STUDENT LOAN ISSUES[1]

Judge Deborah L. Thorne
United States Bankruptcy Court
Northern District of Illinois

Circuit Rulings

I. Totality-of-the-Circumstances Test

***Andrews v. South Dakota Student Loan Assistance Corp.*, 661 F.2d 702 (8th Cir. 1981)**

The bankruptcy court granted the debtor a hardship discharge under §523(a)(8)(B). The lender appealed and the 8th Circuit remanded with instructions to the bankruptcy court. Although the debtor was in remission from Hodgkin's Lymphoma, was divorced, not receiving alimony and did not have a steady income while working at a domestic violence shelter, the appellate court remanded the case back to the bankruptcy court.

The court instructed the bankruptcy court to examine the totality of the circumstances including the debtor's necessary living expenses. The appellate court noted that there isn't a definition of 'undue hardship' in the Bankruptcy Code and therefore each bankruptcy case involving a student loan must be examined on the facts and circumstances surrounding that particular case. The court must then determine, based on the facts and the totality of the circumstances, whether the debtor's future income is sufficient to enable the debtor to make some payments on his/her student loans without preventing the debtor from the ability to maintain a minimal standard of living.

***Long v. Educational Credit Mgmt. Corp.*, 322 F.3d 549 (8th Cir. 2003)**

The bankruptcy court granted the debtor a hardship discharge under §523(a)(8)(B). The lender appealed and the Bankruptcy Appellate Panel affirmed. The 8th Circuit remanded with instructions to the Bankruptcy Appellate Panel. The debtor financed her education through student loans from the federal government. The debtor opened up a chiropractic practice. She worked until she began experiencing a diminution of her mental faculties and extreme depression. After undergoing treatment, the debtor rejoined the workforce. The debtor's income supported her existing expenses but not the monthly student loan installments. The debtor made ten years of payments towards her student loans but defaulted after becoming ill. She then filed a Chapter 7.

The 8th Circuit conducted a de novo review of the case. The 8th Circuit also reaffirmed the totality-of-the-circumstances test as set forth in an earlier case. The court stated that it preferred a less restrictive approach than the *Brunner* framework. Section 523(a)(8)(B) allows for some discretion and the totality-of-the-circumstances test has a better approach than the *Brunner* framework. In adopting the framework, courts should consider: "(i) debtor's past, present and reasonably reliable future financial resources, (ii) a calculation of the debtor's reasonably necessary living expenses and (iii) any other relevant facts and circumstances

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surrounding each particular bankruptcy case." The court then remanded with instructions to apply a de novo standard of review.

***In re Bronsdon,* 435 B.R. 791 (B.A.P. 1st Cir. 2010)**

The bankruptcy court granted the Chapter 7 debtor a hardship discharge under §523(a)(8)(B). The lender appealed and the district court vacated and remanded with instructions. The bankruptcy court discharged the loans again and the lender appealed. The Bankruptcy Appellate Panel affirmed the bankruptcy court's judgment. The debtor, 64 years old, financed her law school education through student loans. Her loans totaled $82,049.45. The debtor failed the bar exam significantly thrice. She continuously searched for employment but wasn't able to find a job. The debtor was single and lived temporarily in her father's house.

The 1st Circuit has not adopted a particular approach for determining undue hardship. The BAP concluded, however, that the *Brunner* framework takes the test too far and imposes too many restrictions on the debtor. Additionally, the court added that the debtor should not be obligated to prove that they acted in good faith with regards to the *Brunner* framework. The BAP, while not officially adopting the totality-of-the-circumstances test, believes the test best measures the determination of undue hardship while adhering the plain meaning of §523(a)(8). In applying the test to the debtor's circumstances, the court found that the debtor's inability to repay the debt was unrealistic. The debtor's age, inability to pass the bar examination, and difficulty in finding employment were all factors in this decision. Thus, the BAP affirmed the bankruptcy court's judgment.

II. Undue Hardship Test

***Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395 (2d Cir. 1987)**

The bankruptcy court granted a hardship discharge to Marie Brunner, which was reversed by the district court, finding the bankruptcy court erred in finding undue hardship. The 2nd Circuit held that the debtor was required to show (i) an inability to maintain a minimal standard of living for herself and dependents if forced to repay the loans; (ii) additional circumstances existed indicating that this situation was likely to persist for significant portion of repayment period of student loans; and (iii) the debtor had made good-faith efforts to repay the loans. In this case, the debtor failed to establish that her current inability to find work would extend for a significant portion of student loan repayment period or that she had made a good-faith attempt to repay student loans, and thus, failed to establish "undue hardship" as required for a discharge of loans.

***Matter of Roberson*, 999 F.2d 1132 (7th Cir. 1993)**

The bankruptcy court denied the debtor's request to discharge his student loans. However, the bankruptcy court ordered a two-year deferment in payment of such loans. The district court reversed the bankruptcy court's decision and discharged the student loans. The creditor appealed and the 7th Circuit reversed and remanded the district court's decision. The debtor, upon leaving the army, earned a degree in industrial technology. To finance his education, the debtor received $9,702 in student loans. A few years later, the debtor's marriage was dissolved, the debtor was laid off, and he had his license revoked. The debtor's wife was awarded possession of the marital residence and automobile. Given his financial condition, the

debtor filed a Chapter 7 and filed a complaint against the Student Assistance Commission, requesting a discharge of his student loans.

The court conducted a de novo review of the case and adopted the *Brunner* framework. The court rejected an alternative framework as the *Brunner* framework is more practical, reliably measures if a hardship is undue, and considers whether the hardship is the result of measures beyond the debtor's control. The court concluded that (i) the debtor was unable to maintain a minimal standard of living while paying off his student loans and (ii) the debtor's circumstances were unlikely to persist given his previous job and with much of his difficulties coming from his two DUI convictions. Given that the debtor's hardship was shown to be temporary by the court, the second prong of the *Brunner* framework was not established. The court did note, however, if the debtor's condition does not improve, he can file a motion to reopen his case. The court ordered a two-year deferment of the debtor's student loans. Thus, the court reversed and remanded the district court's judgment.

***In re Faish,* 72 F.3d 298 (3rd Cir. 1995)**

The bankruptcy court granted the debtor a partial undue hardship discharge under §523(a)(8). The district court reversed the bankruptcy court's decision stating that the debtor failed to establish that repaying the student loans would result in undue hardship. The 3rd Circuit affirmed the district court's judgment. The debtor obtained a master's degree and worked as a budget analyst. The debtor obtained $31,879.31 in student loans. At the time of the adversary proceeding, the debtor was a single mother who was saving up for an automobile and an apartment in a safer area. The debtor struggled with health conditions, but the conditions did not impact her ability to work.

The court adopted the *Brunner* framework as it is the most consistent with the scheme that Congress established. The court stated that the *Brunner* framework is easy to apply and safeguards the financial integrity of the student loan program. The court also noted that additional circumstances not contemplated by the *Brunner* framework may not be included into the court's analysis to support a finding of dischargeability. The court found that (i) the debtor could maintain a minimal standard of living if forced to repay her loans. The court stated that the first prong of the *Brunner* analysis required more than a showing of tight finances. Because the first prong of the *Brunner* test was not satisfied, the court did not discuss the second or third prongs. Thus, the court affirmed the district court's decision and the debtor's student-loan obligation was nondischargable.

***In re Pena*, 155 F.3d 1108 (9th Cir. 1998)**

The bankruptcy court granted the debtors a hardship discharge under §523(a)(8). The Bankruptcy Appellate Panel affirmed. The creditors appealed to the 9th Circuit, which then affirmed the lower courts' judgments. The debtor attended a technical school and received a certificate upon completing the program. The certificate, however, was not recognized by other colleges and did not assist the debtor in finding employment. Moreover, the debtor's wife suffered from a serious mental health condition. The debtor was unable to keep up payments on his student loans. The debtor eventually consolidated the loans under a single note for $9,399.60 and, after continuing to struggle, the debtor received a 90-day deferral. Following the deferral, the debtor did not make any payments on the note.

The court conducted a de novo review of the case and adopted the *Brunner* framework. The court used the *Brunner* court's definition of "undue hardship." The court stated that

Congress' intent, by using the word "undue," indicates that Congress did not view regular hardship as a sufficient reason to discharge student loans. The court found that (i) the debtor could not maintain a minimal standard of living as the debtor's monthly expenses were already exceeding his monthly income, (ii) the debtor's situation was likely to persist given his wife's mental health condition and his inability to find employment with the technical certificate, and (iii) the debtor made a good faith effort to repay the student loans by consolidating the loans. Thus, the 9th Circuit affirmed the lower courts' judgments.

In re Gerhardt, 348 F.3d 89 (5th Cir. 2003)

The bankruptcy court granted the Chapter 7 debtor a hardship discharge under §523(a)(8)(B). The district court reversed and the debtor appealed. The 5th Circuit affirmed the district court's judgment. The debtor obtained over $77,000 in government-insured student loans to finance his music education at three institutions. The debtor was a professional cellist. The debtor, after graduating, subsequently defaulted on each student loan.

The court conducted a de novo review and adopted the *Brunner* framework. The court adopted the framework as most circuit courts had adopted it and the *Brunner* framework presented an easily applicable approach to evaluating the undue hardship determination. The court found that (i) the debtor could not maintain a minimal standard of living while repaying the student loans given his salary as a cellist but that (ii) the debtor's financial circumstances were unlikely to persist for a significant portion of the repayment period. The court reasoned that the debtor was young, well-educated and without dependents. Thus, the debtor had failed to demonstrate how he would qualify for an undue hardship.

***In re Cox,* 338 F.3d 1238 (11th Cir. 2003)**

The bankruptcy court granted the debtor a partial hardship discharge under §523(a)(8). The creditors appealed and the 11th Circuit affirmed the bankruptcy court's judgment. The debtor had several degrees, including an A.A, B.A, J.D., and LL.M. After obtaining his LL.M., the debtor established a law practice which later failed. The bankruptcy court found that (i) the debtor was unable to maintain a minimal standard of living, (ii) the debtor made good faith efforts to repay his student loans, and (iii) his current inability to repay the student loans was unlikely to persist.

The 11th Circuit conducted a de novo review of the case. The appellate court applied the *Brunner* test in determining an "undue hardship." The court noted that Congress's intent was to make it harder for a student to shift their debt responsibility onto the taxpayer and this is clear from Congress's 1998 amendments to the statute. The court defined "undue hardship" as an inability to repay student loans for a continuous and significant period of time. The court concluded that because of the debtor's many degrees, his financial troubles were likely temporary. Because of this, the court concluded there was not an undue hardship and affirmed the bankruptcy court's judgment.

***Educational Credit Management Corp. v. Polleys,* 356 F.3d 1302 (10th Cir. 2004)**

The bankruptcy court granted the debtor a hardship discharge under §523(a)(8). The district court affirmed. The creditors appealed and the 10th Circuit affirmed the lower courts' judgment. At the time of the original adversary proceeding, the debtor was a 45-year old single mother diagnosed with a psychological condition. The debtor worked a few part-time jobs and relied on child support payments but her income fell below federal poverty guidelines.

The 10th Circuit conducted a de novo review of the case and adopted the *Brunner* framework. In justifying adopting the *Brunner* framework over the totality of the circumstances test, the court noted that the *Brunner* test still requires courts to consider all the facts and circumstances of the debtor's case. The court then found that (i) the debtor was unable to maintain a minimal standard of living, (ii) the debtor's psychological condition made it such that her financial problems were likely to persist, and (iii) the debtor, by consolidating her debt and entering into a deferral program, made a good faith effort to repay her student loans. Thus, the 10th Circuit affirmed the lower courts' judgment.

***Oyler v. Educational Credit Mgmt. Corp. (In re Oyler),* 397 F.3d 382, 386 (6th Cir. 2005)**

The bankruptcy court granted the Chapter 13 debtor a hardship discharge under §523(a)(8)(B). The Bankruptcy Appellate Panel affirmed, the lender appealed and the 6th Circuit reversed. The debtor financed his undergraduate and graduate degrees with student loans. The debtor then founded a Messianic Jewish Church where he became the pastor. The debtor had five dependents and his yearly income was less than $10,000. While the congregation provided the debtor and his family with an apartment, the debtor did not have health insurance and suffered from serious medical conditions. The debtor was current in his monthly student loans payments but filed to discharge his student loans under §523(a)(8).

The court conducted a de novo review of the case and adopted the *Brunner* framework. In adopting the framework, the court noted that the *Brunner* framework easily accommodates factors that courts in the circuit evaluate. The court found that (i) the debtor cannot maintain a minimal standard of living if forced to repay his student loans given his salary and dependents. However, the court found that (ii) the debtor failed to show his financial problems would persist for a significant portion of the repayment period. His education and experience show that he qualifies for higher-paying work that could support his dependents and allow for repayment. Because the second prong the *Brunner* framework was not met, the debtor did not qualify for undue hardship discharge of his student loans. Thus, the court reversed the lower court's judgment.

***In re Frushour,* 433 F.3d 393 (4th Cir. 2005)**

The bankruptcy court granted the debtor a hardship discharge under §523(a)(8). The district court affirmed. The creditors appealed and the 4th Circuit reversed the judgment. At the time of the adversary proceeding, the debtor was a single mother and self-employed. The debtor's income was inconsistent due to the nature of her business and because of that, the debtor repaid her student loans inconsistently as well. Creditors noted that the debtor was eligible for a consolidation plan, but the debtor wanted a fresh start and so refused to consolidate the loans.

The 4th Circuit conducted a de novo review of the case and adopted the *Brunner* framework. Beginning their discussion, the court noted that undue hardship is not defined as "inability to pay one's debts." If that was the case, all bankruptcy litigants would have undue hardship. Rather, the court stated that debtors had to meet a heightened standard to be eligible for an undue hardship discharge. The debtor did not satisfy the second and third prongs of the *Brunner* test. The court found that (i) her financial issues are unlikely to persist as she has a significant amount of work experience, is healthy and college educated and (ii) the debtor did not make a good faith effort to repay the loans. With regards to the third prong, the court stated that the debtor should have tried to consolidate the loans. Thus, the court reversed the lower courts' judgments.

***In re Zook,* No. 05-00083, 2009 WL 512436 (Bankr. D.D.C. Feb. 27, 2009).**

The bankruptcy court granted the debtor a hardship discharge under §523(a)(8). The debtor obtained $76,000 worth of student loans to finance college and later medical school. The debtor had severe bipolar affective disorder which resulted in the debtor leaving medical school. The debtor, because of her health condition, was unable to maintain steady employment.

The court adopted the *Brunner* framework with some notable distinctions. The court noted that if a debtor is unable to repay for a finite time, the loans should be discharged for that finite time. Additionally, the court noted that the debtor's inability to repay the student loan should not be for a "significant period' over the course of the repayment period but should be limited to five years. The court found that (i) the debtor would be unable to maintain a minimal standard of living if forced to repay her student loans, (ii) the debtor's health condition worsens over time so it was likely that her financial problems would persist, and (iii) the debtor, by using her inheritance to pay some of her student loans, made a good faith effort to repay her loans. Thus, the bankruptcy court discharged the debtor's student loans.

Recent Rulings

***Krieger v. Educational Credit Mgmt. Corp.,* 713 F.3d 882, 884 (7th Cir. 2013)**

The bankruptcy court granted the debtor a hardship discharge under §523(a)(8). The district court reversed and the debtor appealed. The 7th Circuit reversed and remanded. The debtor was destitute. She lived with her mother in a rural community and was too poor to move in search of better employment prospects. She also lacked internet access and transportation.

The 7th Circuit had previously adopted the *Brunner* framework. However, the court noted that §523(a)(8) does not forbid discharge and that judicial glosses (such as in *Brunner*) should not be allowed to supersede the statute itself. The court also noted that debtors do not need to agree to a payment plan in order to show they acted in good faith. The good faith standard mixes a state of mind with a legal characterization; thus, factual findings, unless proven erroneous, must stand. The court found that (i) the debtor was unable to maintain a minimal standard of living, (ii) the debtor's financial situation, given her lack of prospects, was likely to persist, and (iii) she acted in good faith. Thus, the court reversed and remanded with instructions to reinstate the discharge issued by the bankruptcy judge.

***In re Rosenberg*, 610 B.R. 454 (Bankr. S.D.N.Y. 2020)**

The bankruptcy court granted the Chapter 7 debtor summary judgment and granted him a hardship discharge under §523(a)(8). The debtor borrowed money to fund his undergraduate education. Afterwards, the debtor served in the United States Navy for five years and subsequently attended law school. To finance law school, the debtor received additional student loans. After graduating, the debtor consolidated his student loans; the total outstanding balance was $221,385.49.

The court noted that cases interpreting *Brunner* have led to the punitive standards that make student loans almost impossible to discharge. The dicta used by courts have been applied so frequently that the dicta has subsumed the actual language of the *Brunner* test. The bankruptcy court stated that it would apply the *Brunner* test as it was originally intended.
In applying the first prong of the *Brunner* test, the court emphasized that the debtor's current income must be measured. With regards to the second prong of the *Brunner* test, the court noted

that the *Brunner* test does not require the court to decide if the debtor's financial circumstances are going to persist forever. Finally, the third prong requires the court consider the debtor's past behavior in repaying the loans. The court, in evaluating the third prong, cannot consider the debtor's reasons for filing bankruptcy, the amount of debt, or whether the debtor has rejected repayment options. The court found that the debtor satisfied the *Brunner* test and thus discharged the debtor's student loans.

***In re Tingling*, 2021 WL 922448 (2d Cir. March 11, 2021)**

The bankruptcy court determined that the debtor failed to satisfy the *Brunner* test and thus refused to grant a hardship discharge under §523(a)(8). The district court affirmed and the debtor appealed. The 2d Circuit affirmed. The debtor, a 52-year-old woman, obtained two graduate degrees in healthcare administration. The court stated that although the debtor was recently diagnosed with a tumor, there wasn't evidence that suggested the tumor affected her ability to continue working full-time. Although her tax refunds were significant, the debtor did not put any of the tax refunds towards her student debt. The debtor also did not attempt to negotiate her loans or consolidate them. Finally, the debtor was eligible for two income-based repayment programs but did not enter these programs.

The court conducted a de novo review of the case and applied the *Brunner* framework. The court concluded that the debtor failed all prongs of the *Brunner* test. The debtor (i) was able to maintain a minimal standard of living while repaying the loans, (ii) the debtor's financial troubles were unlikely to persist given her age and advanced degrees, and (iii) the debtor had not made a good faith effort to repay the loans. Thus, the 2nd Circuit affirmed the district court's judgment.

***In re Nitka*, No. 20-1270, 2021 WL 1590008 (10th Cir. Apr. 23, 2021)**

The bankruptcy court dismissed the Chapter 7 debtor's complaint seeking to discharge his student loans pursuant to §523(a)(8). The debtor appealed and the Bankruptcy Appellate Panel affirmed the bankruptcy court's dismissal. The debtor financed his law school education through student loans. The debtor's student loans totaled $191,081. The debtor did not pass the Arizona bar exam, worked at a law firm and later sold insurance. The debtor, not finding employment, focused on building a mobile application and converting a bus into a vacation rental. He participated in an income-driven repayment program which reduced his monthly student loan payments.

The court conducted a de novo review of the case and applied the *Brunner* test. The court noted that the *Brunner* test should be based upon "an inability to earn and not simply a reduced standard of living." Additionally, the court noted that good faith should not be a way for a court to impose its own values on a debtor's life choices. The *Brunner* test additionally gives courts discretion in weighing all relevant considerations. The court found that (i) the debtor could not maintain a minimal standard of living while repaying his student loans, but (ii) the debtor's financial situation was unlikely to persist for a significant portion of the repayment period. The court noted that the debtor is pursuing entrepreneurial goals and his situation will likely change. The debtor was also not pursuing gainful employment and seemed to have given up his job search. Thus, the Bankruptcy Appellate Court affirmed the bankruptcy court's dismissal.

***In re Graddy*, No. 20-12267, 2021 WL 2224350 (11th Cir. June 2, 2021)**

The bankruptcy court determined that the Chapter 7 debtor failed to satisfy the *Brunner* test and thus refused to grant a hardship discharge under §523(a)(8). The district court dismissed the case for lack of jurisdiction and the debtor appealed. The 11th Circuit reversed and remanded. On remand, the district court affirmed the bankruptcy court's judgment, ruling that the student loan debt was nondischargable. The debtor appealed again. The 11th Circuit affirmed the district court's judgment. The debtor attended NYU's School of Law and financed her education through student loans. Following, she became a prosecutor until she moved to Georgia. There, she eventually changed careers and entered a master's program. The debtor, per the creditor, owed about $389,000 in student loans. She earned $8,600 per month and was eligible for income-based repayment plans.

The court conducted a de novo review of the case and adopted the *Brunner* test. The court noted that there is a narrow exception for student loan discharges and discharges are only granted when there is undue hardship on the debtor. The court only considered the second prong of the *Brunner* test and stated that the debtor had failed to show evidence in her favor. The debtor failed to show that her financial circumstances would persist for a significant portion of the repayment period. The court considered her education, work history, employability and home ownership as factors in making their decision. Because the second prong of the *Brunner* test failed, the court did not discuss the two other prongs. Thus, the 11th Circuit affirmed the district court's judgment.

2021 Legislative Proposals Affecting Student Loans

H.R. 521. Representative Krishnamoorthi (D-IL) introduced the Public Service Appreciation through Loan Forgives Act. This bill would allow borrowers enrolled in the Public Service Loan Forgiveness program to have a portion of their loans forgiven at different intervals dependent on the amount of eligible monthly payments they've made. There aren't any cosponsors on this bill.

H.R. 1372/S.210. Senator Rubio (R-FL) introduced the Protecting JOBs Act which would prevent states from suspending, revoking or denying state professional licenses solely due to borrowers being in default on their federal student loans. Representative Ross (D-NC) cosponsored the bill.

H.R. 1133/S.311. Representative Harder (D-CA) introduced the Stopping Doctor Shortages Act which amends the Higher Education Act requiring that the Dept. of Education to allow healthcare professionals who are full-time employees at nonprofits to qualify for the PSLF program even if they're not directly employed by a nonprofit.

H.R. 1586. Representative Perry (R-PA) introduced the Student Loan Reform Act which would create a program that would allow higher education institutions to cosign all federal loans made to students during an academic year.

H.R. 1633. Representative Foster (D-IL) introduced the Public Service Loan Forgiveness Inclusion Act of 2021 which would allow borrowers who would be eligible for PSLF but were enrolled in a non-eligible repayment play, to have the first 60 monthly payments made under a graduated repayment or extended repayment plan to become qualifying payments under PSLF.

S. 821. Senator Burr (D-NC) introduced the Repay Act of 2021 which would give new student loan borrowers the option between enrolling in a fixed, 10-year standard repayment plan and a single income-driven repayment plan. The legislation ensures borrowers would never have to pay more than 15 percent of their discretionary income for their monthly student loan payments.

H.R. 2034. Representative Lawson (D-FL) introduced the Income-Drive Student Loan Forgiveness Act which would direct the Secretary of Education to forgive the balance of some federal student loans for eligible borrowers. The bill also stipulates that any forgiveness received would not be taxable.

S. 487. Senator Braun (R-IN) introduced the Student Loan Tax Elimination Act which would eliminate origination fees for federal student loans.

Consumer Bankruptcy Reform Act of 2020

Senator Warren (D-MA) introduced the Consumer Bankruptcy Reform Act which would amend title 11 of the United States Code to add a bankruptcy chapter relating to the debt of individuals and for other purposes. This is the first major consumer bankruptcy related legislation to be introduced since BAPCPA. The bill would eliminate chapter 7 and chapter 13 and replace them with a new chapter 10.

Chapter 10 would be the single-entry point to bankruptcy court for all consumers. Filing for a chapter 10 would require filling out a form—all previous counseling requirements would be repealed. Additionally, debtors who can pay and can't pay would face a new screening process. It would be based on a debtor's nonexempt assets and future income. The screening process would not look at a debtor's expenses at all. A chapter 10 filer would have a minimum payment obligation which is the sum of the debtor's nonexempt assets and a progressively graduated percent of annual income exceeding 135% of the state median income for a household of like size. This payment is what the debtor will have to pay to get a discharge.

The proposed legislation would amend Section 523 of the Bankruptcy Code to make student loans fully dischargeable. To date it has not been reintroduced in this Congress.

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