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# Two Approaches for Evaluating a Debtor's "Additional Circumstance" Under the *Brunner* Test to Qualify for a Hardship Discharge of Student Loan Debt

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## INTRODUCTION

Under title 11 of the United States Code (the "Bankruptcy Code"), student loan debt is typically non-dischargeable in bankruptcy, except for circumstances in which the failure to discharge "would impose an undue hardship on the debtor and the debtor's dependents."[1] However, the Bankruptcy Code does not define "undue hardship."[2] Instead, Congress "left it up to the various Bankruptcy Courts to utilize their discretion in defining what that term means after an analysis of the statute and a review of applicable legislative history."[3]

In determining what constitutes an "undue hardship," a majority of courts rely on the three-prong *Brunner* test formulated by the United States Court of Appeals for the Second Circuit.[4] Under the *Brunner* test, to prove a debt imposes an "undue hardship," a debtor must show:

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[1] 11 U.S.C. § 523(a)(8) (2018).
[2] *See In re* Fern, 563 B.R. *1, 3 (B.A.P. 8th Cir. 2017).
[3] *In re* Fox, 163 B.R. 975, 978 (Bankr. M.D. Pa. 1993).
[4] *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005).

> (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.[5]

This test imposes a difficult burden on the debtor, "in light of the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt."[6] Failure to satisfy any of the elements results in a finding of no discharge.[7]

There are two approaches in evaluating a debtor's additional circumstances under the second prong of the *Brunner* test: (1) the additional circumstance must occur after the debtor took out the student loans or must have since been exacerbated,[8] and (2) the additional circumstance could be something that was already present when the debtor took out the student loan.[9] Discharge of student loan debt is possible under both approaches, but the first approach narrows the scope of debtors who can meet their burden under the *Brunner* test.[10] Part I of this memorandum discusses the "additional circumstances" requirement of the *Brunner* test. Then, part II analyzes both approaches.

## I. The "Additional Circumstances" Requirement

Under the second prong of the *Brunner* test, the debtor has the burden of providing the court with additional circumstances "beyond the mere current inability to pay, that show that the inability to pay is likely to persist for a significant portion of the repayment period."[11] These

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[5] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (emphasis added).
[6] *Id.*
[7] Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3rd Cir. 1995).
[8] *See* McCoy v. United States (*In re* McCoy), 810 F.App'x 315, 318 (5th Cir. 2020). On January 4, 2021, petition for certiorari was docketed to address the issue. *See* Petition for Writ of Certiorari, *McCoy v. United States*, (No. 20-886).
[9] *See* Mason v. Mason (*In re* Mason), 464 F.3d 878 (9th Cir. 2006).
[10] *See id.*
[11] *In re* Nys, 446 F.3d 938, 941 (9th Cir. 2006).

"additional circumstances" may include "illness, disability, a lack of useable job skills, or the existence of a large number of dependents."[12] The *Brunner* court did not specify whether the "additional circumstance" has to be something that occurred after the debtor took out her loans or whether it could be something that was already present before the debtor took out her loans.[13] Consequently, courts have tried to resolve this issue.[14]

## II. The Different Approaches for the "Additional Circumstance" Requirement

### *A. "Additional Circumstance" Must Occur After Debtor Took Out Student Loans or Must Since Have Been Exacerbated*

Under the first approach, a debtor will not satisfy *Brunner's* "additional circumstance" requirement if the circumstance is something that the debtor knew about prior to taking out the student loans, except when the circumstance has worsened.[15] Here, an "additional circumstance" is only pertinent when it "was either not present when the debtor applied for the loans or has since been exacerbated," because the debtor should have considered pre-existing circumstances under a cost-benefit analysis before taking out the loan.[16] Courts following this approach reduce the number of debtors who can qualify for student loan discharge as a matter of law by limiting eligible "additional circumstances" only to those circumstances that occurred after the debtors took out their student loans or have since gotten worse.[17]

For example, in *In re McCoy*, a debtor asserted that she qualified for the "undue hardship" exception because she had critical health issues resulting from a car accident and a facial burning

[12] *In re* Oyler, 397 F.3d 382, 386 (6th Cir. 2005).
[13] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).
[14] *See, e.g.*, McCoy v. United States (*In re* McCoy), 810 F.App'x 315, 318 (5th Cir. 2020); *In re* Mason, 464 F.3d at 878.
[15] *See e.g.*, *In re* Clark, 465 B.R. 896, 900 (Bankr. N.D. Ala. 2012) (finding that a debtor whose prior convictions predated his student loans did not satisfy the "additional circumstance" requirement).
[16] *In re* Thoms, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001).
[17] *See* Goulet v. Educ. Credit Mgt. Corp., 284 F.3d 773, 779 (7th Cir. 2002) (explaining that a circumstance which occurred before the acceptance of a student loan did not rise to the level required to satisfy the second prong of *Brunner*).

incident.[18] The bankruptcy court considered when these "additional circumstances" occurred and determined that, because they occurred before the debtor "took out the bulk of the loans and did not prevent her from obtaining her doctorate and various forms of employment," they did not meet the "additional circumstance" requirement.[19] Accordingly, the Fifth Circuit upheld the bankruptcy court's finding that the debtor did not qualify for the "undue hardship" exception.[20]

***B. "Additional Circumstance" May Exist Before Debtor Took Out Student Loans***

Under the second approach, the "additional circumstance" could be something that already existed when the debtor took out the student loan.[21] Here, "[t]he 'additional circumstances' test does not focus on a debtor's past choices, but on currently existing circumstances and what those circumstances show with regard to the debtor's future financial situation."[22] Courts following this approach open the door for a greater number of debtors to discharge their student loan debt by allowing debtors to bring forth evidence of "additional circumstances" that they knew about prior to taking out their student loans.[23]

For example, in *In re Mason,* a law school graduate, who had been diagnosed with a learning disability in the third grade, sought to discharge his student loan debt.[24] The court declined to adopt the timing requirement, explaining that no circuit court at the time had held "that a circumstance or condition in existence at the time the debtor obtained the educational loan in question must be excluded from consideration in the persistence analysis, or that the debtor must

[18] 810 F.App'x at 317.
[19] *Id.*
[20] *Id.*
[21] *See e.g.*, Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 31 (D. Conn. 2006) (rejecting the requirement that an "additional circumstance" cannot predate the student loan).
[22] Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 308 B.R. 436, 446 (9th Cir. B.A.P. 2004) *aff'd*, 446 F.3d 938 (9th Cir. 2006).
[23] *See e.g.*, *In re* Walrond-Rogers, 06-12739 WL 2478389 (Bankr. D. Mass. 2008) (explaining courts may consider pre-existing circumstances under the second prong of *Brunner*).
[24] 464 F.3d 878, 880 (9th Cir. 2006).

show a worsening or exacerbation to carry his burden on the second *Brunner* prong."[25] The court explained it had never drawn a "distinction between pre-existing and later-arising 'additional circumstances,'" and thus, declined to do so.[26] Accordingly, the court did not consider when the debtor's "additional circumstance" occurred in determining whether he satisfied the second prong of the *Brunner* test.[27]

## CONCLUSION

In a majority of circuits, student loan debt may be discharged if a debtor can present evidence of an "undue hardship" by satisfying all three prongs of the *Brunner* test.[28] However, there are two approaches courts use to determine whether they should consider when an "additional circumstance" occurred in examining a debtor's student loan debt dischargeability. The two approaches can lead to drastically different results. Requiring that the "additional circumstance" occur after the debtor took out student loans or that the pre-loan circumstance has since been exacerbated limits the scope of debtors who may qualify for student loan debt discharge, whereas allowing the "additional circumstance" to pre-date the debtor's student loan permits a broader range of debtors to reach the second prong of the *Brunner* test. Although the first approach is more restrictive, discharging student loan debt is possible under both approaches.

[25] *Id.* (quoting *In re* Mason, 315 B.R. 554, 561 (B.A.P. 9th Cir. 2004), *rev'd*, 464 F.3d 878 (9th Cir. 2006)).
[26] *Id.* at 883.
[27] *See id.*
[28] Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005).