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The *Brunner* Test Imposes a High Burden to Discharge Student Loan Debt

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INTRODUCTION

The United States Bankruptcy Code (the "Code") makes it more difficult to discharge student loan debt than other debts. Student loans are treated differently from other loans because they are presumptively nondischargable.[1] The government wants to ensure young debtors with promising future income streams remain liable to preserve student loan funding in the future.[2] More specifically, section 523(a)(8) of the Code prevents abuses of the educational loan system and protects the continued viability of student loan programs.[3] But, if certain circumstances are proven, student loan debt can be discharged.[4]

The Code states if repayment "would impose an undue hardship on the debtor and the debtor's dependents," discharge might be available.[5] However, congressional intent indicates that debtors are to repay student loans "in all but the most dire circumstances."[6]

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[1] *See* 11 U.S.C. § 523(a)(8).
[2] *See Plumbers Joint Apprenticeship v. Rosen (In re Rosen)*, 179 B.R. 935, 938 (Bankr. D. Or. 1995).
[3] *Id.*
[4] *See* 11 U.S.C. § 523(a)(8)
[5] 11 U.S.C. § 523(a)(8).
[6] *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 399 (4th Cir. 2005).

Because the Code does not define "undue hardship," courts have developed a variety of tests to determine when a debtor satisfies this standard.[7] These tests are premised upon a case by case analysis that is dominated by a specific factual inquiry. This is a case-specific, fact-dominated standard.

In the Second Circuit, courts apply the *Brunner* test.[8] This test balances financial integrity of student loan programs with the personal and financial sacrifices a debtor should make to repay student loans.[9] Debtors who have received the benefits of an education funded by taxpayer dollars should not be able to dismiss their obligation to repay their loans merely because it would require major personal and financial sacrifices.[10] All circuits, except the First and Eighth, have adopted the *Brunner* test; it is widely recognized as the majority approach.[11]

Part I of this memorandum discusses the elements of the majority approach as set forth in the *Brunner* test and how bankruptcy courts have interpreted these elements. Part II of this memorandum explains the minority approach to the undue hardship standard, the totality of the circumstances test.

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[7] *See Fern v. FedLoan Servicing (In re Fern)*, 563 B.R. 1, 3 (B.A.P. 8th Cir. 2017); *In re Fox*, 163 B.R. 975, 978 (Bankr. M.D. Pa. 1993).
[8] *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987).
[9] *See Bush v. U.S. Dep't of Educ. (In re Bush)*, 450 B.R. 235 (Bankr. M.D. Ga. 2011).
[10] *Id.* at 241.
[11] *See Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298 (3d Cir. 1995); *In re Frushour*, 433 F.3d 393; *Gerhardt v. U.S. Dep't of Educ. (In re Gerhardt)*, 348 F.3d 89 (5th Cir. 2003); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382 (6th Cir. 2005); *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773 (7th Cir. 2002); *Rifino v. Northwest Educ. Loan Assoc. (In re Rifino)*, 245 F.3d 1083 (9th Cir. 2001); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004); *Hemar Ins. Corp. of America v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003).

I. Majority Approach – The *Brunner* Test

In *Brunner*, the Second Circuit created a test to determine if student loans can be discharged because of an undue hardship.[12] This test focuses on the debtor's ability to repay and the debtor's conduct towards repayment.[13] There are three main prongs to the *Brunner* test.[14]

First, 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 loan."[15] Second, "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."[16] Third, the debtor must make "good faith efforts to repay the loans."[17] The debtor has the burden of proof to prove all three prongs by a preponderance of the evidence.[18] If the debtor fails to satisfy one prong or does not meet the burden, the court does not need to proceed.[19]

A. The First Prong: Maintain a Minimal Standard of Living

The first prong of *Brunner* requires a showing, based on the debtor's current income and expenses, a "minimal standard of living" cannot be maintained if forced to repay.[20] Each court determines what constitutes a "minimal standard of living."[21] Many courts conclude it is a "measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities."[22] While a debtor is expected to make "some level of sacrifice" to repay the student loans, one is not expected to live in "abject poverty in order to service a student loan debt."[23]

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[12] *See Brunner*, 831 F.2d 395.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 396.
[16] *Id.*
[17] *Id.*
[18] *See Kelly v. U.S. Dep't of Educ. (In re Kelly)*, 548 B.R. 99, 105 (Brankr. E.D.N.C. 2016).
[19] *Id.*
[20] *Brunner*, 831 F.2d at 396.
[21] *In re Bush*, 450 B.R. 235, 240 (Bankr. M.D. Ga. 2011).
[22] *Id.*
[23] *Id.* at 241.

For example, in *Bush*, the court concluded that the debtor met her burden by proving her "average monthly expenses exceeded her income some $533."[24] The debtor's monthly expenses were limited to rent, utilities, food, clothing, laundry, medical expenses, transportation, taxes, education expenses, and even charitable contributions.[25] The court allowed the debtor to make charitable contributions because, even if this item was eliminated from her monthly expenses, the remaining expenses still exceeded her average monthly income.[26] Based on the debtor's current income and expenses, she could not afford to repay her student loan while maintaining a minimal standard of living.[27] Thus, she satisfied the first prong.[28]

Courts may categorize necessary expenses as more than just minimal food, shelter, and clothing. What is necessary depends on each individual debtor's circumstances and the "reasonableness" of each expense.[29] In *Zook*, the court concluded therapy and non-prescription vitamins were necessary expenses given the debtor's medical history.[30] More notably, the court permitted the debtor to spend hundreds of dollars a month on telephone bills and entertainment because her mental disease makes it hard for her to leave her apartment.[31] Additionally, the debtor often had maintenance expenses on her older vehicle, which "would quickly consume" the excess of her budgetary surplus.[32] The court explained that a debtor is permitted to "save for unexpected or unbudgeted expenses" while still proving she cannot afford to repay the loans.[33] Thus, the debtor in *Zook* could not repay her loan while still maintaining a minimal standard of living.

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Zook v. Edfinancial Corp. (In re Zook)*, No. 05-00083, 2009 WL 512436, at *4 (Bankr. D.DC Feb. 27, 2009).
[30] *Id.* at *6.
[31] *Id.* at *8.
[32] *Id.* at *7.
[33] *Id.*

B. The Second Prong: Existence of Additional Circumstances

The second prong of *Brunner* requires there be a showing that "additional circumstances" exist and this state of affairs is likely to exist for most of the repayment period.[34] Additional circumstances are those the debtor cannot reasonably change because it is "beyond the debtor's control."[35] This prong shows the "congressional imperative that the debtor's hardship must be more than the normal hardship that accompanies bankruptcy."[36]

The additional circumstances must not have been present "when the debtor applied for the loans or have since been exacerbated."[37] This prong is demanding to satisfy and requires a "certainty of hopelessness" that the debtor cannot repay the loans.[38] Some debtors satisfy this standard by showing "illness, disability, a lack of useable job skills, or the existence of a large number of dependents."[39]

These additional circumstances must persist throughout a substantial portion of the repayment period. In *Williams*, the debtor's loan was not discharged because the debtor's circumstances would not continue for the duration of the loan repayment period.[40] The debtor's monthly expenses would decrease shortly after her car was paid off, so loan dischargement was not proper.[41] Rather, there needed to be "insurmountable barriers to debtor's financial recovery and ability" to repay student loans.[42]

The second factor of the *Brunner* test will not be satisfied if the debtor provides "no additional circumstances beyond the debt itself to show that her hardship [was] undue."[43] In

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[34] *Brunner*, 831 F.2d at 396.
[35] *Jones v. Bank One Texas*, 376 B.R. 130, 140 (W.D. Tex. 2007).
[36] *In re Frushour*, 433 F.3d at 401.
[37] *Marcotte v. Brazos Higher Educ. Serv. Corp. (In re Marcotte)*, 455 B.R. 460, 470 (Bankr. D.S.C. 2011).
[38] *Id.* at 471.
[39] *Id.*
[40] *Williams v. Am. Educ. Serv. (In re Williams)*, 492 B.R. 79, 89 (Bankr. M.D. Ga. 2013).
[41] *Id.*
[42] *Id.*
[43] *See In re Frushour*, 433 F.3d 393, 401 (4th Cir. 2005).

Frushour, the debtor was in her forties, had one child, and neither she nor her son suffered any physical or mental disabilities.[44] The court considered her college education, real estate license, and variety of job skills.[45] It concluded she had good jobs in the past and could return to a more lucrative career.[46] A debtor cannot satisfy the second prong by having a low-paying job because that does not in itself provide an undue hardship.[47] While the debtor's economic situation in *Frushour* was "far from ideal," the court noted the likelihood her present circumstances will not extend for the rest of her repayment period.[48] Thus, her debt was not discharged.

C. The Third Prong: Good Faith Requirement

The debtor must have made good faith efforts to repay the loans.[49] A debtor cannot "willfully or negligently cause his own default, but rather his condition must result from factors beyond his reasonable control."[50] The court should look to the debtor's effort to "obtain employment, maximize income, and minimize expenses."[51] If the debtor made payments on the loans before filing the petition, that may be a showing of good faith.[52] This prong involves retrospective analysis because the court looks to the debtor's actions prior to filing for bankruptcy.[53]

In *Mosko*, the court concluded the debtors did not act in good faith. The debtors failed to make student loan payments at a time when "their income substantially exceeded their necessary expenses."[54] Ms. Mosko did not maximize her income because, although she was a teacher, she

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 402.
[49] *See Brunner*, 831 F.2d at 396 (2d Cir. 1987).
[50] *Benjumen v. AES/Charter Bank (In re Benjumen)*, 408 B.R. 9, 21 (Bankr. E.D.N.Y. 2009).
[51] *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007).
[52] *See generally Educ. Credit Mgmt. Corp. (In re Mosko)*, 515 F.3d 319 (4th Cir. 2008).
[53] *Id.*
[54] *In re Mosko*, 515 F.3d 319, 326 (4th Cir. 2008).

did not work during the summer months.[55] An effort to maximize income is a key factor in determining if the debtor was acting in good faith. Furthermore, the debtors did not pursue a loan consolidation option, which is "an important component of the good-faith inquiry."[56] A debtor should adopt a consolidation plan because it shows "the debtors take their debts seriously and are doing their utmost to repay them despite their unfortunate circumstances."[57] One type of consolidation plan is contingent on the debtor's income.[58] Although the Moskos income had decreased over the years, they could have adopted a contingency plan and contributed to loan repayment.[59] Because the Moskos failed to maximize their income or adopt a consolidation plan, they failed to satisfy the good faith requirement.

When determining good faith, the court should evaluate how a debtor "responded to available repayment opportunities."[60] However, a debtor is not required to enroll in an income-based repayment plan to show good faith.[61] In *Metz*, the debtor was able to satisfy the good faith requirement despite not applying for income-based repayment.[62] The debtor calculated her monthly expenses and determined only about $100 could go towards her student loans, less than any payment plan requirement.[63] The debtor satisfied the good faith requirement because "she continually paid on her student loan," "intended to pay at least some of her student loan debt," and "has clearly struggled with financial issues during the past 20 years."[64]

II. Minority Approach – The Totality of the Circumstances Test

[55] *Id.* at 325.
[56] *Id.* at 326.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *In re L.K.*, 351 B.R. 45, 55 (Bankr. E.D.N.Y. 2006).
[61] *See generally Educ. Credit Mgmt. Corp. v. Metz*, No. 18-1281-JWB, 2019 WL 1953119, at *7 (D. Kan. May 2, 2019).
[62] *Id.*
[63] *Id.*
[64] *Id.*

The First and Eighth Circuits follow a different approach known as the totality of the circumstances test. While the totality of the circumstances test and the *Brunner* test both look to the debtor's ability to repay and the debtor's conduct, the totality of the circumstances test is less restrictive.[65] The totality of the circumstances test was created by the Eighth Circuit and, similar to *Brunner*, balances three factors: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant facts and circumstances."[66] This test is a minority test because it is only used by the First and Eighth Circuits.[67]

To satisfy the first two prongs to the totality of the circumstances test, the courts will look at a variety of factors. These factors include the debtor's age, education, dependents, and any other relevant personal circumstances.[68] Since this test is intended to be less restrictive than *Brunner*, no single factor is dispositive.[69] The main difference between the *Brunner* test and the totality of the circumstances test is the totality of the circumstances test allows for a wide range of factors to be considered. Additionally, the totality of the circumstances does not have the same stringent good faith requirement as the *Brunner* test.[70] However, the totality of the circumstances test still requires the debtor to show evidence "they have done everything possible to minimize expenses and maximize income."[71]

CONCLUSION

It is more difficult to discharge student loan debt than other types of repayment obligations.[72] In a majority of circuits, student loan repayments can be discharged only if the

[65] *See generally Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981).
[66] *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003).
[67] *See generally In re Andrews*, 661 F.2d 702.
[68] *See Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks)*, 331 B.R. 18, 31 (Bankr. D. Mass. 2005).
[69] *See Morgan v. U.S. Dept. of Higher Educ. (In re Morgan)*, 247 B.R. 776, 782 (Bankr. E.D. Ark. 2000).
[70] *See In re Morgan*, 247 B.R. at 782 (Bankr. E.D. Ark. 2000).
[71] *U.S. Dept. of Educ. V. Rose (In re Rose)*, 227 B.R. 518, 526 (W.D. Mo. 1998).
[72] *See generally* 11 U.S.C. § 523(a)(8).

debtor satisfies her burden of proof for the three elements of *Brunner*.[73] While a majority of courts follow the *Brunner* test, each circuit can balance the factors slightly differently.[74] Thus, similar cases in different circuits might have different outcomes depending on how the court chooses to analyze undue hardship.[75]

[73] *See generally Brunner*, 831 F.2d at 396.
[74] *See Krieger v. Educational Credit Management Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).
[75] *Id.*