGHER EDUCATION ACT, TITLE IV PROGRAMS 2-10 (2005), *available at* http://www.ed.gov/about/offices/list/oig/auditreports/a09e0015.pdf [hereinafter UNIVERSITY OF PHOENIX AUDIT REPORT] (evaluating whether University of Phoenix's policies and procedures ensure reasonable compliance with federal regulations on Title IV federal financial aid).

89. *See* Shawn Vestal, *College-Funding Battle Lines Drawn; Traditional, For-Profit Schools Spar Over Federal Money Plan*, SPOKESMAN REV. (Spokane, WA), July 11, 2005, at A6 (describing Department of Education's review of University of Phoenix).

90. *Id.* The United States Department of Education defines "ability to benefit" tests as:

> A federal student aid eligibility criteria for postsecondary students who:
>
> (a) do not have a high school diploma or its recognized equivalent and
>
> (b) are beyond the age of compulsory school attendance in the state where the institution is located.
>
> To be eligible to receive federal student aid, the law requires these persons to show that they have the ability to benefit from postsecondary education. To demonstrate this they must pass an independently administered test approved by the U.S. Secretary of Education.

U.S. Department of Education, Glossary Item: Ability to Benefit (ATB), http://www.ed.gov/offices/OSFAP/fsacoach/glossary/atb.html (last visited Apr. 7, 2007).

91. Vestal, *supra* note 89. In fact, because of the "constants threats" one recruiter endured regarding the number of students he was able to enroll, he left the University of Phoenix after two years, despite being considered a "star performer" and receiving a $21,000 raise after eight months of employment. Dawn Gilbertson, *Student-Recruitment Tactics at University of Phoenix Blasted by Feds: Univ. of Phoenix Audit Leads to $9.8 Mil Fine*, ARIZ. REPUBLIC, Sept. 14, 2004, at 1A.

92. *See* 34 C.F.R. § 668.14(b)(22) (2005) (prohibiting any educational institution that participates in any Title IV federal financial aid program from linking monetary reward system to student recruiting).

93. Vestal, *supra* note 89.

The Department of Education's monitoring of the schools certainly assists in policing their activities,[94] but it does not assist the students in paying off student loans for an education that has not proven to be useful in landing a higher-paying job.[95] When a student is later unable to make payments on her educational loans, her options are limited.[96] Although the student can initially file for forbearance or a deferment,[97] the student eventually must make payments because it is extremely difficult to have a loan cancelled or discharged.[98] This difficulty in discharging student loans, including those from for-profit trade schools, is explained below.

B. 11 U.S.C. § 523(a)(8): The Educational Loan Discharge Exception and the Meaning of Undue Hardship

Title 11 of the United States Code sets forth the standards for bankruptcy, and 11 U.S.C. § 523 provides exceptions to a debtor's ability to discharge a loan under the Bankruptcy Code.[99] One such exception, provided under § 523(a)(8), is that a debtor can qualify for a discharge of her student loans only if repayment will impose an "undue hardship" on the debtor and her dependents.[100] The educational loan discharge exception states that a discharge in bankruptcy will not reach a debt

> for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit . . . or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, *unless excepting such debt from discharge under*

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94. *See* UNIVERSITY OF PHOENIX AUDIT REPORT, *supra* note 88, at 11-14 (describing mechanism of auditing school to ensure compliance). States also have regulatory agencies to oversee proprietary schools, including those that regulate licensing requirements and mandatory inspections. Linehan, *supra* note 29, at 778. As Linehan points out, however, these regulatory agencies do not provide the oversight that is necessary to regulate the for-profit trade schools in an effective manner. *Id.* at 779-81.

95. *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 188-89 (Bankr. W.D. Tex. 2001) (determining that school did not provide training for student to develop necessary skills, student was unable to find higher paying job, and student did not earn enough money to pay his necessary bills as well as his student loans).

96. *See* U.S. Department of Education, Loan Cancellation & Discharge, http://www.ed.gov/offices/OSFAP/DCS/loan.cancellation.discharge.html (last visited Apr. 7, 2007) (discussing ways in which Department of Education can cancel debtor's educational loans); YouCanDealWithIt.com, Student Loan Deferment & Forbearance, *supra* note 10 (discussing deferment and forbearance options when student is unable to pay loan).

97. See *supra* notes 10 and 12 for the definitions of deferment and forbearance, respectively.

98. *See* U.S. Department of Education, Loan Cancellation & Discharge, *supra* note 96 (setting forth circumstances under which student may qualify for loan cancellation or discharge). The only other mechanisms for cancellation of an educational loan include death, total and permanent disability that occurred after disbursement of the loan, a school's false certification with regard to the student's ability to benefit from the education, or the closing of the school the student attended while the student was attending or within ninety days of the student's last date of attendance at the school. *Id.* See also *infra* Part II.B for a discussion of the educational loan discharge exception and the difficulty students have in discharging educational loans.

99. 11 U.S.C.A. § 523 (West 2004 & Supp. 2006).

100. *Id.* § 523(a)(8).

this paragraph will impose an undue hardship on the debtor and the debtor's dependents.[101]

1. Courts' Interpretations of the Legislative Intent of "Undue Hardship"

Congress implemented the undue hardship standard for student loan discharge without giving any guidance as to what the standard for "undue hardship" requires.[102] The congressional materials are only slightly more explanatory.[103] The few comments that were made, however, coupled with bankruptcy policy,[104] have helped courts to interpret the meaning of "undue hardship."

According to *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*,[105] the educational loan discharge exception under § 523(a)(8) is necessary to prevent debtors from abusing the bankruptcy laws by discharging their student loans to avoid repayment.[106] Because educational loans enable a student to earn greater money over the course of her career, the student should not be able to discharge these loans when she earns a sufficient amount of income for herself and her dependents.[107] Thus, some courts have concluded that Congress intended to exclude recent graduates from benefiting from bankruptcy when they can then "pocket all of the future benefits derived from their education."[108] More specifically, Congress was worried about doctors and lawyers, who typically earn a great deal of money upon graduating.[109]

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101. *Id.* (emphasis added).

102. *See* Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (stating that Congress gave "absolutely no guidance" as to definition of "undue hardship"); Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753 (Bankr. S.D.N.Y. 1985) (noting that Congress did not define "undue hardship" within bankruptcy provisions), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

103. Neither the bill nor the Senate report accompanying the bill made any reference to the standard of "undue hardship." *See Brunner*, 46 B.R. at 753-54 (stating that congressional materials gave "inkling of its intent" in creating undue hardship standard). Because of the dearth of guidance from the Senate report and the bill, courts have attributed the rationale of the Commission on the Bankruptcy Laws of the United States, which created the student loan discharge exception and the undue hardship standard, to Congress. *Id.* at 754.

104. See *infra* Part II.B.2 for a discussion of general bankruptcy policy and the problem bankruptcy policy poses in the context of educational loans, namely that education is an intangible asset that cannot be returned to offset the discharged debt.

105. 46 B.R. 752 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

106. *Brunner*, 46 B.R. at 754 (citing H.R. DOC. NO. 93-137, pt. 2, at 140 n.14 (1973)).

107. *Id.* (citing H.R. DOC. NO. 93-137, pt. 2, at 140 n.14).

108. Nys v. Educ. Credit Mgmt. Corp. (*In re* Nys), 308 B.R. 436, 441 (B.A.P. 9th Cir. 2004), *aff'd*, 446 F.3d 938 (9th Cir. 2006); *see also* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (stating that Congress wanted to prevent those "beginning lucrative careers" from being able to shirk repayment); Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (stating that Congress was concerned that recent graduates would shirk repayment "on the eve of lucrative careers").

109. *See, e.g.*, *Speer*, 272 B.R. at 191 (noting specifically that Congress was concerned about doctors and lawyers); Laura Miller, Comment, *The Option That is Not an Option: The Invalidity of the Partial Discharge Option for the Student Loan Debtor*, 39 WAKE FOREST L. REV. 1053, 1058 (2004)

2. General Bankruptcy Policy and Courts' Interpretation of the Meaning of "Undue Hardship"

Congress intended for the United States bankruptcy laws to serve two purposes: (1) to treat debtors and creditors equally, and (2) to give debtors a fresh start in life after filing for bankruptcy.[110] To treat debtors and creditors equally, creditors must receive something in return for the discharge of the debt.[111] In a typical Chapter 7 bankruptcy proceeding, the court sells the debtor's assets, and the creditors receive the proceeds from the sale of the assets.[112] The court then discharges the debtor's remaining debt.[113]

Educational loans, however, pose a problem to the general function of equality between creditors and debtors.[114] Because education is an intangible asset, it cannot be sold and returned to the creditor as a tangible asset can.[115] Therefore, these creditors do not have the same protection that they would have with a loan for a tangible asset.[116] A House of Representatives report recognized this problem in declaring the following: "[E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and rely[] for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future."[117]

Even more, because the student debtor is normally just starting out in life, she is less likely to have significant assets.[118] Therefore, bankruptcy becomes an "attractive means by which the student may eliminate frustrating and burdensome student loan payments" without the student having to incur a great amount of cost.[119] Thus, educational loan discharges pose a problem for the bankruptcy policy of treating debtors and creditors equally.

(stating that stories of doctors and lawyers discharging student loans shortly after graduation were a cause of concern).

110. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 93-94 (2002).

111. *See id.* at 94-95 (discussing process in which debtors are freed of their obligation on debt).

112. *Id.* at 94.

113. *See* 11 U.S.C.A. § 727(b) (West 2004) (stating that bankruptcy courts discharge all debts incurred prior to filing for bankruptcy in full, except for debts covered under section 523); Huey, *supra* note 110, at 94-95 (describing loan discharge process).

114. *See In re* Roberson, 999 F.2d 1132, 1135-36 (7th Cir. 1993) (discussing difficulty of complying with bankruptcy policy by discharging student loans because of continuing benefit of education).

115. *See id.* (quoting H.R. REP. NO. 95-595, at 133 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6094) (noting that educational loans are uninsured loans).

116. *See id.* (recognizing educational loans are made without security).

117. H.R. REP. NO. 95-595, at 133, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6094.

118. *See In re Roberson*, 999 F.2d at 1136 (stating that after graduation student's loans will likely "dwarf his assets").

119. *Id.*

A similar controversy surrounds the second bankruptcy policy of giving debtors a fresh start in relation to the educational loan discharge exception.[120] The Supreme Court has described the rationale for affording debtors a fresh start as "giv[ing] to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[121] Furthermore, it has held that courts should construe the bankruptcy laws consistently with the fresh start policy.[122]

Some courts, however, have argued that the courts do not need to conform to the bankruptcy policy of giving debtors a fresh start for debtors seeking to discharge educational loans.[123] The *Brunner* court labeled educational loans as an "enlightened social policy" because lenders cannot check the credit or financial status of the borrowers, and borrowers receive low interest rates and can defer loans until they are no longer enrolled.[124] In exchange for these benefits, the *Brunner* court concluded that borrowers of educational loans give up the benefits of bankruptcy policy.[125] The *Brunner* court further asserted that student borrowers were aware of this "bargain" and made a choice to accept the "risk" that it involved.[126]

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120. *Compare* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985) (determining that general bankruptcy policy does not apply to educational loans), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam), *with* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) (stating that courts should construe *Brunner* test discussed below in accordance with fresh start policy).

121. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

122. *Id.* at 245.

123. *See, e.g.*, Johnson v. Edinboro State Coll., 728 F.2d 163, 164-65 (3d Cir. 1984) (stating that Congress intended educational loan discharge exception to supersede general bankruptcy policy, including "fresh start" policy); *Brunner*, 46 B.R. at 756 (stating that debtors do not receive normal benefits of bankruptcy laws for educational loans unless extreme circumstances exist).

124. *See Brunner*, 46 B.R. at 756 & n.4 (discussing that lenders in educational field do not have same ability to make lending decisions based on borrower's credit as do lenders in other contexts). This assertion, however, is only correct in the context of government loans; private educational loan lenders can and do check credit scores and may require cosigners prior to approving loans for student borrowers. *See, e.g.*, Citibank, Paying for College: Loan Products, http://studentloan.citibank.com/slcsite/fr_hloan.asp (last visited Apr. 7, 2007) (offering loan option that has application process which includes credit response in three minutes or less); The College Board, College Board Connect Loan: Private Loans for Students, http://www.collegeboard.com/student/pay/loan-center/25525.html (last visited Apr. 7, 2007) (stating that College Board's private educational loan is credit based).

125. *See Brunner*, 46 B.R. at 756 (determining that borrowers forego benefits of bankruptcy policy in exchange for educational loans).

126. *Id. But see* 11 U.S.C.A. § 524(c) (West 2004 & Supp. 2006) (stipulating requirements that must be met in order for debtor to waive discharge, including affidavit from debtor's attorney stating that agreement does not impose undue hardship on debtor and that "attorney fully advised the debtor of the legal effect and consequences" of agreement); *id.* § 727(a)(10) (permitting "written waiver of discharge executed by the debtor" but only by court approval); Lichtenstein v. Barbanel, 161 F. App'x 461, 467 (6th Cir. 2005) (per curiam) (distinguishing case at bar involving postpetition waiver from actions that held debtor's prepetition waiver of discharge is invalid because it conflicts with fresh start policy in bankruptcy); Klingman v. Levinson, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (dictum) (stating that "[f]or public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy"); Hayhoe v. Cole (*In re* Cole), 226 B.R. 647, 654 (B.A.P. 9th Cir. 1998) (holding that

Alternatively, other courts have specifically held that the fresh start policy is applicable in educational loan discharge cases. In *Educational Credit Management Corp. v. Polleys*,[127] the Court of Appeals for the Tenth Circuit expressed concern that prior applications of the *Brunner* test were too restrictive, and as a result, those applications "fail[ed] to further the Bankruptcy Code's goal of providing a 'fresh start' for the honest but unfortunate debtor."[128] Therefore, in adopting the *Brunner* test, the Tenth Circuit specifically held that a court's application of the test had to allow the judge discretion to discharge an educational loan in accordance with the fresh start policy for a deserving, needy debtor.[129] Furthermore, in *Speer v. Educational Credit Management Corp. (In re Speer)*,[130] the Bankruptcy Court for the Western District of Texas structured its entire opinion on the premise that "it is time to reconcile the 'undue hardship' standard [of the educational loan discharge exception under § 523(a)(8)] with the underlying fresh start policy of the Bankruptcy Code."[131] Thus, educational loan discharge cases pose a problem to courts in both areas of bankruptcy policy—treating creditors and debtors equally and giving debtors a fresh start.

3. Courts' Tests to Define "Undue Hardship"

As stated above, the educational loan discharge exception under § 523(a)(8) does not provide any guidance to the courts in determining the meaning of undue hardship and, thus, when to discharge a loan. As a result, the courts have developed various tests in an attempt to define undue hardship. In *Pennsylvania Higher Education Assistance Agency v. Johnson (In re Johnson)*,[132] the Bankruptcy Court for the Eastern District of Pennsylvania became the first court to create a test in an attempt to define undue hardship—the *Johnson* test.[133] Most circuit courts, however, widely criticized the *Johnson* test and rejected it,

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debtor's prepetition waiver of discharge is invalid because it conflicts with fresh start policy in bankruptcy).

127. 356 F.3d 1302 (10th Cir. 2004).

128. *Polleys*, 356 F.3d at 1308; *see also* Evans v. Higher Educ. Assistance Found. (*In re* Evans), 131 B.R. 372, 376 (Bankr. S.D. Ohio 1991) (applying fresh start policy in bankruptcy to determine whether court should discharge student debtor's loans).

129. *Polleys*, 356 F.3d at 1309.

130. 272 B.R. 186 (Bankr. W.D. Tex. 2001).

131. *Speer*, 272 B.R. at 193. The Bankruptcy Court stated:

> This Court has difficulty with such a strict interpretation [that a debtor must demonstrate "unique and extraordinary circumstances" or a "certainty of hopelessness"] for the honest, but financially strapped debtor with student loans. This is especially so in light of the fact that the predominant goal of the Bankruptcy Code is to provide such honest and financially strapped debtors a fresh start from burdensome debt. The difficulty in reconciling the undue hardship exception with the overriding policy goals of bankruptcy has finally compelled this Court to express in writing its continuing frustrations with student loan dischargeability issues in general.

Id. at 191-92.

132. No. 77-2033 TT, 1979 U.S. Dist. LEXIS 11428 (Bankr. E.D. Pa. June 27, 1979).

133. *Johnson*, 1979 U.S. Dist. LEXIS 11428, at *59-62.

instead adopting the *Brunner* test.[134] One circuit has yet to decide what test to apply,[135] and another has rejected the *Brunner* test.[136] Within the circuit courts that apply the *Brunner* test, two diverging ideas have emerged as to whether courts should consider the educational value the student received in determining if the court should discharge the loan.[137] The Second Circuit and Seventh Circuit have determined that courts should not consider the educational value the student received in reviewing the debtor's future ability to repay the loan under an undue hardship analysis.[138] The Ninth Circuit, however, has determined that courts should consider the educational value the student received in calculating the debtor's future ability to repay the loan.[139]

a. Early Developments: The Johnson *Test*

The Bankruptcy Court for Eastern District of Pennsylvania, in *Johnson*, announced the first cohesive test for determining whether to discharge a student loan under § 523(a)(8).[140] Under certain circumstances, the *Johnson* test specifically required the court to consider whether the debtor had financially benefited from the education.[141] Prior to this test, the *Johnson* court noted that many courts had adopted a dictionary approach to defining undue hardship.[142] The dictionary approach resulted in "much confusion, a lack of definite standards, and a marked inconsistency" in determining what constituted an undue hardship.[143]

As a result of the confusion in previous models, the court attempted to develop a "judicially manageable approach" by mapping out a specific three-

134. *See, e.g.*, Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam) (rejecting *Johnson* test and instead affirming test established in Southern District of New York in present case); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305 (3d Cir. 1995) (adopting *Brunner* test and criticizing *Johnson* test).

135. The First Circuit has not yet heard a case that requires application of an undue hardship test.

136. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553-54 (8th Cir. 2003) (affirming that Eighth Circuit rejected *Brunner* test in favor of totality of circumstances test); Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704-05 (8th Cir. 1981) (establishing that court should examine totality of circumstances in bankruptcy proceeding for student loan discharge).

137. *Compare* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 n.3 (Bankr. S.D.N.Y. 1985) (stating that court should not consider educational value in reviewing debtor's future ability to repay loan), *with* United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (noting that court should consider benefit of education to debtor in terms of debtor's ability to repay loan, which is second prong of *Brunner* test).

138. *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993); *Brunner*, 831 F.2d at 396.

139. *Pena*, 155 F.3d at 1114.

140. Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033 TT, 1979 U.S. Dist. LEXIS 11428, at *59-62 (Bankr. E.D. Pa. June 27, 1979) (defining "undue hardship" as examination of debtor's future income, sufficiency of that income to maintain debtor and his dependents, and reason that debtor is filing for discharge of his debts).

141. *Id.* at *60-61.

142. *Id.* at *20.

143. *Id.*

pronged test.[144] This three-pronged test consisted of a mechanical test, a good faith test, and a policy test.[145] Under the mechanical test, the court compared the debtor's future financial resources with the debtor's expenses to determine whether the debtor could sufficiently support herself and her dependents.[146] Under the good faith test, the debtor faced a presumption against receiving a discharge if a debtor exhibited bad faith in her attempts to repay the loan.[147] If a presumption against discharge arose, the debtor could rebut the presumption in the policy test, which required an examination of whether (1) the debtor's purpose in pursuing the bankruptcy proceedings was to discharge the loans, and (2) the education financially benefited the debtor.[148]

Other courts have applied the policy prong of the *Johnson* test to determine whether the education financially benefited the debtor.[149] For example, in *Evans v. Higher Education Assistance Foundation (In re Evans)*,[150] a divorced mother of two who worked as a manager at McDonald's decided to attend Lawton Institute of Technology ("Lawton") in pursuit of a career change that would enable her to earn more money.[151] Lawton, a for-profit trade school, told students that it provided training in computer and word processing and could place students in high-paying secretarial jobs after graduation.[152] In fact, many of the "professors" were learning the computer and word processing skills at the same time as the students, and Lawton did not provide job placement assistance to students upon completion of the program.[153] Although Evans attended class regularly and received a certification upon completion, she was unable to secure employment in a secretarial field because she lacked the skills necessary to do so and had to continue to work at McDonald's.[154]

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144. *Id.* at *20-21.

145. *Johnson*, 1979 U.S. Dist. LEXIS 11428, at *60-61.

146. *Id.* at *60.

147. *Id.* at *51, 60. A debtor exhibiting only negligence or irresponsibility, as distinguished from bad faith, however, will face the presumption only if the court determines that the debtor would not have passed the above-mentioned mechanical test but for the debtor's negligence or irresponsibility. *Id.* at *60.

148. *Id.* at *60-61.

149. *See, e.g.*, Evans v. Higher Educ. Assistance Found. (*In re* Evans), 131 B.R. 372, 376 (Bankr. S.D. Ohio 1991) (discharging student loan partially based on policy test because debtor had not received any marketable skills from trade school and thus discharge would give her fresh start that Congress intended); Correll v. Union Nat'l Bank of Pittsburgh (*In re* Correll), 105 B.R. 302, 306-09 (Bankr. W.D. Pa. 1989) (applying same factors as *Johnson* test and considering educational benefit to student as factor in discharging student loans for four debtors); Shoberg v. Minn. Higher Educ. Coordinating Council (*In re* Shoberg), 41 B.R. 684, 687-88 (Bankr. D. Minn. 1984) (determining that discharge where debtor had "lack of a completed high school education, lack of further completed vocational or technical training, and work history largely limited to unskilled work" would not frustrate intent of Congress).

150. 131 B.R. 372 (Bankr. S.D. Ohio 1991).

151. *Evans*, 131 B.R. at 373.

152. *Id.*

153. *Id.*

154. *Id.* at 373-74.

Applying the *Johnson* policy prong, the Bankruptcy Court for the Southern District of Ohio first determined that Evans was not attempting to abuse the system.[155] The court then examined the value of the education to Evans and determined that she did not receive any marketable skills from Lawton that were necessary to get a job in the secretarial field.[156] The court held that Evans was not the type of debtor with whom Congress was concerned, and therefore, discharged her educational loans.[157] Thus, under the *Johnson* test, courts considered the benefit of the education to the debtor in assessing the debtor's undue hardship.

b. The Majority Approach: The Brunner *Test*

i. A Brief History

Eight years after *Johnson*, the Second Circuit adopted a different three-pronged test to determine whether the debtor had suffered an undue hardship in *Brunner*.[158] Circuit courts have widely adopted the *Brunner* test—eight circuits have held that *Brunner* is the applicable test for undue hardship under § 523(a)(8),[159] one circuit has applied the *Brunner* test without expressly adopting it,[160] and only one circuit has held that *Brunner* is not the applicable test for

155. *Id.* at 376.

156. *Evans*, 131 B.R. at 376.

157. *Id.* at 376-77. In reaching this conclusion, the court looked at the fact that Evans was trying to "survive under the same standard of living that existed prior to [her] educational loan and the completion of Lawton's program, and is unable to maintain more than a minimal existence for herself and her children." *Id.* at 376.

158. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). The Second Circuit affirmed the Southern District of New York's opinion and stated that the standard of undue hardship "properly was reviewed by the district court." *Id.* Therefore, subsequent courts have attributed the decisions expressed in the bankruptcy court opinion to the Second Circuit. *See, e.g.*, United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (discussing *Brunner* court's contention that educational value should not be factor in determining whether discharge of educational loan is appropriate, which was stated by bankruptcy court in *Brunner*).

159. *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005) (adopting *Brunner* test because it is "simpler rubric" of hybrid test Sixth Circuit previously used in which *Brunner* test was examined using multiple additional factors); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) (adopting *Brunner* test while acknowledging that it needed to be applied less harshly to "better advance the Bankruptcy Code's 'fresh start' policy"); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003) (adopting *Brunner* test because it is "workable"); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003) (adopting *Brunner* test); *Pena*, 155 F.3d at 1112 (same); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305-06 (3d Cir. 1995) (same); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (rejecting *Johnson* test explicitly and adopting *Brunner* test); *Brunner*, 831 F.2d at 396 (adopting test created by Bankruptcy Court for the Southern District of New York).

160. *See* Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541, 546 (4th Cir. 2003) (applying *Brunner* test as applicable test in student loan discharge case but not formally adopting it as applicable standard).

undue hardship under § 523(a)(8).[161] Under the *Brunner* test, a court will grant a discharge of the debtor's student loans based on the debtor's "undue hardship" when the debtor proves:

> (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.[162]

A debtor must satisfy each element of the three-prong test in order for the court to grant a discharge,[163] and the burden of proof lies with the debtor.[164] The test is stringent,[165] and the *Brunner* court explained that courts should grant a discharge only when the debtor shows a "certainty of hopelessness."[166] Thus, the inability to repay the loans and maintain a minimal standard of living must persist for a significant period of time.[167]

ii. *Brunner* Test in the Second Circuit and Seventh Circuit: Educational Benefit to the Debtor Is Not a Consideration

In articulating the *Brunner* test, the Bankruptcy Court for the Southern District of New York specifically rejected the *Johnson* test, particularly because it allowed courts to consider the benefit of the education to the debtor in deciding if the debtor suffered an undue hardship.[168] The court stated that it was "not only improper" to consider that factor, but also "antithetical to the spirit of the guaranteed loan program."[169] The *Brunner* court reasoned that because the federal government does not check the creditworthiness or judgment of a student borrower, the inclusion of this factor would place the government in the

161. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553-54 (8th Cir. 2003) (declining to adopt *Brunner* test because it prefers "less restrictive approach" of examining totality of circumstances in each case).

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

163. *See id.* (stating that test requires "three-part showing").

164. *See Faish*, 72 F.3d at 306 (identifying burden as being on debtor).

165. *See* Mosley v. Gen. Revenue Corp. (*In re* Mosley), 330 B.R. 832, 841 (Bankr. N.D. Ga. 2005) (stating that *Brunner* test is "often strictly interpreted," resulting in denial of discharge for debtors who are truly deserving and not complying with fresh start policy of Bankruptcy Code); Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 193 (Bankr. W.D. Tex. 2001) (describing *Brunner* test as: "[l]et's make it as tough as humanly possible to discharge a student loan").

166. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 (Bankr. S.D.N.Y. 1985) (quoting Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam); *see also In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (agreeing with *Brunner* court in rejecting *Johnson* test's approach of considering educational benefit to debtor).

167. *Brunner*, 46 B.R. at 755.

168. *Id.* at 755 n.3.

169. *Id.*

role of ensuring the value of the education and would ultimately result in an increased burden on other taxpayers.[170] Thus, concluded the *Brunner* court, the student's wisdom, not the government's, should govern the ultimate judgment of the potential financial benefit to the student from the education.[171] The Court of Appeals for the Seventh Circuit took the *Brunner* analysis one step further in *In re Roberson*[172] by finding that when the education does not provide the benefit the student expected, the student bears the sole responsibility of that burden.[173] Therefore, the Second Circuit, in affirming the bankruptcy court's reasoning for the *Brunner* test, and the Seventh Circuit do not permit courts to consider the educational benefit to the student in determining whether it should discharge a debtor's educational loan.[174]

iii. *Brunner* Test in the Ninth Circuit: Educational Benefit Is a Consideration

Despite its adoption of the *Brunner* test, the Ninth Circuit has not strictly followed the suggested model of the *Brunner* court. Although the Ninth Circuit agreed the benefit of an education should not be a separate factor for consideration, it determined that the educational value that the student received was nonetheless relevant to determine the ability of the debtor to repay the loans (the second prong of the *Brunner* test).[175] For instance, the Ninth Circuit in

170. *Id.* at 755 n.3, 756; *see also In re Roberson*, 999 F.2d at 1136 (stating that government's assistance to students in form of loans is not intended to "insure [sic] the future success of each student taking advantage of that opportunity").

171. *Brunner*, 46 B.R. at 755 n.3; *see also In re Roberson*, 999 F.2d at 1137 (noting that it is individual's decision to borrow for school).

172. 999 F.2d 1132 (7th Cir. 1993).

173. *In re Roberson*, 999 F.2d at 1137.

174. *See id.* at 1136-37 (rejecting *Johnson* test's policy prong that considered educational benefit to debtor and instead agreeing with *Brunner* court's reasoning that courts should not consider educational benefit to debtor); Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam) (adopting analysis of Bankruptcy Court for Southern District of New York).

175. United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998). The Bankruptcy Court for the Western District of Texas has also taken the value of the debtor's education into account, despite utilizing the *Brunner* test. *See* Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 187-89 (Bankr. W.D. Tex. 2001) (discussing lack of education that Speer received from trade school). In a tongue-in-cheek opinion, the *Speer* court questioned the harshness of the educational loan discharge exception, as well as the *Brunner* test. *Id.* at 191-94. To describe the educational loan discharge exception, the *Speer* court used the subheading, "What could Congress possibly be thinking?, or Why does the government hate the little man?," and the subheading, "Let's make it as tough as humanly possible to discharge a student loan or the *Brunner* test," to describe the *Brunner* test. *Id.* at 191, 193. In applying the second prong of the *Brunner* test, the *Speer* court looked at the "failure of the 'education'" that Speer received from the proprietary trade school that he had borrowed loans to attend. *Id.* at 195-96. Because the court found that Speer did not receive any benefit from this education and will never be employed in the field, the court determined that he met the "additional circumstances" necessary to satisfy the *Brunner* test. *Id.* at 196-97. Therefore, the court concluded that it could discharge his educational loans in accordance with the *Brunner* test. *Speer*, 272 B.R. at 198.

United Student Aid Funds v. Pena (In re Pena)[176] determined that the debtor's income would not likely increase as a result of his education from ITT Technical Institute because the credential he received did not benefit him in any way; he was unable to find employment or receive credit when transferring to another school.[177] As a result, his financial difficulties were likely to persist for a significant length of time in relation to his repayment period, and the debtor would not be able to repay his student loans.[178]

The Ninth Circuit took this analysis one step further in *Educational Credit Management Corp. v. Nys (In re Nys)*.[179] In *Nys*, the court considered what is necessary to prove the second prong of the *Brunner* test, namely to what extent must the debtor prove that additional circumstances exist affecting the debtor's ability to repay the loan.[180] The court held that the additional circumstances did not need to be "exceptional."[181] Instead, the debtor only needed to show additional circumstances "that her income cannot reasonably be expected to increase and that her inability to make payments will likely persist throughout a substantial portion of the loan's repayment period."[182] The *Nys* court provided an "unexhaustive list" of factors that a court could consider as additional circumstances, including whether the education was of poor quality, whether the student was left with little or no marketable job skills, and whether the student had "[m]aximized income potential in the chosen educational field."[183]

Finally, applying the Ninth Circuit's decision to consider educational value, the Bankruptcy Court for the District of Arizona, in *Cota v. United States Department of Education (In re Cota)*,[184] determined that the education Cota received to be an electrician from a for-profit trade school was "useless" because he could not secure employment inside the field, the school did not provide job placement services as promised, and the school closed shortly after Cota received his certificate.[185] As a result, the court found that Cota had met his burden in showing that he did not have the future ability to repay his loan, and the court discharged his loan.[186] Therefore, in the Ninth Circuit, courts may consider the educational benefit to the student in determining whether the

176. 155 F.3d 1108 (9th Cir. 1998).

177. *Pena*, 155 F.3d at 1110-14.

178. *Id.* at 1114.

179. 446 F.3d 938 (9th Cir. 2006).

180. *Nys*, 446 F.3d at 941, 946-47.

181. *Id.* at 946.

182. *Id.* This showing of additional circumstances would rebut the presumption that the debtor would eventually be able to repay the loan while maintaining a minimal standard of living. *Id.* Additionally, the court noted that the debtor could not demonstrate the additional circumstances if she chose to live a lifestyle that she could not afford and chose not to repay. *Id.*

183. *Nys*, 446 F.3d at 947. The Ninth Circuit remanded the case to the bankruptcy court to apply the appropriate standard. *Id.*

184. 298 B.R. 408 (Bankr. D. Ariz. 2003).

185. *Cota*, 298 B.R. at 418-19.

186. *Id.* at 419, 423.

debtor suffered an undue hardship, and as a result, whether the court should discharge the debtor's educational loan.

c. Holding Out: The Eighth Circuit's Totality of the Circumstances Test

The Eighth Circuit has refused to adopt the *Brunner* test and has instead formulated its own test, which examines the totality of the circumstances.[187] Under the totality of the circumstances test, a bankruptcy court must examine "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[188]

The totality of the circumstances test is decidedly different than the *Brunner* test. Foremost, the *Brunner* test requires that a debtor satisfy all three factors to discharge the student loan,[189] whereas the totality of the circumstances test only requires consideration of all three factors, none of which is dispositive, with no definitive determination of what should constitute a discharge.[190] Furthermore, the Eighth Circuit specifically pointed out that the totality of the circumstances test provides for a fact-specific inquiry into each case.[191] Finally, the court rejected the *Brunner* test because it was concerned that "requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)."[192] In light of its consideration of all relevant facts and circumstances, the totality of the circumstances test allows the benefit of the education to be taken into account, at least from the perspective of the ability of the student to become employed in that field after graduation.[193]

III. DISCUSSION

With only one circuit court holding out, the Bankruptcy Court for the Southern District of New York's test established in *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*[194] is clearly the current

187. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553 (8th Cir. 2003) (affirming that Eighth Circuit rejected *Brunner* test in favor of totality of circumstances test); Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 705 (8th Cir. 1981) (establishing that court should examine totality of circumstances in bankruptcy proceeding for student loan discharge).

188. *Long*, 322 F.3d at 554.

189. See *supra* notes 162-67 and accompanying text for a discussion of the three factors of the *Brunner* test and the requirements placed on the debtor to receive a discharge.

190. *See Long*, 322 F.3d at 554 (criticizing *Brunner* test for requiring proof of each element and preferring instead "that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances").

191. *Id.*

192. *Id.*

193. *See* Morgan v. U.S. Dep't of Educ. (*In re* Morgan), 247 B.R. 776, 782 (Bankr. E.D. Ark. 2000) (listing factors that courts consider under totality of circumstances test).

194. 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

standard for determining whether a debtor's undue hardship is sufficient to discharge her educational loan.[195] On the surface, the three prongs of the *Brunner* test[196] are well conceived; the *Brunner* test ensures that the student debtor is not abusing the federal financial aid system by filing for bankruptcy to avoid repayment of her student loans when she has the ability to repay her loans.[197] In the context of for-profit trade schools, however, the Second Circuit and Seventh Circuit's approach to the *Brunner* test falls short by not permitting the courts to consider the educational value the student received because the *Brunner* court's underlying assumptions are inappropriate in this context.

Unlike those circuits, and despite also adopting the *Brunner* test, the Ninth Circuit allows courts to consider the educational value the student received in examining additional circumstances that exist and will affect the student's ability to repay the loan.[198] In doing so, the Ninth Circuit injects the policy elements of the *Johnson* test, which the *Brunner* court rejected,[199] back into the determination of undue hardship. At least in the context of for-profit trade schools, consideration of the educational value the student received is necessary to effectively balance the goals of bankruptcy policy with the educational loan discharge exception.

A. The Second Circuit and Seventh Circuit's Approach to the Brunner *Test Is Too Harsh in the Context of For-Profit Trade Schools*

Courts should consider the educational value that a student received from a for-profit trade school when using the *Brunner* test to determine whether the debtor has suffered an undue hardship, which merits discharge of her educational loan under § 523(a)(8). Under *Brunner*, courts cannot consider the

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195. See *supra* notes 159-61 and accompanying text for a list of the eight circuits that have adopted the *Brunner* test, another that has applied it, and the one circuit that has rejected it. The Supreme Court has not resolved the split among the circuits as to the correct test for determining undue hardship in an educational loan discharge case.

196. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (holding that proper test consists of satisfaction of three prongs: "(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").

197. *See Brunner*, 46 B.R. at 754 (noting Congress's concern of "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts" in defining undue hardship test (quoting H.R. DOC. NO. 93-137, at 140 n.14 (1973)). Congress was concerned that students might abuse the bankruptcy system by prematurely seeking to discharge their student loans. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (stating that Congress wanted to prevent those "beginning lucrative careers" from being able to shirk repayment); Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (stating that Congress was concerned recent graduates would shirk repayment "on the eve of lucrative careers").

198. See *supra* Part II.B.3.b.iii for a discussion of the Ninth Circuit's approach to consideration of educational value in educational loan discharge cases.

199. See *supra* notes 148-57 and accompanying text for an explanation of the policy prong of the *Johnson* test and an application of the test in the context of for-profit trade schools.

educational value that the student received in determining if the student has suffered an undue hardship.[200] The decision to exclude this consideration is inappropriate in the context of for-profit trade schools.

1. Fundamental Flaws Exist in *Brunner*'s Assertion that Student Borrowers Exchange the Benefit of Educational Loans by Sacrificing Their Bankruptcy Protection

The *Brunner* court stated that borrowers of educational loans surrender the benefits of bankruptcy.[201] According to the court, in exchange for giving up these benefits, the debtor does not have to submit to a mandatory credit check and receives low interest rates and possible deferrals.[202] The court's rationale, however, is fundamentally flawed.

First, this rationale is incompatible with the fresh start policy of bankruptcy.[203] The goal of the fresh start policy is to release a debtor of her loan obligation free and clear.[204] By definition, a borrower intends to repay the loan to the lender.[205] Borrowers, by and large, do not engage in a credit transaction with the intent to discharge the loan in a bankruptcy proceeding.[206] Instead, bankruptcy proceedings are a response to unanticipated difficulties in the debtor's life.[207] The fresh start policy is essential to the debtor at those times and serves its purpose of releasing the "honest but unfortunate debtor" from an interminable sentence of debt despite all future efforts.[208] A debtor who has a loan from a for-profit trade school that has not given her any marketable skills

200. See *supra* Part II.B.3.b.ii for a discussion of the *Brunner* and *Roberson* courts' strict decision that educational value is not a factor for consideration in determining if the debtor has suffered an undue hardship. But see *supra* Part II.B.3.b.iii pointing out that the Ninth Circuit, which has adopted *Brunner*, does consider educational value to the student-debtor in determining if the debtor has suffered an undue hardship.

201. *Brunner*, 46 B.R. at 756.

202. *Id.*

203. See *supra* notes 120-22 and accompanying text for a discussion of the fresh start policy in bankruptcy and the Supreme Court's holding that bankruptcy laws should be construed consistently with the fresh start policy.

204. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (holding that Bankruptcy Code's purpose is "giv[ing] to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt").

205. *See* BLACK'S LAW DICTIONARY 954 (8th ed. 2004) (stating that loan is "[a] thing lent for the borrower's temporary use").

206. *See, e.g.*, 11 U.S.C.A. § 523(a)(2)(A) (West 2004 & Supp. 2006) (excluding from discharge any loans that borrower received by fraud or misrepresentations); Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 265 (1997) (noting that most courts do not permit discharge if borrower did not have intent to repay loan at time agreement was made).

207. *See* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554-55 (1915) (discussing fresh start purpose of Bankruptcy Code as "consequent upon business misfortunes").

208. *See Local Loan Co.*, 292 U.S. at 245 (stating that purpose of Bankruptcy Code "would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy").

and has not placed her in a job in her field of trade as promised has suffered an unanticipated misfortune.[209] Thus, the *Brunner* court's rationale is antithetical to the fresh start policy, which would require the court to discharge an educational loan debt where a for-profit trade school has misled a student by not providing the promised marketable skills necessary to succeed.

Moreover, the *Brunner* court's rationale suggests that a debtor can decide to contract out of bankruptcy discharge: The debtor does not submit to a credit check, and in exchange gives up the benefits of bankruptcy.[210] This suggestion, however, is untrue.[211] In order for a debtor to waive her ability to discharge a loan, many strict statutory requirements must be met.[212] Specifically, 11 U.S.C. § 524(c) stipulates the requirements that must be met in order for a debtor to waive discharge, including the submission of an affidavit from the debtor's attorney stating that the agreement does not impose an undue hardship on the debtor and the attorney "fully advised the debtor of the legal consequences" of such an agreement.[213] Additionally, § 727(a)(10) requires court approval of a "written waiver of discharge executed by the debtor."[214] Even more, three circuit courts have specifically recognized that upholding a debtor's agreement to waive discharge is contrary to the fresh start policy in bankruptcy.[215] As a result of these strict requirements, students are likely unaware of their ability to waive their right to discharge the educational loan, let alone make the conscious choice to waive that right. Based on the foregoing reasons, the *Brunner* court's rationale is flawed in assuming that a student debtor can decide to contract out of bankruptcy discharge.

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209. *See, e.g.*, United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1110, 1114 (9th Cir. 1998) (finding that credential received from ITT Technical Institute did not benefit debtor in any way because he was unable to find employment or receive credit when transferring to another school); Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 418-19 (Bankr. D. Ariz. 2003) (finding that education Cota received from for-profit trade school to be an electrician was "useless" because he could not secure employment in field, school did not provide job placement services as promised, and school closed shortly after Cota received his certificate); Speer v. Educ. Credit Mgmt. Corp (*In re* Speer), 272 B.R. 186, 197-98 (Bankr. W.D. Tex. 2001) (noting debtor's frustration with his inadequate trade school education); Evans v. Higher Educ. Assistance Found. (*In re* Evans), 131 B.R. 372, 376 (Bankr. S.D. Ohio 1991) (finding that debtor had not received any marketable skills from trade school).

210. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985) (suggesting that student borrower makes choice to give up bankruptcy policy in exchange for "bargain" of education), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

211. *See, e.g.*, Klingman v. Levinson, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (stating that "[f]or public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy").

212. *See* 11 U.S.C.A. § 524(c) (West 2000 & Supp. 2006) (setting forth requirements that must be met for debtor to waive ability to discharge her loan); *id.* § 727(a)(10) (permitting "written waiver of discharge executed by the debtor" but only by court approval).

213. *Id.* § 524(c).

214. *Id.* § 727(a)(10).

215. *See* Lichtenstein v. Barbanel, 161 F. App'x 461, 468 (6th Cir. 2005) (holding that debtor's prepetition waiver of discharge is invalid because it conflicts with fresh start policy in bankruptcy); Hayhoe v. Cole (*In re* Cole), 226 B.R. 647, 654 (B.A.P. 9th Cir. 1998) (same); *Klingman*, 831 F.2d at 1296 n.3 (stating that public policy prohibits contracting away right to bankruptcy discharges).

2. Courts' Interpretation of the Legislative Intent of the Educational Loan Discharge Exception, § 523(a)(8), Does Not Encompass the Student Debtor Who Has Been Misled by a For-Profit Trade School

In enacting § 523(a)(8), Congress was concerned that students would benefit from loan programs by attaining an education and then immediately discharging the loans after heading out into the working world to utilize that education.[216] The legislative intent, as interpreted by the courts, assumes that the benefits of an education are equal; that is, all educational loans are considered equally undeserving of discharge.[217] The benefits of the education, however, are not always equal.[218] The for-profit trade school industry is not properly regulated, and as a result, a for-profit trade school education is less of an "asset" than an education from other institutions.[219] Therefore, the legislative history that most courts attribute to the educational loan discharge exception does not encompass the student debtor who has been misled by a for-profit trade school.

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216. *See, e.g.*, United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1111 (9th Cir. 1998) (stating that requirement of debtor's good faith in discharging educational loan is due to legislative intent of preventing abuses of bankruptcy system by debtors attempting to purge themselves of educational debt); *see also* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (finding that Congress wanted to prevent those "beginning lucrative careers" from being able to shirk repayment); Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (discussing that Congress was concerned that recent graduates would evade repayment "on the eve of lucrative careers"). See *supra* Part II.B.2 for a discussion of the courts' interpretations of the legislative intent for the educational loan discharge exception.

217. The *Roberson* court identified the rationale for excluding educational loans from discharge in a bankruptcy proceeding: an education is a continuing, intangible benefit the student will have for the rest of her life. *In re* Roberson, 999 F.2d 1132, 1135-36 (7th Cir. 1993). In a typical bankruptcy proceeding, a debtor returns at least a portion of the asset to the lender in a liquidated form. Huey, *supra* note 110, at 94. For an educational loan, however, the debtor's asset is not tangible, but instead results in greater income over the course of her lifetime. *In re Roberson*, 999 F.2d at 1135-36. Therefore, if the debtor's loan were discharged, the debtor will retain the asset of her education, but the lender will not recover any portion of the loan. *See id.* at 1136 (noting that bankruptcy is attractive option for debtors with recent student loans because "if steady employment is not immediately forthcoming . . . the student may eliminate frustrating and burdensome student loan payments").

218. *See, e.g.*, *Pena*, 155 F.3d at 1110, 1114 (determining that debtor's credential earned from ITT Technical Institute did not benefit him in any way because he was unable to find employment or receive credit when transferring to another school); *Speer*, 272 B.R. at 195-96 (discussing failure of debtor's trade school education and concluding that debtor is incapable of more lucrative employment); Evans v. Higher Educ. Assistance Found. (*In re* Evans), 131 B.R. 372, 376 (Bankr. S.D. Ohio 1991) (determining that debtor did not receive any marketable skills from trade school she attended).

219. See *infra* Parts III.A.2.a and b for a discussion of the ways in which the free market and government regulation fail in the context of for-profit trade schools.

a. Students Are Unable to Access Appropriate Resources to Determine the Credibility of a For-Profit Trade School's Program

The *Brunner* court reasons that a student's wisdom should be the deciding factor for whether the student should attend a school.[220] This reasoning appears to assume that the student choosing to attend a for-profit trade school receives the necessary information to make an informed decision. This assumption, however, has inherent problems because a student choosing to attend a for-profit trade school is unable to uncover the necessary information to make an informed decision as to whether the school will be beneficial to the student.[221]

First, students are unable to access accurate information about the for-profit trade school's job placement statistics. The federal rules regarding institutional eligibility for financial aid do not specifically require schools to report job placement statistics.[222] Rather, the Department of Education only collects program completion statistics, not job placement statistics.[223] A study of for-profit trade schools found that the largest five for-profit trade schools have *completion* rates of only seven percent, thirty-one percent, forty-seven percent, forty-nine percent, and fifty-nine percent.[224] The for-profit trade schools, however, often report their job placement statistics as eighty percent.[225] Obviously, the reported job placement statistics do not include the fact that many students do not even complete the programs.[226] Moreover, because the job placement statistics are self-reported, they are particularly difficult to verify.[227] As a result of all of these factors, potential students have great difficulty accessing the information that would be necessary for them to make an appropriate, informed decision as to whether to attend a for-profit trade school.

Moreover, the *Brunner* court's assumption ignores the demographics of students attending for-profit trade schools. These students are usually from low-income families and are the first in their family to obtain any form of higher education, both of which make it more difficult for these students to access necessary information from a neutral source. Most students attending for-profit

220. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y.), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam); *see also In re Roberson*, 999 F.2d at 1137 (stating that individual makes decision to enter school).

221. *See* Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 419 (Bankr. D. Ariz. 2003) (noting that "court is at a loss to know what sort of investigation Mr. Cota could have pursued which would have informed him of the dangers associated with attending a trade school").

222. *See* LOONIN & DEVANTHÉRY, *supra* note 29, at 41 (describing federal requirements on for-profit trade schools in reporting job placement statistics).

223. *Id.* (describing federal regulations for for-profit trade schools and fact that collection of job placement statistics rests on accrediting agencies, not Department of Education).

224. *Id.* at 1 (citing statistics for the following schools: Apollo Group, Corinthian, Education Management Corporation, ITT, and Career Education Corporation, respectively).

225. *Id.*

226. *See id.* (noting difference in job placement statistics reported by for-profit trade schools and completion statistics collected by the Department of Education).

227. LOONIN & DEVANTHÉRY, *supra* note 29, at 38.

trade schools are low-income students.[228] These students view the for-profit trade schools as their method of climbing the success ladder and gaining a higher level of income.[229] Thus, these students likely do not have the financial resources to gather additional information regarding the for-profit trade schools and will likely rely on the for-profit trade schools for accurate information. Additionally, most students attending for-profit trade schools are the first generation to obtain any form of higher education.[230] As a result, these students likely do not have the networking resources to obtain information beyond what the for-profit trade schools themselves provide. Relying solely on the for-profit trade schools for their information, students are unable to make the informed decision the *Brunner* court contemplated, particularly because the schools will tell the students just about anything to fill the classrooms.[231]

b. Students Are Unable to Transfer Credits Earned at For-Profit Trade Schools to Not-For-Profit, Four-Year Institutions

Students are often unable to transfer the credits earned at for-profit trade schools to other institutions because the other institutions fear the for-profit trade school education is inadequate.[232] For the most part, for-profit trade schools have been unable to gain accreditation at one of the eight regional accrediting agencies, which are the dominant accrediting agencies for traditional not-for-profit schools.[233] These regional accrediting agencies evaluate colleges based on factors that include the "degrees held by faculty, professor-to-student ratios and the number of volumes in school libraries."[234] Instead, national accrediting agencies accredit the for-profit trade schools.[235] These national accrediting agencies determine accreditation status using job placement statistics.[236] As discussed previously, these job placement statistics have many flaws, particularly because the information is self-reported, impossible to verify, and is not subject to any policing mechanism.[237] As a result of the different accreditation status of the for-profit trade schools and the different criteria on

228. NUNEZ & CARROLL, *supra* note 79, at iii.

229. Linehan, *supra* note 29, at 759.

230. NUNEZ & CARROLL, *supra* note 79, at iii.

231. *See* Linehan, *supra* note 29, at 758-59 (finding five misrepresentations that for-profit schools frequently tell students, including misrepresentations as to (1) program time requirements, (2) program content, (3) school's accreditation status, (4) school's ability to license students, and (5) student's job placement ability after graduation). See *supra* Part II.A.2 for a discussion of the misrepresentations made to students by admissions recruiters at proprietary schools.

232. *See* Hechinger, *supra* note 49 (stating that traditional schools rarely accept transfer students from for-profit trade schools because they believe that academic standards at for-profit trade schools are insufficient).

233. *Id.* (stating that regional accrediting agencies have accredited only approximately ninety for-profit trade schools but have accredited three thousand traditional colleges and universities).

234. *Id.*

235. *Id.*

236. *Id.*

237. LOONIN & DEVANTHÉRY, *supra* note 29, at 36-41.

which the schools are evaluated in gaining accreditation, the traditional schools are unwilling to allow for-profit trade school students to transfer their credits into the traditional not-for-profit institutions, fearing that the students have not received an adequate academic experience.

c. Students Have No Viable Remedies Against For-Profit Trade Schools

A student has no viable remedies against a for-profit trade school for the misrepresentations it uses to induce the student to enroll.[238] These for-profit trade schools tend to use questionable marketing tactics, which include misrepresenting facts, in order to fill the seats at their institutions.[239] Yet, the current remedies, including claims for misrepresentation, breach of contract, and violation of consumer protection statutes, do not allow a wronged student to recover against the for-profit trade schools for these misrepresentations.[240] As a result, the student is saddled with her student loan obligations until she repays the loans.[241] Thus, the student must uphold her end of the promise, paying for her education, while the for-profit trade school is able to elude its promise, placing the student in gainful employment in her field of choice.

3. The Second Circuit and Seventh Circuit's Assertion that Taxpayers Will Bear an Additional Burden Is Not Compelling because the Federal Government Has an Interest in Regulating For-Profit Trade Schools and the Education that Students Receive

The Second Circuit and Seventh Circuit assert that a court's consideration of educational value in the undue hardship analysis will result in an additional burden on taxpayers.[242] If courts consider educational value when determining whether a student suffered an undue hardship, courts will discharge more educational loans.[243] Because the federal government guarantees repayment of Title IV loans to any private lender,[244] the discharge of additional student loans

238. See *infra* Part III.A.2.c for a description of the lack of legal remedies a student has against a for-profit trade school for these misrepresentations and the problems that result from the lack of any legal remedy.

239. *See* LOONIN & DEVANTHÉRY, *supra* note 29, at 1 (finding that for-profit trade schools self-reported job placement rates are misleading); Linehan, *supra* note 29, at 758-59 (discussing five misrepresentations commonly used by for-profit schools).

240. *See generally* Linehan, *supra* note 29, at 763-81 (describing lack of legal remedies for students against for-profit trade schools for their misrepresentations). See *supra* notes 84-87 and accompanying text for a description of the difficulties in establishing a case against the for-profit trade schools for tort claims, for breach of contract claims, and under consumer protection statutes.

241. *See* LOONIN & DEVANTHÉRY, *supra* note 29, at 6 (stating that "only treason, murder, and student loan collection have no statute of limitations in this country").

242. *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993); Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) (affirming application of undue hardship standard).

243. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 n.3 (Bankr. S.D.N.Y.), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam) (discussing that student will have more difficulty in discharging loans if court does not consider educational value, so if it does, more discharges will occur, potentially burdening taxpayers).

244. *In re Roberson*, 999 F.2d at 1136.

may result in an additional burden on the taxpayers.[245] This potential burden on taxpayers, however, is not a compelling reason not to consider the educational value in loan discharges because the federal government has an interest in the regulation of for-profit trade schools and the education the students receive.

The federal government has long had a significant role in the development and regulation of education at all levels.[246] It must continue to do so because education plays a vital role in the state of the nation.[247] Namely, higher education is directly correlated to higher levels of wealth and community action, as well as lower incidences of welfare and crime.[248] Therefore, the nation as a whole benefits from the education each student receives.

Although the federal government has attempted to regulate the for-profit trade school industry through regulation of federal financial aid,[249] these efforts have not been effective in curbing predatory marketing practices of trade schools or ensuring that these schools provide a quality education to students. Even worse, the for-profit trade school industry has successfully used lobbying efforts to limit the federal government's regulation of the industry.[250] Considering the benefits that education offers society, as well as the predatory tactics of the for-profit trade schools on potential students,[251] the government not only has the capacity to regulate for-profit education in a better manner than the free market, it has a responsibility to do so. Therefore, the federal government's interest in higher education, including education received at for-profit trade schools, far outweighs the potential for an additional burden on taxpayers.

Additionally, any burden on the taxpayers may serve as an impetus for positive change by the federal government in regulating the for-profit trade school industry. By putting additional pressure on the federal government, the

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245. *Brunner*, 46 B.R. at 755 n.3; *see also In re Roberson*, 999 F.2d at 1137 (noting that taxpayers will bear burden).

246. *See* Richard W. Riley, *The Role of the Federal Government in Education – Supporting a National Desire for Support for State and Local Education*, 17 ST. LOUIS U. PUB. L. REV. 29, 32-36 (1997) (discussing developing role of federal government in education dating back to U.S. Constitution).

247. *See id.* at 29 n.1 (discussing role of education in shaping law-abiding, productive citizens).

248. *Id.*

249. *See, e.g.*, 20 U.S.C. § 1002(b)(1)(A) (2000) (requiring for-profit trade schools to "provide[] an eligible program of training to prepare students for gainful employment in a recognized occupation" in order for school to maintain institutional eligibility for federal financial aid); *id.* § 1085(a)(2) (finding a for-profit school ineligible to participate in federal loan program if its default rate is above twenty-five percent for more than three consecutive years). See also *supra* notes 36-43 and accompanying text for a discussion of the Higher Education Act and the regulation of federal financial aid in the context of for-profit trade schools.

250. *See* Linehan, *supra* note 29, at 763-64 (suggesting that federal government has not attempted stricter regulations due to effective lobbying by for-profit trade school industry); Dillon, *supra* note 41 (quoting Delaware Representative Michael N. Castle as stating that for-profit trade schools have "full-blown lobbying effort and give lots of money to campaigns"); Hechinger, *supra* note 49 (quoting associate executive director of American Association of Collegiate Registrars and Admissions Officers as stating that for-profit colleges "are buying legislation for their otherwise suspect goods").

251. See *supra* Part II.A.2 for a discussion of the misrepresentations that for-profit trade schools make in marketing the school to potential students.

Department of Education may use its audit function more frequently to examine for-profit trade schools for violations of Title IV federal financial aid rules.[252] Even more, the Department of Education may lobby Congress to enact more stringent standards for Title IV eligibility for for-profit trade schools that includes reporting and disclosure of job placement statistics.[253] Therefore, the additional burden on taxpayers that may result from the initial decision to consider educational value in determining whether to discharge a student loan may serve as an impetus for changes by the Department of Education.

As discussed above, the Second Circuit and Seventh Circuit's approach to the *Brunner* test is harsh and inappropriate in the context of for-profit trade schools. First, a fundamental flaw exists in the *Brunner* court's assertion that borrowers exchange the benefit of educational loans by sacrificing their bankruptcy protection because the assertion is contrary to the fresh start policy of bankruptcy and is misleading in suggesting that a borrower can contract out of bankruptcy protection, which she cannot.[254] Second, the legislative intent of the educational loan discharge exception under § 523(a)(8) does not encompass the student debtor who has been misled by a for-profit trade school because the federal government does not properly regulate the for-profit trade school industry, and as a result, the benefit of the education is not always equal to that of traditional schools.[255] Finally, the federal government's interest in the regulation of for-profit trade schools and the education of students attending those schools outweighs any additional burden on taxpayers resulting from the consideration of educational value in student loan discharges.[256] Therefore, courts should consider the educational value that the for-profit trade school provided in determining whether to discharge an educational loan, at least in the context of for-profit trade schools.[257]

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252. *See, e.g.*, UNIVERSITY OF PHOENIX AUDIT REPORT, *supra* note 88, at 2-10 (describing Department of Education's audit of University of Phoenix's policies and procedures to ensure reasonable compliance with federal regulations on Title IV federal financial aid). See *supra* notes 89-93 and accompanying text for a description of the Department of Education's ability to audit and use of an audit against the University of Phoenix in greater detail.

253. *See* LOONIN & DEVANTHÉRY, *supra* note 29, at 1, 36-41 (noting that Department of Education collects only completion rates of students at for-profit trade schools, not job placement rates, and serious flaws currently exist in for-profit trade schools' self-reported job placement rates). See also *supra* notes 222-27 for a discussion of the inadequacies of the current reporting mechanism for job placement statistics of for-profit trade schools.

254. See *supra* Part III.A.1 for a discussion of the flaws in *Brunner's* assertion that a borrower of educational loans sacrifices her bankruptcy protection.

255. See *supra* Part III.A.2 for a discussion of the fact that the legislative intent of § 523(a)(8) does not encompass for-profit trade school students who have been misled.

256. See *supra* Part III.A.3 for a discussion of the assertion that the taxpayers will bear a large burden if educational value is considered, and the response that the federal government's compelling interest in education overweighs that concern.

257. See *infra* Part III.B for the suggestion that circuit courts should adopt the Ninth Circuit's approach that considers educational value in determining whether the student suffered an undue hardship in educational loan discharge cases.

B. The Solution: A Multivariable Test Based on the Ninth Circuit's Approach in Considering Educational Value

The Ninth Circuit has instructed courts to consider the educational value the student received under the second prong of the *Brunner* test in determining whether the court should discharge the student loan under § 523(a)(8).[258] The second prong examines additional circumstances that affect the debtor's ability to repay the loan, and the Ninth Circuit has held that these circumstances do not need to be "exceptional."[259] As demonstrated by the inadequacy of the Second Circuit and Seventh Circuit's approach,[260] the Ninth Circuit's approach of considering educational value in determining whether it should discharge an educational loan is necessary to effectively balance the goals of bankruptcy policy with the educational loan discharge exception, at least in the context of for-profit trade schools.

The question, then, is what circumstances courts should consider in evaluating the educational value a student has received from a for-profit trade school. Assessing educational value can be difficult because education has intangible benefits. If the test is too broad in allowing any loan from a for-profit trade school to be discharged, it will burden the government and will not serve its purpose—allowing student debtors an outlet when they have not received the education for which they bargained. On the other hand, if the test is too strict in requiring certain factors to be met, it will not allow the truly needy debtor to recover. Therefore, in considering educational value, the factors must serve as a guide for future courts, but the test must allow the courts to look at the full picture of each case. As a result, no factor will be dispositive, and the courts will need to perform a fact-specific inquiry for each case.[261]

The factors that the Ninth Circuit and the Bankruptcy Court for the District of Arizona utilized were all worthwhile factors in evaluating the educational value of a for-profit trade school. The Ninth Circuit examined such factors as

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258. *See* Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 945-46 & n.6 (9th Cir. 2006) (holding that "additional circumstances" showing inability to repay loan in future under second prong of *Brunner* do not need to be "exceptional" but instead include such factors as quality of education and lack of marketable job skills); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (considering educational value in holding that debtor suffered undue hardship and discharging debtor's educational loan).

259. *Nys*, 446 F.3d at 946.

260. See *supra* Part III.A for a discussion of the reasons why the Second Circuit and Seventh Circuit's rejection of the consideration of educational value is too harsh in the context of for-profit trade schools.

261. *See Nys*, 446 F.3d at 947 (noting that its suggested factors were unexhaustive so courts could consider other factors). By making these decisions fact specific, the court will not incur an additional burden because the *Brunner* test is, by its nature, fact specific. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756-58 (Bankr. S.D.N.Y. 1985) (applying three prongs of its test to specific facts of Brunner's situation), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam); Speer v. Educ. Credit Mgmt. Corp (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (stating that lack of guidance as to what "undue hardship" means "requires each court to apply its own intuitive sense . . . on a case by case basis").

whether the student was able to secure employment in her field,[262] receive credit when transferring to a traditional institution,[263] or increase her earning potential.[264] In applying the Ninth Circuit's decree, the bankruptcy court additionally found it determinative that the school did not provide any job placement services as it had promised, and the school closed shortly after the student had received his certificate.[265]

Although a degree from a higher education institution does not guarantee that a particular student will find a job, whether the school's students as a whole are able to secure employment in their field is a particularly compelling factor for consideration in the context of for-profit trade schools. For a for-profit trade school to be eligible to distribute federal financial aid, the school must provide "an eligible program of training to prepare students for gainful employment in a recognized occupation."[266] If a school has failed to prepare its students such that they are unable to secure employment in their trade, it has failed to fulfill its obligation in accordance with federal financial aid regulations. Thus, not only does this factor indicate whether the trade school is supplying that which it has promised its students, but also whether it is supplying that which it has promised the federal government.

Therefore, the primary factor a court should consider in determining educational value is whether the school's students are able to secure employment in their field.[267] Additionally, the courts should consider whether the school is still receiving federal funding toward its financial aid,[268] whether the school has closed since the student began attending the school,[269] whether one of the eight regional accrediting agencies accredited the school,[270] whether the student is able

262. *See Pena*, 155 F.3d at 1110, 1114 (finding that student was unable to secure employment in his chosen field).

263. *See id.* (finding that student was unable to transfer his credits to another higher education institution).

264. *See Nys*, 446 F.3d at 947 (stating, in "unexhaustive list," that courts should consider whether the student had "[m]aximized income potential in the chosen educational field").

265. Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 418-19 (Bankr. D. Ariz. 2003).

266. 20 U.S.C. § 1002(b)(1)(A) (2000).

267. *See Pena*, 155 F.3d at 1110, 1114 (considering that student was unable to secure employment in his chosen field when assessing educational value in determining that court should discharge his student loan). In considering this element, a court will need to review the school's completion rates as reported to the Department of Education, not just the job placement statistics reported by the for-profit trade school to its accrediting agency. See *supra* notes 222-27 and accompanying text for a discussion of the problems with job placement rate data and the fact that the completion rates of for-profit trade schools are low.

268. *See* 20 U.S.C. § 1085(a)(2) (West 2000 & Supp. 2006) (revoking institution's ability to disburse federal financial aid, including educational loans, if institution's default rate on educational loans exceeds twenty-five percent).

269. *See Cota*, 298 B.R. at 418-19 (considering that school closed shortly after student earned his certificate in deciding to discharge debtor's educational loan).

270. See *supra* Part III.A.2.b for a discussion of the different, higher standards a regional accrediting agency uses as opposed to a national accrediting agency in determining the accreditation status of a school and the consequences of that determination.

to transfer the credits to a not-for-profit higher education institution,[271] whether the student was able to increase her earning potential by completing the program,[272] and whether the student performed at a satisfactory level in school.[273] Evaluation of these factors will achieve the fresh start policy of bankruptcy, while ensuring that the legislative intent—not allowing a student to discharge a loan when the student will continue to receive a future benefit from the education for the rest of her life—is not dishonored.

IV. CONCLUSION

The Ninth Circuit's decision to allow courts to consider the educational value the student received in determining whether a court should discharge a student loan is more appropriate than the Second Circuit's and Seventh Circuit's decisions to exclude this factor, particularly in the context of for-profit trade schools.[274] The Second Circuit's and Seventh Circuit's decisions are incompatible with the bankruptcy policy to give debtors a fresh start by discharging their loans.[275] Moreover, the legislative intent of the educational loan discharge exception, that students who will continue to be enriched for the rest of their lives from an education should not be permitted to discharge their loans immediately after graduation, does not encompass the for-profit trade school industry because the education the student has received is not equal to an education from other institutions.[276] The education is not equal because students are receiving inadequate information or are being misled about the for-profit trade schools, students are unable to transfer credits earned at for-profit trade

271. *See Pena*, 155 F.3d at 1110, 1114 (considering that student was unable to transfer his credits to another higher education institution in deciding to discharge debtor's educational loan).

272. *See* Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006) (stating, in "unexhaustive list," that courts should consider whether student had "[m]aximized income potential in the chosen educational field").

273. While none of the cases or data has touched on this topic, this factor seemed obvious to the author: if the student performed significantly below the average in the program, then perhaps the school is not at fault for the student's failure to benefit from the education. Alternatively, if the student has performed extremely well, the student should likely have been able to find correlative work.

274. *See* Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 946-47 (9th Cir. 2006) (holding that "additional circumstances" showing inability to repay loan in future under second prong of *Brunner* do not need to be "exceptional" but instead include such factors as quality of education and lack of marketable job skills); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (noting that court should consider value of education to debtor in terms of debtor's ability to repay loan). *But see* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 n.3 (Bankr. S.D.N.Y. 1985) (determining that court should consider educational value in determining whether it should discharge debtor's educational loan), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (agreeing with *Brunner* court in rejecting *Johnson* test's approach that considered educational benefit to debtor).

275. See *supra* Part III.A.1 for a discussion of the reasons why not considering educational value in determining whether the court should discharge a student loan is contrary to the fresh start policy in bankruptcy proceedings.

276. See *supra* Part III.A.2 for a discussion of the reasons that the education at a for-profit trade school is not equivalent to an education at a not-for-profit school.

schools to not-for-profit institutions, and students have no redress against the for-profit trade schools for any misrepresentations the schools used to induce the students to attend the program.[277] Finally, the federal government's strong interest in education, which includes the regulation of for-profit trade schools, outweighs any concern that the taxpayers will bear an additional burden if courts consider educational value in determining whether it should discharge an educational loan.[278]

Instead, a multivariable test based on the Ninth Circuit's approach that allows courts to consider the educational value the student received in determining whether it should discharge a student loan is more appropriate in the context of for-profit trade schools.[279] Considering factors under a multivariable test will allow the courts to effectively balance the goal of the fresh start policy in bankruptcy with the legislative intent of the educational loan discharge exception not to allow a student to discharge her loan when she has high future earning potential.[280] In turn, the unduly harsh standard under the *Brunner* test will not force other Troy Speers of the nation to struggle in a life sentence of debt.

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277. See *supra* Part III.A.2 for a discussion of the problems inherent in the for-profit trade school system making it unequal to a not-for-profit school.

278. See *supra* Part III.A.3 for a discussion of the reasons the federal government's interest in education is so strong that it outweighs concern about burdening the taxpayers.

279. See *supra* Part III.B for a discussion on why the Ninth Circuit's approach is the best solution to this problem.

280. For a full listing of the factors courts should consider in the multivariable test, see *supra* notes 267-73 and accompanying text.

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