THE "SPECIAL CIRCUMSTANCE" OF STUDENT LOAN DEBT UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) attempts to steer debtors away from chapter 7 and into chapter 13 plans in which they will have to repay a portion of their debt. BAPCPA employs a formula known as the "means test" which deducts certain expenses from income to determine disposable income and the ability to repay. Whether by design or oversight, Congress failed to include student loan repayment as an express, allowable expense in the means test. For some debtors, this means that a chapter 13 plan may not truly reflect the debtor's ability to repay. As a result, some have argued that student loan repayment constitutes a "special circumstance," which merits inclusion in the means test. This Note examines the divergent case law on this issue and the policy implications of not including student loan debt repayment in the means test. The Note argues that courts that have determined that student loans constitute a special circumstance present a more reasoned analysis but that ultimately Congress should amend BAPCPA to deal expressly with student loans.

"Running into debt isn't so bad. It's running into creditors that hurts."
-Source Unknown

INTRODUCTION

Sometime around the turn of the twentieth century, American writer, artist, and philosopher, Elbert Hubbard noted: "Every man should have a college

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education, just to realize how little the thing is worth."[1] Were Mr. Hubbard alive today, it is uncertain whether he would find that the worth of a college education has changed in the past one hundred years. But one thing *is* certain: he would find its current costs—which have far outpaced inflation since 1916—to be no laughing matter.

The average annual tuition for a four-year public university in 2009–2010 was more than $7000.[2] The average cost of a private four-year institution is more than $25,000 per year.[3] Because grants and scholarships have not kept pace with the rising cost of post-secondary education, students have filled the gap by borrowing increasing amounts from both federal and private sources.[4] Student loans perhaps represent one line of credit that has not frozen during the current recession. The average graduating senior leaves a four-year undergraduate school with roughly $20,000 in student loan debt.[5] In 2008, over two-thirds of students at four-year colleges and universities carried at least some student loan debt.[6]

Commentators LeMay and Cloud note that the availability of financial aid to underwrite the cost of attending college is "one of the centerpieces of American higher education."[7] According to the U.S. Department of Education, the federal government distributed over fifteen million student loans in the 2006–2007 award year, representing a total value of approximately $70 billion.[8] Between 2000–2001 and 2005–2006, private student loan volume grew by roughly 27% each year, totaling $17.3 billion in the 2005–2006 award year.[9] Given these high dollar values, it would be reasonable to assume that a significant student loan default rate exists. As the Department of Education calculated, the student loan default rate in 2005 was 4.6%.[10] This figure, however, only includes defaults within two years of beginning repayments.[11] Some have suggested that the Department of Education's limited review period understates the true amount of defaults. One study that

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1. ELBERT HUBBARD, PHILOSOPHY OF ELBERT HUBBARD 76 (The Roycrofters 1930).

2. College Board, 2009–2010 College Prices, http://www.collegeboard.com/student/pay/add-it-up/4494.html (last visited Apr. 1, 2010).

3. *Id.*

4. C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 81 (2007).

5. FinAid.org, Student Loans, http://www.finaid.org/loans/ (last visited Apr. 1, 2010).

6. The Project on Student Loan Debt, Quick Facts About Student Debt, http://projectonstudentdebt.org/files/File/Debt_Facts_and_Sources.pdf (last visited Apr. 1, 2010).

7. LeMay & Cloud, *supra* note 4, at 79.

8. U.S. Dep't of Educ., *Student Loan Volume Tables – FY 2009 President's Budget*, http://www2.ed.gov/about/overview/budget/studentloantables/09ffeldlgross-ay.pdf (last visited Oct. 8, 2008).

9. THE COLLEGE BOARD, TRENDS IN STUDENT AID 5 (2006), *available at* http://www.collegeboard.com/prod_downloads/press/cost06/trends_aid_06.pdf.

10. U.S. Dep't. of Educ., *National Student Loan Default Rates*, http://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html (last visited Oct. 8, 2008).

11. *Id.*

followed federal student loan borrowers for the period of ten years ending in 2003–2004 found that nearly 10% defaulted on their loans.[12]

Recent data suggests that default rates are continuing their ascent as the country struggles to pull itself out of recession. A new study by the U.S. Department of Education that tracks default within three years of repayments found that almost 12% of borrowers who began repayment in fiscal year 2007 defaulted within three years.[13] This was up from 9.2% in 2006.[14] The default rate of students who used federal student loans at for-profit colleges was an astounding 21.2%.[15]

Not surprisingly, an increasing proportion of consumer bankruptcy proceedings involve student loan debt.[16] Although the Bankruptcy Code itself is silent on the subject, many courts and commentators have noted that the principle purpose of the Bankruptcy Code is to grant a "fresh start" to honest, but unfortunate, debtors.[17] Both chapter 7 and chapter 13 of the Bankruptcy Code permit an individual debtor to discharge certain unpaid debts. Chapter 7 permits a discharge of prepetition debts following the liquidation of the debtor's nonexempt assets, if any, by a bankruptcy trustee who then distributes the proceeds to creditors.[18] Chapter 13 authorizes a debtor "with regular income to obtain a discharge after the successful completion of a payment plan approved by the bankruptcy court."[19] Chapter 7 is considered to be debtor-friendly, while chapter 13 provides more protection for creditors.[20] Generally, student loan debt is extremely difficult to have discharged in bankruptcy proceedings.[21] Under 11 U.S.C. § 523(a)(8) a debtor must show that the student loan repayment constitutes an "undue hardship."[22] This topic has been thoroughly explored by legal commentators.[23]

Recently, the topic of student loan debt appeared in a new context in bankruptcy proceedings as a result of the passage of the Bankruptcy Abuse

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12. SUSAN P. CHOY & XIAOJIE LI, U.S. DEP'T OF EDUC., DEALING WITH DEBT: 1992-93 BACHELOR'S DEGREE RECIPIENTS 10 YEARS LATER vi (2006), *available at* http://nces.ed.gov/pubs2006/2006156.pdf.

13. Justin Pope, *Student Loan Default Data Highlights For-Profits*, WASH. POST, Dec. 14, 2009.

14. *Id.*

15. *Id.*

16. Kent Anderson, *Student Loans in Chapter 13 Bankruptcy: Recent Court Decisions Show a Disturbing Trend*, BANKR. L. CTR., June 27, 2008, http://law.lexisnexis.com/practiceareas/Bankruptcy-Law-Blog/BankruptcyLawCenter/Student-Loans-In-Chapter-13-Bankruptcy--Recent-Court-Decisions-Show-A-Disturbing-Trend.

17. Grogan v. Garner, 498 U.S. 279, 286–87 (1991).

18. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007). Prepetition debts are those debts incurred by the debtor prior to filing a bankruptcy petition with the appropriate court.

19. *Id.*

20. LeMay & Cloud, *supra* note 4, at 83.

21. *See infra* Part I.

22 11 U.S.C. § 523(a)(8) (2006).

23. *See, e.g.*, LeMay & Cloud, *supra* note 4.

Prevention and Consumer Protection Act of 2005 (BAPCPA).[24] Central to BAPCPA was the inclusion of a *means test* in § 707(b). The means test is essentially a mechanical tool for identifying debtors who have the ability to repay a portion of their debts and channeling those debtors out of chapter 7.[25] The means test takes a debtor's monthly income, subtracts statutorily defined expenses, and uses a series of calculations to determine whether the debtor's income raises a presumption of abuse that requires either dismissal or conversion to a chapter 13 proceeding.[26] But, Congress made no explicit mention of student loans in providing the statutorily defined expenses.[27] This omission, whether through oversight or design, has the effect of making the means test inaccurate for those with legitimate student loan repayment expenses.

Congress, however, provided a notable protection against the harsh application of the means test in appropriate circumstances. Section 707(b)(2)(B)(i) allows a debtor to rebut the presumption of abuse by demonstrating *special circumstances* that justify additional expenses or adjustments to monthly income for which there is no reasonable alternative.[28] In other words, if special circumstances justify the deduction of additional expenses from a debtor's income, such that the means test reveals that the debtor does not have the ability to repay a significant portion of the debt, then the debtor may stay under the preferred protection of chapter 7.

Recently, debtors have argued that student loan debt repayment should qualify as a special circumstance, thereby allowing debtors to include it as an itemized expense under the means test. Bankruptcy courts have split on the issue. For example, courts have relied on fairness to the debtor, the lack of any reasonable alternative to repayment of the student loans, the uniqueness of student loan debt, and the ubiquity of student loans to hold that student loans may constitute special circumstances.[29] Courts rejecting student loan repayment as constituting a special circumstance have relied on legislative history or the nature of student loans as merely a means to incur a more advantageous income or to enter a different vocation.[30] To date, no appellate decisions have addressed this issue.

The discussion in this Note applies to debtors above median-income who are attempting to file in chapter 7, discharge other debts, and perhaps be able to pay non-dischargeable student loan debt. At first glance, this would seem to apply to a relatively small percentage of chapter 7 debtors, because the vast majority of

24. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

25. *In re* Champagne, 389 B.R. 191, 197–98 (Bankr. D. Kan. 2008).

26. *See infra* Part II.A.

27. 11 U.S.C. § 707 (2006).

28. 11 U.S.C. § 707(b)(2)(B)(i).

29. *See In re* Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007); *In re* Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007); *In re* Templeton, 365 B.R. 213 (Bankr. W.D. Okla. 2007).

30. *See In re* Pageau, 383 B.R. 221 (Bankr. D.N.H. 2008); *In re* Vaccariello, 375 B.R. 809 (Bankr. N.D. Ohio 2007).

them tend to be below median-income.[31] Most debtors with student loan problems will more than likely be able to get into chapter 7 if they prefer. However, as student loan debt increases for many Americans, and student loan servicers offer extended repayment terms as long as thirty years, an increasing number of student loan debtors could be above median-income and yet not have enough expenses to pass the means test without taking the student loan payments into account.

This Note examines new arguments arising under the BAPCPA provisions concerning the treatment of student loan debt in bankruptcy proceedings. Part I explores how the Bankruptcy Code expressly deals with student loan debt and the difficulty debtors face in discharging student loan debt. Part II examines the function of "means testing" in 11 U.S.C. § 707(b). This Part explores the legislative history behind means testing, the mechanics of means testing, some early empirical results, and § 707(b)'s special circumstances provision. Part III analyzes the case law that considers whether student loan debt constitutes a special circumstance for the purposes of incorporation as an expense in the means test calculation. Part IV discusses several policy considerations implicated where courts convert student loan debtors' chapter 7 proceedings into chapter 13 proceedings. Finally, this Note concludes that the current statutory language has led to significant confusion and additional layers of litigation, and that Congress should act to provide a clear determination of how student loans are to be treated in the means testing calculation. In light of the purpose of the means test—to determine ability to repay a substantial portion of unsecured debt—Congress should allow student loan repayment, perhaps up to a certain dollar threshold, to be considered a necessary expense. Barring any congressional action, this Note also concludes that courts should interpret the special circumstances provision of § 707(b) to provide for the consideration of student loan debt repayment. Otherwise, failure to deal with student loan debt in means testing calculations could burden debtors with significant student loan debt who have their cases converted to chapter 13 because they fail to demonstrate special circumstances. Such debtors may find themselves in a debt spiral from which there is no easy extrication.

I. THE BANKRUPTCY CODE'S EXPRESS PROVISION ON STUDENT LOAN DEBT REPAYMENT: 11 U.S.C. § 523(A)(8)

Prior to 1976, bankruptcy laws treated educational loans as general unsecured debt that debtors had the ability to discharge in bankruptcy proceedings.[32] In 1976, Congress made student loan debt presumptively non-dischargeable after investigations into student loan programs revealed that some students were "declaring bankruptcy upon graduation solely for the purpose of discharging their obligation to repay their federally guaranteed loan, thus sticking

31. Clifford J. White III, Executive Director for U.S. Trustees, *Making Bankruptcy Reform Work: A Progress Report in Year 2*, ABI JOURNAL 16 (June 2007) (noting that less than 10% of chapter 7 debtors are above median-income).

32. 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, 97 (2002) (citing Education Amendment of 1976, Pub. L. No. 94-482, § 127, 90 Stat. 2081, 2141 (codified as amended in scattered sections of 20 U.S.C.)).

the taxpayer with the bill for their education."[33] Currently, the Bankruptcy Code expressly deals with the treatment of student loan debt in bankruptcy proceedings in § 523(a)(8). The relevant portion states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> > (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for –
> >
> > > (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
> > >
> > > (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> > >
> > > (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.[34]

BAPCPA modified § 523(a)(8) so that it would include private loans made for educational purposes as well as student loans backed by the U.S. government.[35] The key statutory language is *undue hardship*, a term that Congress has not yet defined.[36] Of all the exceptions to discharge included under § 523(a), Bankruptcy and Appellate Panels have discussed the discharge exception for student loans more than any other.[37] In examining the other non-dischargeable items in § 523, LeMay and Cloud note that student loan debt now has the same standard of discharge as "debts arising from tax evasion, fraud, embezzlement, child support, alimony, and willful and malicious injury."[38]

In interpreting the undue hardship standard, most courts have set the bar for dischargeability fairly high. As a result, student loan debt is extremely difficult

33. 125 CONG. REC. H2759 (1979) (statement of Rep. Michel). *See also*, 125 CONG. REC. S9160 (1979) (statement of Sen. DeConcini) ("Certainly the taxpayer should not pick up the tab for any individual who is capable of paying his own way and who will be able to repay his loan without substantial hardship. The purpose of the guaranteed student loan program is to allow a student to delay his payments until he has completed his college program and can work to make the payments. It was never intended to be used as a back door means of paying the bill with taxpayer's money.").

34. 11 U.S.C. § 523(a)(8) (2006).

35. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

36. LeMay & Cloud, *supra* note 4, at 83.

37. Stewart H. Cupps, *Section 523 – Exceptions to Discharge*, 2007 ANN. SURV. BANKR. L. PART III § 27.

38. LeMay & Cloud, *supra* note 4, at 83.

to discharge in bankruptcy proceedings.[39] Public policy considerations provide the justification for the high standard. Because federal student loan programs put federal taxpayer dollars at risk, bankruptcy law should arguably make it difficult to cancel such debts.[40] In addition, because Congress created the federally guaranteed loan program as a way to improve American society as a whole through a better-educated public,[41] it has a keen interest in ensuring the integrity and solvency of the loan program.[42] In recent years, the U.S. government has been even more adamant in pursuing student loan repayment.[43] Further, the Supreme Court held in 2005 that the federal government can garnish Social Security benefits in order to collect on defaulted student loans and that such collection efforts are not subject to time limits.[44]

Although more than one test exists for determining undue hardship,[45] the *Brunner* test has become the most widely accepted.[46] The *Brunner* court examined the legislative history of § 523(a)(8) and determined that Congress intended to make the discharge of student loans more difficult than that of other non-excepted debt.[47] The court stated that student loan programs were not designed to turn the federal government "into an insurer of educational value."[48] The *Brunner* test requires a three-part showing in order to support a finding of undue hardship. The debtor must demonstrate:

> (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.[49]

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39. Jonathan D. Glatter, *That Student Loan, So Hard to Shake*, N.Y. TIMES, Aug. 24, 2008, at BU (noting that student loan debt is more difficult to get rid of than credit card or other debt).

40. *Id.*

41. LeMay & Cloud, *supra* note 4, at 82.

42. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 EDUC. LAW. REP. 11, 21 (2006).

43. The nondischargeability provision for student loans was broadened in 2005 to include private student loans not guaranteed by the federal government. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

44. Lockhart v. United States, 546 U.S. 142, 145–47 (2005).

45. LeMay & Cloud, *supra* note 4, at 84 (noting that currently four judicial tests are used to determine *undue hardship*).

46. *Id.* at 86 (noting that the *Brunner* test is now employed by nine Circuit Courts of Appeal).

47. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

48 Brunner v. N.Y. State Higher Educ. Servs. Corp., 46 B.R. 752, 756 n.3 (S.D.N.Y. 1985).

49. *Id.*

Debtors have difficulty establishing all three prongs of the test.[50] The Seventh Circuit, in adopting the *Brunner* test, observed that the first prong required "an examination of the debtor's current financial condition to see if payment of the loans would cause his standard of living to fall below that minimally necessary."[51] In order to clarify what may qualify as an *additional circumstance* for the purposes of the second prong, the Ninth Circuit recently adopted a non-exhaustive list.[52] The circumstances include: serious medical or physical disability of the debtor; lack of or severely limited education; poor quality of education; lack of usable or marketable job skills; underemployment; having maximized income potential in the chosen field; having a limited number of years remaining in the debtor's work life; age or other factors that prevent retraining or relocation; lack of assets that could be used to repay the loan; potentially increasing expenses; and lack of better financial options elsewhere.[53] Finally, the Seventh Circuit advised that the third prong should be guided by the understanding that "undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from 'factors beyond his reasonable control.'"[54] The Seventh Circuit perhaps best exemplifies the difficulty in meeting all three prongs of the *Brunner* test by warning that because it is the individual's decision whether or not to borrow for an education, the consequences of that borrowing should lie with the individual and not with the taxpayers.[55]

If debtors are unable to meet the undue hardship burden, they will be required to continue making payments on the debt obligations. An attractive alternative would be the ability to discharge as many other unsecured debts as possible in order to make the repayment of student loans less burdensome. Therefore, debtors with significant student loan debt who are unable to meet the § 523(a)(8) requirements would benefit from being able to file under the more debtor-friendly chapter 7 proceeding. Some debtors, however, may experience another roadblock: the "means test."

II. SECTION 707(B) MEANS TESTING UNDER BAPCPA

In the 1990s, the United States experienced the longest peacetime economic expansion in its history.[56] By November 1999, unemployment stood at only 4.1%.[57] Despite this unprecedented economic growth, the number of bankruptcy filings surged.[58] In 1996, bankruptcy filings surpassed one million in a single year for the first time ever.[59] This data apparently caught the attention of

50. LeMay & Cloud, *supra* note 4, at 86.

51. *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

52. *In re* Nys, 446 F.3d 938, 947 (9th Cir. 2006).

53. *Id.*

54. *In re* Roberson, 999 F.2d at 1135 (internal citations omitted).

55 *Id.* at 1137.

56. America.gov, The U.S. Economy: A Brief History, http://usinfo.state.gov/products/pubs/oecon/chap3.htm (last visited Oct. 8, 2008).

57. *Id.*

58. Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 141 (2007).

59. *Id.*

Congress and—maybe even more importantly—the attention of creditor lobbyists.[60] Many began to speculate that the surge in filings, especially chapter 7 filings, was a result of consumers abusing bankruptcy protections.[61] Congress subscribed to the notion that many bankruptcy filers were merely seeking to discharge most of their debt under chapter 7 instead of opting to repay a significant portion under a chapter 13 repayment plan.[62] Congress' attempt at a panacea for the supposed abuse of the bankruptcy system came in the form of *means testing*.[63] Prior to the passage of BAPCPA, Congress had considered means testing as an element of bankruptcy reform in every session since 1997.[64]

A. Mechanics of Means Testing: A Focus on Allowed Expense Deductions

In simplified terms, the means test is a mechanical calculation that deducts a debtor's statutorily defined expenses from the debtor's current monthly income.[65] The purpose of the means test is to determine whether debtors who earn above-median incomes[66] have enough disposable income to repay a significant portion of their debts. If the means test calculation reveals that the debtor has sufficient income to repay a significant portion of the debt, then a presumption of abuse arises.[67] If a presumption of abuse arises, then the court, U.S. trustee, trustee,

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60. *See, e.g.*, Henry J. Sommer, *Trying To Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 AM. BANKR. L.J. 191, 191–92 (2005).

61. Price & Dalton, *supra* note 58, at 143.

62. *Id.* The Senate Judiciary Committee in 1999 noted, "It is the strong view of the Committee that the bankruptcy code's generous, no-questions-asked policy of providing complete debt forgiveness under chapter 7 without serious consideration of a bankrupt's ability to repay is deeply flawed and encourages a lack of personal responsibility." S. REP. No. 106-49, at 3 (1999).

63. Senator Grassley considered means testing a fundamental element of BAPCPA:

> The Bankruptcy Reform Act of 2005 asks the very fundamental question of whether repayment is possible by an individual. It is this simple: If repayment is possible, then he or she will be channeled into chapter 13 of the Bankruptcy Code which requires people to repay a portion of their debt as a precondition for limited debt cancellation. This bill requires this by providing for a means-tested way of steering people . . . who can repay a portion of their debts, away from chapter 7 bankruptcy.

151 CONG. REC. S1856 (2005) (statement of Sen. Charles Grassley).

64. Eugene R. Wedoff, *Means Testing in the New § 707(B)*, 79 AM. BANKR. L.J. 231, 231 (2005).

65. *See* 11 U.S.C. § 707(b) (2006).

66. BAPCPA provides that only debtors with above-median income can be subject to a means test presumption of abuse. 11 U.S.C. § 707(b)(7). Median incomes are defined as the median state income figures that are "both calculated and reported by the Bureau of the Census in the then most recent year." 11 U.S.C. § 109(39A) (2006).

67. 11 U.S.C. § 707(b). Section 707(b)(2)(A)(i) of the Bankruptcy Code states:

> [T]he court shall presume abuse if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) [statutorily-defined expenses], and multiplied by 60 is not the lesser of-(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or (II) $10,950.

or any party in interest, may dismiss the debtor's case upon notice and a hearing.[68] Alternatively, with the debtor's consent, the case may be converted to a case under chapter 11 or 13 of the Bankruptcy Code.[69] The only way for the debtor to rebut the presumption of abuse is to do so under § 707(b)(2)(B).[70]

For the purposes of this Note, it is necessary to understand the extent of allowed expenses under § 707(b). Section 707(b)(2)(A)(ii)(I) provides that "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service . . . ." The National Standards cover the general categories of food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous expenses.[71] Local Standards provide allowances for transportation and housing/utility expenses.[72] The statute also references "Other Necessary Expenses issued by the Internal Revenue Service."[73] Unlike the National and Local Standards, which establish specific expense allowances, "Necessary Expenses" set no such specific allowance.[74] The Internal Revenue Service's (IRS) Internal Revenue Manual discusses eighteen categories of "Other Necessary Expenses."[75] The thirteenth category provided is "student loans."[76] However, the list of expenses is limited by a subsequent sentence claiming that "[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts."[77] This serves to eliminate the ability of a debtor to include student loans as a "necessary expense."

Section 707(b)(2)(A)(ii) also specifically references six expenses that are permitted in addition to the allowed IRS deductions.[78] These expenses include deductions for the following: health insurance, disability insurance, and health savings accounts; safety from family violence; food and clothing; continued contributions to the care of household or family members; expenses for minor children to attend elementary or secondary school; and home energy costs in addition to those allowed by the IRS.[79] In addition, § 707(b)(1) allows debtors to include charitable contributions as an expense deduction for purposes of the means test.[80] From the face of the statute, it appears that Congress gave fairly detailed,

68. Id. § 707(b)(1).
69. *Id.*
70. Wedoff, *supra* note 64, at 242.
71. Wedoff, *supra* note 64, at 254.
72. *Id.*
73. 11 U.S.C. § 707(b)(2)(A)(ii)(I).
74. Wedoff, *supra* note 64, at 262.
75. IRM § 5.15.1.10¶3.
76. *Id.*
77. 11 U.S.C. § 707(b)(2)(A)(ii)(I).
78. Wedoff, *supra* note 64, at 264.
79. *Id.* at 264–70.
80. 11 U.S.C. § 707(b)(1). The relevant language states:

> In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of

although not exhaustive, consideration as to what it would allow as a valid expense under § 707(b). Congress clearly provided no express provision for the treatment of student loan debt in the means test calculation.

B. Early Empirical Results of Means Testing

The § 707(b) means test has been heavily criticized by bankruptcy judges, attorneys, and academics since the passage of BAPCPA.[81] Some have suggested that the definitions of income and expenses are complicated and arbitrary, and will likely only lead to increased litigation as opposed to providing a good measure of a debtor's ability to repay a significant portion of her debt.[82] While means testing was intended to be an objective and somewhat mechanical tool for weeding out bankruptcy abusers,[83] it still leaves considerable room for judicial discretion.[84] This is plainly evidenced by the need for a judicial ruling to determine whether or not student loans qualify as a special circumstance for the purposes of including them as an expense in the means test calculation.

It is worth noting, however, that means testing (despite its unpopularity) is unlikely to affect a substantial portion of chapter 7 filers. Only debtors who have above-median incomes are subject to a means test presumption of abuse.[85] Most debtors have incomes below the median and, thus, will be within the safe harbor.[86] A study released in 2007 notes that more than 90% of chapter 7 debtors and 73% of chapter 13 debtors are below-median income.[87] Despite these numbers, BAPCPA appears to have somewhat changed the landscape of bankruptcy filing. By December 2006, chapter 13 cases accounted for nearly 40% of all filings, up from fewer than 30% prior to BAPCPA.[88] However, that number had declined somewhat to 33% by the end of 2008.[89] A review of debtors who filed from October 17, 2005, through the end of September 2006, revealed that 94% were below median income.[90] Of the remaining 6% above the median income, 10% of

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> "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

Id.

81. *See, e.g.*, David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223 (2007); Sommer, *supra* note 60, at 191–92.

82. Wedoff, *supra* note 64, at 281.

83. "Under the new section 707(b), the former subjective 'substantial abuse' standard is replaced by a more objective means test formula to determine whether a case is 'presumed abusive.'" Clifford H. White III, Dep't of Justice, *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act* (2006), *available at* http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony061206.pdf.

84. *Id.*

85. 11. U.S.C. § 707(b)(7) (2006).

86. Wedoff, *supra* note 64, at 278–79.

87. White, *Making Bankruptcy Reform Work*, *supra* note 31.

88. White, *Oversight*, *supra* note 83.

89. *Id.*

90. *Id.*

those were presumed "abusive."[91] Despite the presumption of abuse only arising for 0.6% of all filers, the Director of the Executive Office for United States Trustees claimed that this data suggested that the means test "is a useful screening device to identify abusive cases."[92] If the small sample of data were somewhat representative of the actual numbers, means testing would have given rise to a presumption of abuse for only around 5000 debtors in 2007.[93]

C. Special Circumstances

As previously noted, a presumption of abuse that arises as a result of means testing can be rebutted through the provisions of § 707(b)(2)(B). This section of the Bankruptcy Code allows debtors to document and itemize additional expenses or adjustments to current monthly income sufficient to bring the debtor's disposable income below the threshold at which a presumption of abuse arises.[94] A debtor must demonstrate special circumstances to prompt such adjustments.[95] The relevant part states:

> In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustment to current monthly income for which there is no reasonable alternative.[96]

Section 707(b)(2)(B) also contains several procedural requirements for establishing special circumstances.[97]

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91. *Id.*
92. *Id.*
93. *Bankruptcies Jump 40 Percent in 2007*, CNNMONEY.COM, Jan. 1, 2008, http://money.cnn.com/2008/01/03/news/economy/consumer_bankruptcy/index.htm (noting that bankruptcy filings in 2007 totaled 801,840. 801,840 * 0.6% = 4,811).
94. Wedoff, *supra* note 64, at 242.
95. 11 U.S.C. § 707(b)(2)(B)(i) (2006).
96. *Id.*
97. 11 U.S.C. § 707(b)(2)(B) provides:

> (ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide –
>
> (I) documentation for such expense or adjustment to income; and
>
> (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.
>
> (iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustment to income are required.
>
> (iv) The presumption of abuse may only be rebutted if the additional expenses or adjustment to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii),

1. Legislative History

The ability to demonstrate special circumstances may have been added to the Code to protect debtors from a rigid application of the means test.[98] The legislative history reveals that Congress intended the special circumstances provision to establish a "significant, meaningful threshold."[99] The Committee Report noted that "special circumstances adjustments must not be used as a convenient way for debtors to choose a more expensive lifestyle."[100] Under the provision, only financial considerations could inform a debtor's ability to overcome the presumption of abuse.[101] The drafters intended the provision to be reserved for debtors whose special circumstances placed them in "dire need of chapter 7 relief."[102]

The legislative history of the statute's two examples of special circumstances, call to military service and serious medical conditions, also deserves mention. The original language of § 707(b)(2)(B) did not include examples of allowed special circumstances. Senator Jeff Sessions proposed them in a 2005 amendment to the bankruptcy reform legislation.[103] His comments reveal that the examples were not meant to be exhaustive or to limit judicial discretion in defining special circumstances.[104] Rather, Senator Sessions proposed the examples to ensure that "those incapable of paying back their debt due to military service or a serious medical condition may not be required to do so."[105] As discussed in Part III, the inclusion of Senator Session's list has had the unintended consequence of providing some courts with a tool to limit the scope of allowed special circumstances.

2. Courts and Commentators

Courts have struggled to define what constitutes a special circumstance.[106] Some courts have found rebutting the presumption of abuse through special circumstances to be a difficult task.[107] One court noted that,

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(iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of –

(I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or

(II) $10,000.

98. S. REP. NO. 106-49, at 6 (1999). The Senate Judiciary Committee made a conscious decision to choose the *special circumstances* standard over the *extraordinary circumstances* standard included in the House of Representative's version of bankruptcy reform. *Id.* at 6–8.

99. *Id.* at 7.

100. *Id.*

101. *Id.*

102. *Id.*

103. H.R. REP. NO. 109-31(I), at 9 (2005).

104. 151 CONG. REC. S1834-01, S1845-46 (2005) (statement of Sen. Sessions).

105. *Id.*

106. *In re* Cribbs, 387 B.R. 324, 329 (Bankr. S.D. Ga. 2008).

107. *See, e.g.*, *In re* Harr, 360 B.R. 759, 760 (Bankr. N.D. Ohio 2007); *In re* Martin, 371 B.R. 347, 353 (Bankr. C.D. Ill. 2007); *In re* Sparks, 360 B.R. 224, 230 (Bankr.

although § 707(b) allows the abuse presumption to be rebutted, it set the bar "extremely high, placing it effectively off limits for most debtors."[108] Another judge noted that special circumstances must be construed as "uncommon, unusual, exceptional, distinct, peculiar, particular, additional or extra conditions or facts."[109] Courts have tried to define the standard through the use of shorthand words or phrases, such as "unanticipated" and "truly unavoidable,"[110] or "beyond the reasonable control of the debtor."[111] It seems doubtful that the expense of student loan repayment would suffice under these interpretations. Another commentator provides additional examples of special circumstances: high commuting costs, security costs in a dangerous neighborhood, and the cost of infant formula or diapers.[112] These examples seem much more attainable to the average debtor. However, the commentator appears to qualify the examples, noting that "any legitimate expense that is out of the ordinary for an average family" could be considered.[113] The prevalence of student loan debt in this country would most likely disqualify the expense from being considered "out of the ordinary for an average family."

Many courts, however, have not set such a high bar for a debtor to prove special circumstances. Judge Lundin of the Middle District of Tennessee even noted that "special circumstances is not as harshly worded as barriers and exceptions elsewhere in the Bankruptcy Code," such as the "undue hardship" barrier for discharge of student loans under 11 U.S.C. § 523(a)(8).[114] Another court noted that the term "special circumstances" is not limited to circumstances outside the debtor's control.[115] An agreeing court claimed that if "Congress intended to place such a restriction on the nature of special circumstances it envisioned, Congress knows well how to construct appropriate language."[116] Further demonstrating the inconsistent approaches to an appropriate standard, one court claimed that "courts are given broad discretion in making a determination if a particular case presents 'special circumstances.'"[117] Despite the amalgamation of special circumstances standards, bankruptcy courts appear to agree that a determination of the existence of special circumstances must be made on a case-by-case basis, particularly because of the fact-specific nature of the issue.[118]

E.D. Tex. 2006).

108. *Harr*, 360 B.R. at 760.

109. *Martin*, 371 B.R. at 353.

110. *Sparks*, 360 B.R. at 230.

111. *In re* Tuss, 360 B.R. 684, 701 (Bankr. D. Mont. 2007).

112. 6 COLLIER ON BANKRUPTCY ¶ 707.05[2][d] (Alan N. Resnick et al. eds., 15th ed. rev. 2006).

113. *Id.*

114. Keith M. Lundin, *Chapter 13 Bankruptcy*, 3d. ed. § 478.1 (2000 & Supp. 2007).

115. *In re* Tamez, No. 07-60047, 2007 WL 2329805 (Bankr. W.D. Tex. Aug. 13, 2007).

116. *In re* Graham, 363 B.R. 844, 850–51 (Bankr. S.D. Ohio 2007).

117. *In re* Templeton, 365 B.R. 213, 216 (W.D. Okla. 2007) (citing *In re* Tranmer, 355 B.R. 234 (Bankr. D. Mont. 2006)).

118. *See In re* Turner, 376 B.R. 370, 378 (Bankr. D.N.H. 2007); *In re* Knight, 370 B.R. 429, 437 (Bankr. N.D. Ga. 2007).

The special circumstances exception has become yet another example of judicial discretion seeping into the post-BAPCPA world. In light of the vague statutory directive, judges have had to create an appropriate standard. A brief look at various special circumstances cases outside the topic of student debt repayment will provide a useful analogy. In *Eisen v. Thompson*, the court examined whether a loan taken out against a 401(k) plan in order for a family to deal with credit card debt could be a special circumstance under § 707(b).[119] The court held that such loan repayments are neither extraordinary, nor rare.[120] The court found that individuals take out such loans for many different reasons and that, without more, such a situation was too common to be a special circumstance.[121] In another case involving 401(k) loans, the court suggested that a special circumstance is a "life circumstance that directly and unavoidably affect[s] one's earning capacity or give[s] rise to necessary, additional expenses."[122] However, another court found retirement plan loans consistent with bankruptcy policy if the loans were taken out in the debtor's attempt to find a non-bankruptcy solution to his financial problems.[123]

One court allowed a debtor to adjust monthly expenses to account for the replacement of a furnace and the repair of a rotted deck because such repairs were fundamental to the debtor's safety and the safety of the debtor's family.[124] The Eighth Circuit Bankruptcy Appellate Panel claimed that demonstrating to the court that a debtor will soon need a new car may constitute special circumstances.[125] Under certain conditions, maintaining separate households may constitute special circumstances. At least one case held that maintaining two separate households due to employment issues was a special circumstance sufficient to rebut the presumption of abuse.[126] The maintenance of separate households because of marital separation has also been considered a special circumstance that justified additional expenses.[127] In dicta, the *In re Crego* court speculated that lost jobs, domestic relations problems, children in trouble, natural disasters, and car wrecks may qualify as special circumstances.[128]

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119. 370 B.R. 762, 773 (N.D. Ohio 2007).

120. *Id.*

121. *Id.*

122. *In re* Smith, 388 B.R. 885, 888 (Bankr. C.D. Ill. 2008).

123. *In re* Cribbs, 387 B.R. 324, 330 (Bankr. S.D. Ga. 2008) (noting that the repayment of the 401(k) loan was voluntary but non-manipulative).

124. *In re* Sullivan, 370 B.R. 314, 322 (Bankr. D. Mont. 2007).

125. *In re* Wilson, 383 B.R. 729, 734 (8th Cir. B.A.P. 2008).

126. *See In re* Graham, 363 B.R. 844 (Bankr. S.D. Ohio 2007).

127. *See In re* Crego, 387 B.R. 225 (Bankr. E.D. Wis. 2008) (finding special circumstances where debtors were undergoing a divorce and maintained separate households because there was no reasonable alternative but to incur the additional expenses for the welfare of the debtor's family); *In re* Crabtree, No. 07-60543-12, 2007 WL 3024030 (Bankr. D. Mont. 2007) (finding special circumstances where debtors maintained separate homes because of irreconcilable marital differences, but could not afford to file for divorce); *In re* Armstrong, No. 06-31414, 2007 WL 1544591 (Bankr. N.D. Ohio 2007) (finding that marital separation "presents the high probability of having every bit as devastating impact on family life and finances as serious illness and military deployment").

128. *Crego*, 387 B.R. at 228.

Another court did not find special circumstances that warranted including the expenses of additional property taxes and insurance on the debtors' residence where they voluntarily increased their mortgage expense by taking out a second mortgage.[129] Likewise, voluntary actions such as decreasing work hours in order to spend more time with children or getting married, without more, has been held not to be within the definition of special circumstances.[130] Courts have generally not found expenses related to adult children to constitute special circumstances, absent findings that the adult child was ill or disabled.[131] Courts typically have not allowed debtor parents to include their child's college expenses, including debt service on student loans, as a condition that constitutes a special circumstance.[132] However, even this line of cases has been highly fact-oriented. One court found that special circumstances existed where a debtor mother was a co-signor on her son's student loan, the son had stopped making payments, and she was left with no reasonable alternative but to pay the debt.[133]

In sum, a survey of case law construing the § 707(b)(2)(B) special circumstances language provides little guidance on the issue of whether student loan repayment qualifies as a special circumstance. In fact, the cases suggest that bankruptcy courts are inconsistent when attempting to provide an appropriate standard in any context. This will likely continue until more of these cases reach Bankruptcy Appellate Panels or Circuit Courts. While commentators have noted that one of the purposes of BAPCPA was to eliminate judicial discretion,[134] the above cases show that Congress gave courts enough undefined phrases to ensure that judicial discretion is still the order of the day. Naturally, the increased litigation only serves to add to the cost of bankruptcy for those who require it.

III. SPECIAL CIRCUMSTANCES CASE LAW

Recently, potential chapter 7 debtors have argued that student loan debt repayment should qualify as a special circumstance. Bankruptcy courts have been divided on this issue.[135] Courts that have rejected student loan repayment as a special circumstance have relied on the statutory examples, legislative history, or an interpretation of a student loan as merely a means to secure a more advantageous income.[136] Courts holding that student loans may constitute special circumstances have relied on fairness to the debtor, the lack of any reasonable alternative to payment of the student loans, the uniqueness of student loan debt,

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129. *In re* O'Connor, No. 08-60641-13, 2008 WL 4516374, at *11–12 (Bankr. D. Mont. 2008).

130. *In re* Hernandez, No. 08-31588, 2008 WL 5441279, at *5 (Bankr. N.D. Ohio 2008).

131. *See In re* Patterson, 392 B.R. 497, 506 (Bankr. S.D. Fla. 2008) (noting that Congress already contemplated the expense of caring for ill or disabled adult children by allowing for continued contributions for the care of family members).

132. *Id.*

133. *In re* Haman, 366 B.R. 307, 313 (Bankr. D. Del. 2007).

134. *See, e.g.*, Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471 (2007).

135. *See In re* Vaccariello, 375 B.R. 809 (Bankr. N.D. Ohio 2007); *In re* Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007).

136. *Id.*

and the ubiquity of student loans.[137] To date, no appellate decisions have resolved this issue.

A. Cases Holding that Student Loan Payments Do Not Constitute Special Circumstances

Legislative history reveals that the statutorily provided examples were not meant to be exhaustive or to limit judicial discretion.[138] But, some courts have seized on them to deny debtors an opportunity to rebut the presumption of abuse. In *In re Lightsey*, the court focused on a statement made by Senator Orin Hatch to find that student loan debt did not meet the special circumstances threshold.[139] Senator Hatch stated that the means test "includes a special circumstances safety valve that allows debtors to adjust their income or expenditures based on *unforeseen circumstances* such as military activation and deployment or unexpected and catastrophic medical conditions."[140] The court applied the doctrine of *ejusdem generis* ("of the same kind"), interpreting statutory examples as typical of the general category covered.[141] Without much discussion, the *Lightsey* court concluded that the examples provided by the statute did not match the debtor's circumstance of dealing with student loan debt.[142]

Without focusing on the legislative history, a trustee in another case argued that student loans, given their prevalence among American consumers, are not of the "same nature" as a serious medical condition or active military service.[143] However, in refusing to lay down a per se rule against student loans as a special circumstance, one court noted that student loan payments were not so dissimilar to military service and serious medical conditions that such payments could never qualify as a special circumstance.[144]

One court found a distinct lack of congressional intent based on a holistic reading of § 707(b).[145] As noted previously, § 707(b)(2)(A)(ii)(I) states that, "notwithstanding any other provisions of this clause, the monthly expenses of the debtor shall not include any payments for debts."[146] If this language applies to all of § 707, or even just § 707(b), the court reasoned that it conveys "clear congressional intent that 'payments for debts' are categorically distinct from those living expenses whose extraordinary nature may qualify as a special circumstance."[147] Similarly, Eugene Wedoff explained that § 707(b)(2)(A)(ii)(I)

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137. *See Knight*, 370 B.R. 429; *In re* Templeton, 365 B.R. 213 (Bankr. W.D. Okla 2007); *In re* Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007).

138. 151 CONG. REC. S1834-01, S1845-46 (2005) (statement of Sen. Sessions).

139. 374 B.R. 377, 382 (citing 151 CONG. REC. S1787 (statement of Sen. Hatch)).

140. 151 CONG. REC. S1787 (2005) (statement of Sen. Hatch) (emphasis added).

141. *Lightsey*, 374 B.R. at 383.

142. *Id.*

143. *In re* Zahringer, No. 07-30217, 2008 WL 2245864, at *1 (Bankr. E.D. Wis. 2008) (ruling in the trustee's favor, but without discussing the merits of the trustee's argument about the statutorily provided examples).

144. *In re* Champagne, 389 B.R. 191, 202 (Bankr. D. Kan. 2008).

145. *Lightsey*, 374 B.R. at 383.

146. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

147. *Lightsey*, 374 B.R. at 383.

serves to eliminate student loans from the "other necessary expenses" category in the IRS's Internal Revenue Manual.[148] The statute eliminates debt expenses from this part of the means test in order to deal with them in subsequent paragraphs, namely § 707(b)(2)(A)(iii) and (iv). These paragraphs create a means test deduction for secured claims and priority debt, respectively.[149] Student loans, however, do not fit into either category. Given these circumstances, the *Lightsey* court's argument appears well-founded. Congress effectively eliminated student loan debt repayment as an expense deduction through § 707(b)(2)(A)(ii)(I) and never expressly addressed it in subsequent paragraphs.

However, not all courts find § 707(b)(2)(A)(ii)(I)'s "payment of debt" exception controlling on the issue of student loan repayment. The court in *In re Knight* examined § 707(b)(2)(A) in isolation and determined that the clear language of the statute precluded student loan payments from being considered a *reasonably necessary* expenditure under § 707(b)(2)(A).[150] Although the court found it improper to include student loan repayment as an expense under § 707(b)(2)(A), it went on to rule on the issue of whether student loan repayment constituted a special circumstance under § 707(b)(2)(B) and determined that it did.[151]

Another line of cases contends that the examples given by § 707(b)(2)(B) do not identify specific expenses, but rather circumstances that give rise to such expenses.[152] Using this logic, the circumstances that lead to incurring loan debt must be special in order to justify the inclusion of the additional expense item.[153] The two events provided by the statute, call to duty and serious medical conditions, seemingly present two events that are outside the control of a debtor.[154] Applying this analysis, the court in *In re Pageau* reasoned that educational loans that were necessitated by permanent injury, disability, or an employer closing, therefore causing a debtor to require education or training, might constitute a special circumstance.[155] However, the court could not be convinced that a student loan incurred in the ordinary course of higher education should be given the same consideration.[156]

In determining that student loans are not special circumstances, some courts reason that they are generally incurred to secure a "more advantageous income" or to enter a different vocation.[157] Other courts argue that the wide use of student loans among the American population makes them anything but rare or unusual.[158] Opposing courts tend to see the ubiquity of student loans as a reason to include them in the expense deductions of the means test calculation, often noting

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148. Wedoff, *supra* note 64, at 261–62.
149. 11 U.S.C. § 707(b)(2)(A)(iii)-(iv).
150. 370 B.R. 429, 436–37 (Bankr. N.D. Ga. 2007).
151. *Id.* at 437.
152. *In re* Turner, 376 B.R. 370, 378 (Bankr. D.N.H. 2007).
153. Eisen v. Thompson, 370 B.R. 762, 773 (N.D. Ohio 2007).
154. *See In re* Pageau, 383 B.R. 221, 228 (Bankr. D.N.H. 2008).
155. *Id.*
156. *Id.*
157. *Id.*
158. *In re* Vaccariello, 375 B.R. 809, 816 (Bankr. N.D. Ohio 2007).

the difficulty that student loan debtors face in having their loans discharged.[159] However, the *Lightsey* court claimed that if Congress intended non-dischargeability to be the standard for special circumstances "it would have said so."[160] *Lightsey* also found possible far-reaching implications for courts ruling that non-dischargeable student loan payments constitute a special circumstance. *Lightsey* noted that such courts[161] would have to apply the same standard to every other non-dischargeable obligation, "from long-term auto lease payments that exceed the IRS standards to debts arising not only from student loans but also from fraud, embezzlement, and the like."[162] The *Pageau* court even noted that there is no suggestion in § 707(b)(2)(B) that courts have been delegated the power to distinguish between "good" non-dischargeable debt and "bad" non-dischargeable debt, finding that one constituted special circumstances while the other did not.[163] This discussion, however, appears to exaggerate the likely implications of the *In re Knight* decision and other similar decisions. Non-dischargeability was merely one factor in the *Knight* decision.[164] The special circumstances provision of § 707(b) is largely discretionary. Courts uniformly evaluate special circumstances arguments on a case-by-case basis.[165]

The *Lightsey* opinion directly confronted another argument relied upon by opposing courts. Opposing courts note that failure to include student loans as a deductible expense could force some debtors into a chapter 13 plan that would have little likelihood of succeeding.[166] The inability to have other debts discharged in a chapter 7 plan could cause the debtor to fall further behind on his student loan payments, causing such a debtor to accrue even more interest and bringing about long-term economic harm.[167] *Lightsey* claimed that these fears are misplaced. The opinion noted that student loan repayments are authorized by Bankruptcy Code provisions that permit debtors to maintain regular student loan payments as part of a chapter 13 plan.[168] However, if a debtor's actual income and expenses should have qualified him as a chapter 7 debtor, then any chapter 13 repayment would likely yield no greater payment to unsecured creditors than a chapter 7 liquidation. The *Lightsey* court recognized this point[169] but claimed that such a decision should be made based on congressional policy considerations.[170] Through the creation of BAPCPA, Congress intended to steer chapter 7 debtors into chapter 13 repayment

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159. *See In re* Knight, 370 B.R. 429, 438 (Bankr. N.D. Ga. 2007).

160. *In re* Lightsey, 374 B.R. 377, 383 (Bankr. S.D. Ga. 2007); *see also In re* Pageau, 383 B.R. 221, 228 (Bankr. D.N.H. 2008).

161. The *Lightsey* court specifically cites *Knight* prior to this discussion. 374 B.R. at 382.

162. *Lightsey*, 374 B.R. at 383

163. *Pageau*, 383 B.R. at 229.

164. *See Knight*, 370 B.R. 429.

165. *See In re* Turner, 376 B.R. 370, 378 (Bankr. D.N.H. 2007); *Knight*, 370 B.R. at 437.

166. *See Knight*, 370 B.R. at 439.

167. *Id.*

168. *In re* Lightsey, 374 B.R. 377, 382 (Bankr. S.D. Ga. 2007) (citing 11 U.S.C. § 1322(b)(5) (2006)).

169. *Id.*

170 *Id.*

plans when possible. Within a chapter 13 repayment plan, the possibility exists that a modification could occur during the lifetime of the plan that would increase the pay-out to creditors.[171]

The *Lightsey* court recognized that the result of its decision, and similar decisions, might cause economic strain for the debtor.[172] However, the court reasoned that such implications were part of the bargain made when the debtor signed the student loan note.[173] In the court's view, the § 707(b) means test is "mechanical and leaves little discretion to the courts in adjusting those calculations, even in a case where a debtor appears to be using the bankruptcy process for a legitimate fresh start."[174]

B. Cases Holding that Student Loan Payments Qualify as Special Circumstances

In addressing the issue of student loan debt as a special circumstance, most courts have begun their inquiry by assessing the plain language of § 707(b)(2)(B)(i).[175] The statute states that special circumstances must justify additional expenses or adjustments to income for which there is no reasonable alternative.[176] In *In re Haman*, the debtor argued that because student loan debt was non-dischargeable, it should be considered a special circumstance for which there is no reasonable alternative.[177] In reviewing § 707(b)(2)(B)(i), the *Haman* court claimed that the special circumstances exception is not a tool that allows debtors to justify additional discretionary expenditures.[178] Rather, the standard must be strictly construed to allow only those expenses unavoidable to the debtor.[179] In this way, courts can avoid frustrating BAPCPA's attempt to prevent improper discretionary spending on the part of higher income debtors, which in turn allows for increased distributions to unsecured creditors.[180] After setting forth this standard, the *Haman* court found that repayment of a student loan was not improper discretionary spending under the facts of the case.[181] Furthermore, because the debtor could not possibly pay the obligation in full, no reasonable alternative existed.[182]

Other courts have also found the *no reasonable alternative* language to be controlling. In *In re Templeton*, the Bankruptcy Court for the Western District of

171. *Id.*
172. *Id.* at 383.
173. *Id.* at 382.
174. *Id.*
175. *See, e.g.*, *In re* Haman, 366 B.R. 307, 313 (Bankr. D. Del. 2007).
176. 11 U.S.C. § 707(b)(2)(B)(i) (2006).
177. *Haman*, 366 B.R. at 310.
178. *Id.* at 314.
179. *Id.*
180. *Id.*
181. *Id.* at 318. In some regards, the *Haman* case is distinct. The debtor was a co-signor on her son's student loan. He stopped making payments when he developed a psychological disorder, leaving the debtor with the burden of repayment. *Id.* at 310. The court's analysis did not rely on these factors, but rather focused squarely on the question of whether there was a reasonable alternative to repayment. *Id.* at 315.
182. *Id.*

Oklahoma cited factors that point to a finding of no reasonable alternative.[183] In that case, the debtor's student loans were non-dischargeable, ineligible for consolidation, and ineligible for deferment.[184] The *Haman* court made no mention of attempts at deferment or consolidation,[185] but did find the debtor's inability to meet the § 523(a)(8) undue hardship standard to be a factor that led to a finding of no reasonable alternative.[186] At least one court has found an examination of such conditions to be essential in the special circumstances calculus.[187]

In finding that no reasonable alternative to repayment existed, both the *Haman* and *Templeton* courts analogized their facts to those in *In re Thompson*.[188] The *In re Thompson* court held that special circumstances exist where debtors are required to make payments on a loan secured by their 401(k) account.[189] Although other courts have reached similar holdings,[190] *In re Thompson* itself has been overturned and is no longer good law.[191]

Courts holding that student loan repayment can be a special circumstance have rejected arguments from opposing courts that judicial discretion is limited by the statutory examples of serious medical conditions or calls to active duty. Without even discussing the legislative history, the *Haman* court simply asserted that Congress's use of the words "such as" to introduce the examples indicated that Congress was providing a non-exhaustive list and not constricting application of the statute.[192] The *Haman* court found it questionable whether the examples were even indicative of the type of condition that could be considered a special circumstance.[193] It noted that neither a call to active duty nor a serious medical condition is necessarily something beyond a debtor's control.[194] Finally, the court examined Senator Sessions' intent behind providing the two statutory examples.[195] The court determined that they were not limiting and did not require that special circumstances be of an involuntary nature.[196]

The *Knight* court examined the nature of higher education and student

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183. 365 B.R. 213, 216 (Bankr. W.D. Okla. 2007).

184. *Id.*

185. *See Haman*, 366 B.R. at 307.

186. *Id.*

187. *In re* Wagner, No. BK07-42262, 2008 WL 706616, at *3 (Bankr. D. Neb. 2008) ("Debtors state that the loans are not eligible for consolidation or deferment, but provide no evidence that they have actually tried to take advantage of any such alternatives and have been declined.").

188. *Haman*, 366 B.R. at 314; *In re Templeton*, 365 B.R. 213, 216 (W.D. Okla. 2007).

189. *In re* Thompson, 350 B.R. 770, 777–78 (Bankr. N.D. Ohio 2006).

190. *In re* Cribbs, 387 B.R. 324, 330 (Bankr. S.D. Ga. 2008).

191. Eisen v. Thompson, 370 B.R. 762, 773 (N.D. Ohio 2007).

192. *Haman*, 366 B.R. at 313.

193. *Id.* at 313–14.

194. *Id.* (citing *In re* Thompson, 350 B.R. 770, 777 (Bankr. N.D. Ohio 2006) ("The serious health condition could stem from a self-inflicted injury, and an individual called to active duty could have voluntarily enlisted as a reservist.")).

195. *See* discussion *supra* Part II.C.1.

196. *Haman*, 366 B.R. at 314.

loan debt itself.[197] The court claimed that the cost of higher education is beyond the means of most American families without some form of financial assistance.[198] The U.S. government often backs and guarantees such assistance as a matter of public policy because improving an individual's education helps improve society as a whole.[199] Since students often leave universities with tens of thousands of dollars worth of debt, it is not uncommon for a student to make payments on student loan debt service for periods ranging from ten to thirty years.[200] Loan terms of up to thirty years means that more above-median-income debtors will have unpaid student loan debt. This suggests that the lack of treatment of student loans in means testing is likely to be a growing problem. Lastly, debtors cannot discharge student loan debt in bankruptcy proceedings unless they can establish the high standard of "undue hardship" under § 523(a)(8).[201] In the court's opinion, these factors make student loan debt "unique" and worthy of consideration as a *special circumstance* where debtors have no reasonable alternative for avoiding "unfair economic harm."[202]

IV. POLICY CONSIDERATIONS

A few key policy questions merit special consideration. First, during a chapter 7 proceeding, is it appropriate to consider a hypothetical chapter 13 plan under the special circumstances analysis of § 707(b)(2)? Second, if a student loan debtor fails to rebut a § 707(b)(2) presumption of abuse, what are the possible ramifications of channeling such a debtor into a chapter 13 plan? Third, are there better alternatives than bankruptcy proceedings for above-median-income debtors with considerable student loan debt?

A. Analyzing Hypothetical Chapter 13 Plans In Chapter 7

Just as they disagree on the question of whether student loan repayment constitutes a special circumstance, courts also disagree about whether it is proper to consider what would happen to a debtor in a hypothetical chapter 13 proceeding.[203] The general argument is that a debtor who only finds himself in chapter 13 because his student loans are not included in the means test has no genuine ability to pay back a substantial portion of his debts. Therefore, any workable plan would only provide a minimal pro rata distribution to creditors and may even force a debtor to reduce student loan payments, in turn leading to more accrued interest. Some debtors have even argued that the likelihood that there would be no, or little, payment to unsecured creditors in a chapter 13 plan was, in

197. *In re* Knight, 370 B.R. 429, 438–39 (Bankr. N.D. Ga. 2007).

198. *Id.* at 438.

199. *Id.* In the *In re Pageau* case, similar arguments were also asserted by the debtor. They were subsequently rejected by the court. 383 B.R. 221, 226–27 (Bankr. D.N.H. 2008).

200. *Knight*, 370 B.R. at 438–39.

201. *Id.* at 439.

202. *Id.*

203. *See, e.g.*, *In re* Delbecq, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007); *Pageau*, 383 B.R. at 229–30.

and of itself, a special circumstance.[204] Such arguments appear to be outside the norm; most debtors simply bring up hypothetical chapter 13 plans as one consideration in the special circumstances calculus.

As discussed in Part III, the *Knight* court found consideration of a hypothetical chapter 13 plan to be proper.[205] The court considered that repayment of student loans in a chapter 13 plan would likely occur at less than the contractual payment.[206] This would cause the debtor to accrue additional interest during the typical five-year repayment plan, which would possibly subject the debtor to garnishment or a requirement to pay the accrued interest in a lump sum upon completion of the plan.[207] If, due to the debtor's need to pay down other unsecured debt in a chapter 13 plan, the debtor defaulted on his student loans, this would lead to even more severe economic consequences.[208] Where a debtor had a legitimate inability to reduce expenses or increase income, and the means test did not accurately reflect the debtor's ability to repay due to the omission of student loan expenses, a chapter 13 plan may be set up for failure.[209] The *Knight* court found that such a result would be too harsh, especially considering that student loan debts are most often legitimately incurred and even encouraged as a matter of public policy.[210] Another court simply stated, "If Chapter 13 is the required alternative to Chapter 7, it should be a remedy that works."[211]

Alternatively, any chapter 13 plan able to succeed under such circumstances would most likely provide very little to other unsecured creditors. The *In re Delbecq* case addressed this situation.[212] The court reasoned that if the debtor in that case was forced into chapter 13, her general unsecured creditors would likely not receive a distribution under any plan.[213] The court further noted that the administrative costs associated with chapter 13 would make payments on a student loan during the life of the plan less than what the debtor paid prior to entering bankruptcy.[214] While no section of the Bankruptcy Code prohibits a debtor from submitting a Chapter 13 plan that provides little or nothing to unsecured creditors, the *Delbecq* court determined that it made no logical sense to force the debtor into such a plan simply because that debtor could not rebut

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204. *In re* Touter, 402 B.R. 903, 907 (Bankr M.D. Fla. 2009); *In re* Johns, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006) ("The potential payback of zero percent to unsecured creditors in a Chapter 13 is not a special circumstance contemplated under § 707(b)(2)(B).").

205. *Knight*, 370 B.R. at 439.

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.* at 440 ("The price of chapter 13 relief should not be the creation of yet another default situation and unavoidable financial distress at the end of the chapter 13 case on account of debts legitimately incurred and in fact encouraged as a matter of public policy.").

211. *In re* Webb, 370 B.R. 418, 425 (Bankr. N.D. Ga. 2007).

212. *In re* Delbecq, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007).

213. *Id.*

214. *Id.*

§ 707(b)(2)'s presumption of abuse.[215]

Other courts have shied away from considering a chapter 13 alternative when dealing with chapter 7 special circumstances analysis. The *Pageau* court claimed that such arguments would require a court to consider hypothetical post-petition events and analyze a chapter 13 plan that had yet to be filed.[216] The *Pageau* court believed that consideration of such hypothetical situations would strip § 707(b)(2)(A) of its mechanical application.[217] Such an outcome, in the court's opinion, would be contrary to congressional intent as it applies to § 707(b).[218] The *Haman* court reached a similar conclusion.[219] The court observed that means test calculations are based on the debtor's historic income and expense figures.[220] As such, Congress did not intend the means test to produce the most accurate prediction of a debtor's ability to fund a chapter 13 plan.[221]

Despite the *Pageau* court's determination that evaluating a hypothetical chapter 13 plan is not proper as part of the special circumstances analysis, the court left open the possibility that such an exercise could occur elsewhere in the § 707(b)(2)(B) framework. For instance, it asserted that a debtor may consider completing a chapter 13 analysis and arguing that it is relevant to the "separate 'reasonable alternative' analysis required by § 707(b)(2)(B)(i)."[222] However, the existence of a "separate 'reasonable alternative' analysis" under the applicable statute is questionable. Section 707(b)(2)(B)(i) is, itself, the special circumstances paragraph. Those special circumstances must cause a reduction in income or increase in expenses for which there is no *reasonable alternative*. Reading the reasonable alternative language in isolation from the special circumstances language that is contained in the very same clause is a questionable parsing of statutory language.[223]

The *Haman* court similarly found that hypothetical chapter 13 plans could not be considered under § 707(b)(2) analysis, noting that Congress' intention in adding the means test to § 707(b)(2) was to limit judicial discretion in determining

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215. *Id.* at 759–60.

216. *In re* Pageau, 383 B.R. 221, 22930 (Bankr. D.N.H. 2008).

217. *Id.* at 230 (citing *In re* Ries, 377 B.R. 777, 783 (Bankr. D.N.H. 2007) (explaining that the mechanical test of § 707(b)(2)(A) does not allow for consideration of postpetition events)).

218. *Id.* at 229–30 (citing *In re* Hartwick, 359 B.R. 16, 21 (Bankr. D.N.H. 2007) (concluding that courts must examine the circumstances that exist on the petition date in applying the means test)).

219. *In re* Haman, 366 B.R. 307, 316–17 (Bankr. D. Del. 2007).

220. *Id.* at 316.

221. *Id.* at 316–17 (citing *In re* Miller, 361 B.R. 224, 234–35 (Bankr. N.D. Ala. 2007) (noting that a major objective of BAPCPA was to limit the scope of judicial discretion)).

222. *Pageau*, 383 B.R. at 230 (citing *In re* Lightsey, 347 B.R. 377, 381 (Bankr. S.D. Ga. 2007)).

223. Although the *Pageau* court claimed that hypothetical chapter 13 considerations do not play a role in the special circumstances analysis, it added one final comment on the subject: "Chapter 13 plans that provide *de minimis* dividends to unsecured creditors are neither barred from confirmation under the Bankruptcy Code nor by the practice in this district." *Id.* at 231.

abuse. However, the court found an alternative avenue for considering post-petition events, although in a slightly different context.[224] In the *Haman* case, an above-median-income debtor successfully rebutted the § 707(b)(2) presumption of abuse by demonstrating that student loan debt constituted a special circumstance.[225] The court found that the debtor had no reasonable alternative but to incur the monthly student loan expense. In response, the United States Trustee (UST) argued that the debtor had a reasonable alternative—to convert the case to a chapter 13 and make pro rata distributions to other creditors. As mentioned above, the court determined that this was not proper under § 707(b)(2). However, the *Haman* court stated that forward-looking analysis could be properly conducted under the scope of § 707(b)(3)'s *totality of the circumstances* test.[226] The court stated that "Congress expressly incorporated the formerly judicially created totality of the circumstances test which permits consideration of circumstances both preceding and following the filing of a petition."[227] According to the *Haman* court, Congress intended there to be a two-step process for determining abuse. First, the standardized formula of § 707(b)(2) would apply. Second, a case-by-case analysis under § 707(b)(3) would be employed to address inevitable exceptional cases.[228] Therefore, under the *Haman* analysis, a hypothetical chapter 13 plan that would provide nearly zero percent distribution to unsecured creditors is not an argument available to debtors seeking to rebut a presumption of abuse. However, creditors, the UST, or any other party in interest may employ a hypothetical chapter 13 analysis under § 707(b)(3) to show that debtors can afford to make at least some pro rata distributions, therefore raising a presumption of abuse.

B. Channeling Debtors Burdened With Student Loans Into Chapter 13 Proceedings

A debtor earning a median, or slightly above-median income, and holding a considerable amount of student loan debt, may find a chapter 13 bankruptcy plan difficult to fulfill. Student loans present debtors with a unique set of circumstances. Student loans are unsecured and non-priority debts.[229] However, unlike a wide range of general unsecured debt, student loans are, for the most part, non-

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224. *Haman*, 366 B.R. at 316–17.

225. *Id.* at 318.

226. *Id.* at 317. Section 707(b)(3) provides:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider –
>
> (A) whether the debtor filed in bad faith; or
>
> (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(3) (2006).

227. *Haman*, 366 B.R. at 317.

228. *Id.*

229. Anderson, *supra* note 16.

dischargeable.[230] Should a debtor fail to establish special circumstances, or fail for any reason to succeed in filing for bankruptcy under chapter 7, two possibilities remain under chapter 13: (1) pay the student loan as scheduled outside of a chapter 13 plan, or (2) make student loan payments through the chapter 13 plan.[231] Both approaches present debtors with serious pitfalls. The first approach would generally result in a low dividend to other unsecured creditors and can lead to challenges of unfair discrimination against them.[232] The second approach would most likely result in a higher dividend to the other unsecured creditors.[233] However, because the debtor would not be making full payments on the student loans in order to increase the pro rata distribution to the other creditors, unpaid interest on the student loan would continue to accumulate and capitalize during the life of the plan.[234] Depending on the size of the student loan debt and the pro rata distribution under the plan, such a scenario could leave a debtor worse off.

The first approach, and its related pitfalls, deserve further consideration. Paying off student loan debt outside a chapter 13 plan, with the attendant consequence of being able to pay an extremely low pro rata distribution to other unsecured creditors, appears to be the preferential scenario. This scenario involves pitting several policy objectives against each other, with most requiring more litigation to determine an outcome. A recent Pennsylvania case, *In re Orawsky*, identified some of the policy issues at play.[235] First, Congress evidenced a policy favoring equal treatment of creditors.[236] Section 1322(b)(1)'s expresses a preference for not treating one class of unsecured creditors differently from another.[237] Second, allowing a debtor to pay off student loan debt while providing little to other unsecured creditors shifts the burden of non-dischargeability from the debtor to creditors that hold those other unsecured claims.[238] Third, there is no express, statutory priority for student loan debts in the Bankruptcy Code.[239] Congress could have granted student loan debt priority in bankruptcy proceedings, but it did not.[240]

On the other hand, the *Owarsky* court also identified several counter-

230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. 387 B.R. 128, 145 (Bankr. E.D. Pa. 2008).
236. *Id.*
237. The section provides:

> (b) subject to subsections (a) and (c) of this section, the plan may-
> Designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims.

11 U.S.C. § 1322(b)(1) (2006).

238. *Orawsky*, 387 B.R. at 145.
239. *Id.*
240. *Id.*

arguments. The court noted that interpreting the equality of creditor treatment principle to mean that pro rata distribution is required in every case is "arguably contrary to § 1322(b)(1) express authorization for separate classification and discrimination with respect to different types of unsecured claims."[241] The court also cited several pre-BAPCPA cases where courts permitted discrimination in favor of child and spousal support claims in chapter 13 plans based on arguments that public policy so strongly favors payment of such claims.[242] The *Owarsky* court suggests that the public interest in protecting the solvency of educational loan programs is a fairly strong public policy consideration.[243] Aside from the solvency of such programs, it may also be worth considering that public tax dollars are directly implicated upon student loan default.

Standards for determining the existence of unfair discrimination under § 1322(b)(1) have varied. A number of courts have used the four-prong *Wolff* test, which asks: "(1) whether the discrimination has a reasonable basis; (2) whether the debtor can carry out the plan without discrimination; (3) whether the discrimination is proposed in good faith; and (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination."[244] In the Ninth Circuit, courts have recently used the *Wolff* test to disallow payments of student loans outside of a chapter 13 plan.[245] A number of districts have found unfair discrimination where a debtor is allowed to make payments on his student loan outside of a chapter 13 plan.[246] Some courts have gone so far as to create a bright-line rule prohibiting "any discrimination in favor of non-dischargeable student loan obligations over other unsecured creditors."[247] Some courts have determined such treatment of student loans to be "presumptively unfair."[248] Other districts have held that such plans are acceptable and have not found unfair

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241. *Id.* at 146.

242. *Id.*

243. *Id.*

244. *In re* Wolff, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982).

245. Anderson, *supra* note 16.

246. *See In re* Belda, 315 B.R. 477 (Bankr. N.D. Ill. 2004) (denying confirmation of a sixty month chapter 13 plan wherein the debtor would make regular monthly payments on his student loans outside the plan, resulting in a 62% dividend to the student loan creditor over the life of the plan and a 10% dividend to other unsecured creditors); *In re* Simmons, 288 B.R. 737 (Bankr. N.D. Tex. 2003) (finding a thirty-six month plan unfairly discriminatory where student loan creditor would receive a 65.5% dividend outside the plan while other general unsecured creditors would only receive a 6.35% dividend); *In re* Colley, 260 B.R. 532 (Bankr. M.D. Fla. 2000) (noting that unfair discrimination exists where plans provide for full contractual payments of a student loan creditor's claim while providing for a lower percentage of other unsecured creditors' claims to be paid off through pro rata distribution).

247. *In re* Taylor, 137 B.R. 60, 65 (Bankr. W.D. Okla. 1992).

248. *In re* Caruso, No. 00-84200, 2001 WL 34076052, at * 3 (Bankr. C.D. Ill. July 16, 2001) ("On the other hand, government made or insured student loans, although nondischargeable, are not accorded priority status under 11 U.S.C. §507. They are properly classified as general unsecured claims. As such, their disparate treatment is presumptively unfair and the debtor has the burden of proving otherwise.").

discrimination.[249] The *In re Owarsky* case provides a well-reasoned argument for not finding discrimination through analyzing the competing objectives of the Bankruptcy Code.[250]

Regardless of the standard employed, or whether a plan is found to discriminate or not, student loan debtors may find themselves in unenviable positions. Neither separate treatment of student loan debt, nor payment through a plan, achieves either of the underlying aims of the Bankruptcy Code: "ensuring equitable treatment of creditors or removing unaffordable debt obligations as a barrier to a person's future economic viability as a member of society."[251] Judging from the disagreement among districts on how to handle such situations, it is clear that a great deal of uncertainty exists around the issue of the treatment of student loans in bankruptcy proceedings. A debtor that loses out on special circumstances arguments may only graduate to another level of litigation—attempting to defeat charges of unfair discrimination.

C. Bankruptcy Alternatives for Above-Median-Income Debtors with Considerable Student Loan Debt

So far, this Note has demonstrated that bankruptcy proceedings impose significant obstacles to the elimination of student loan debt in either a chapter 7 or chapter 13 plan. Debtors will want to explore and/or exhaust all other options before filing a bankruptcy petition. In fact, at least one judicial opinion claimed that debtors must provide evidence that they actually tried to take advantage of any repayment alternatives and were declined, in order to meet their burden of proof in establishing special circumstances under § 707(b)(2)(B).[252]

Student loan debtors have several viable alternatives to aid in repayment. Loan providers generally provide extended repayment options, extending the term of repayment from ten years to as long as thirty years.[253] The Federal Direct Loan Program, as well as other private lenders, allows income-contingent repayments, which tie the repayment amount to income level and generally allow for a longer repayment term.[254] Debtors may want to consider requesting forbearance should circumstances warrant.[255] There are also several ways in which a debtor can defer

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249. *See, e.g.*, *In re* Pageau, 383 B.R. 221, 229 (Bankr. D.N.H. 2008) ("In this district, student loan debts may be paid directly and separately during a debtor's chapter 13 plan in accordance with § 1322(b)(5) as long as payments are to maintain and keep current long-term student loan debt, i.e., loans that mature after plan completion, with no acceleration of that debt.").

250. *In re* Orawsky, 387 B.R. 128 (Bankr. E.D. Pa. 2008).

251. Anderson, *supra* note 16.

252. *In re* Wagner, No. BK07-42262, 2008 WL 706616, at *3 (Bankr. D. Neb. 2008).

253. Loan Repayment and Debt, http://www.collegeboard.com/student/pay/loan-center/432.html (last visited Jan. 10, 2009).

254. *Id.* It is important to note, however, that this option may have different short- versus long-term consequences. While repayment might decrease in the short term, over the long haul, debtors could wind up with considerably more debt. *Id.*

255. Forbearance allows debtors to suspend payments temporarily when they are experiencing financial hardship.

student loan repayments. These include: joining the military, entering the Peace Corps, or enlisting with other service programs.[256] Some service programs, such as those that channel teachers into low-income areas or those that facilitate disaster relief or community-building programs,[257] even allow debtors to work off student loans.[258] Before incurring the cost of bankruptcy court filings, some or all of these options should be explored.

CONCLUSION

Any conclusion on the topic of student loan debt would be lacking if it did not recognize the obligations that student borrowers undertake when they choose to accept student loans. In these trying economic times, it is certainly within the realm of possibility that student loan default may become an even more salient problem. Indeed, recent data indicates an increased rate of default on student loan repayments.[259] The exploding cost of post-secondary education is creating new generations of highly leveraged Americans. Michael Dannenberg, a senior fellow at the New America Foundation, notes, "In general, higher education is a good investment, but there are no guarantees."[260] He suggests students exercise caution when borrowing large amounts of money for college.[261] For those burdened by massive student loan debt, bankruptcy will not provide a simple remedy. Therefore, students should carefully budget what they need, research attainable earning potential upon graduation, and not treat student loans as free money, lest they come to realize that Uncle Sam can be a very powerful creditor.

Case law involving student loan debt and the special circumstances provision of § 707(b) is still relatively new. Lawyers, judges, and commentators are in the process of examining the ins and outs of BAPCPA. The special circumstances provision of § 707(b) provides another example of how BAPCPA has generated uncertainty and increased litigation. In seeking to eliminate judicial discretion in determining a debtor's ability to pay, Congress has, inadvertently or not, provided several means of avoiding the harsh application of means testing, including through the use of the special circumstances provision of § 707(b)(2)(B)(i). Congress has created a situation in bankruptcy proceedings that pits important policy goals against one another. On the one hand, Congress, through BAPCPA, expressed a desire to have debtors pay back a significant portion of their debts in a chapter 13 proceeding. On the other hand, the United States has made student loans readily available in order to achieve greater access to higher education, while making such loans virtually impossible to discharge in

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256. *Id.*

257. Such programs include Teach for America and AmeriCorps. For a brief overview of programs through which debtors can achieve student loan forgiveness, see Money Under Thirty, Student Loan Forgiveness Guide, http://www.moneyunder30.com/student-loan-forgiveness-guide (last visited Mar. 6, 2009).

258. *Id. See also* ED.gov, Fiscal Year 2007 Budget Summary, Student Financial Assistance, http://www.ed.gov/about/overview/budget/budget07/summary/edlite-section2d.html (last visited Jan. 10, 2009).

259. Pope, *supra* note 13.

260. *Id.*

261. *Id.*

bankruptcy. Unfortunately, Congress did not provide any guidance for how these competing policy concerns should play out under BAPCPA. Perhaps even more confusing, is that Congress expressly provided for some fairly broad expenses in the means testing provisions, such as those for charitable organizations.[262] This apparently leads to the conclusion that a bankruptcy court is unable to question a debtor's charitable contributions when determining eligibility for chapter 7, but may exclude a debtor's legitimate student loan obligations.

In the end, it is unclear why Congress did not expressly provide for student loans in § 707(b) given that more than two-thirds of college students now carry student loan debt.[263]Although some courts apparently disagree, student loan debt has become a common element in the average American household's budget. As noted previously, the IRS Internal Revenue Manual even includes student loans in its category of "other necessary expenses." Yet Congress has relegated student loan debt to the debatable category of special circumstances where its inclusion as an expense in the means test will be made on a case-by-case basis.

Because Congress has yet to revisit BAPCPA, the confusion that it generated is debated through litigation. For cash-strapped debtors, the new layers of filing fees and litigation costs are a most unwelcome addition to the Bankruptcy Code. Given these circumstances, the best solution would be for Congress to revisit § 707(b). Congress should expressly provide for the treatment of student loan debt repayment in the means test calculation so as to take it completely out of the nebulous realm of "special circumstances." Competing policy interests and competing unsecured lenders could be somewhat protected by limiting the amount of student loan payment that can be claimed as an expense to a certain dollar amount. This threshold amount could be indexed to inflation or the average cost of college tuition. Such a scheme would be similar to other allowed expenses under § 707(b).[264] In most cases, inclusion in the means test calculation would not frustrate the purpose of BAPCPA. BAPCPA sought to limit discretionary spending on the part of above-median-income debtors so that they could not avoid paying creditors merely by filing for chapter 7 relief. Although student loans are not unavoidable, they are clearly important—and even necessary for many Americans to earn a decent living. Once incurred, there are very few reasonable alternatives to repayment. It does not seem abusive that a debtor would seek to provide for repayment of such loans in the case of a bankruptcy proceeding.

In the meantime, or in the case that Congress chooses not to act, this Note suggests that the courts should follow the holdings of those that have found that student loan debt repayment constitutes a special circumstance. BAPCPA, as noted in its name, was intended to prevent abuse of the bankruptcy system—to channel debtors with the ability to pay into chapter 13. Section 707(b)'s failure to deal with student loan debt in means testing calculations could burden debtors with significant student loan debt who have their cases converted to chapter 13 because they fail to demonstrate special circumstances. Should a court not allow a chapter 13 plan to discriminate in favor of student loan payment, student loans may simply

262. *See supra* Part II.A.
263. *See* Project on Student Loan Debt, *supra* note 6.
264. *See supra* Part II.A.

accrue interest or late penalties during the life of the plan. This situation would only compound debt and the debtor would more than likely be better off not filing a bankruptcy petition.

The Act should not be read as pernicious and arbitrary—those who have the ability to repay should do so, but forcing debtors who legitimately have no ability to repay into a doomed chapter 13 plan would serve little purpose.[265] Student loan debt has become a regular part of many American household budgets. Given its status as a priority, non-dischargeable debt, debtors cannot avoid repayment in most circumstances. Calculating the debt as part of a debtor's reasonable expenses best accomplishes the goal of determining a debtor's ability to repay.

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265. *See generally* Jean Braucher, *A Guide to the Interpretation of the 2005 Bankruptcy Law* (Ariz. Legal Studies, Discussion Paper No. 08-28, 2009), *available at* http://ssrn.com/abstract=1307250.

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