



The Differing Standards to Obtain a Student Loan Debt Discharge

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Cite as: *The Differing Standards to Obtain a Student Loan Debt Discharge*, 13 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 2 (2021).

INTRODUCTION

Discharging student loans in a bankruptcy case is often an uphill battle. Under section 523 of title 11 of the United States Code (the “Bankruptcy Code”), student loans are presumed nondischargeable. Thus, a discharge is generally unavailable for student loans “[u]nless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents.”¹ To obtain a discharge, a debtor bears the burden of showing “undue hardship” by a preponderance of the evidence.² In determining “undue hardship,” a majority of courts use the *Brunner* Test.³ A minority of courts use the more subjective “Totality of the Circumstances” approach explained in *Long v. Educational Credit Management Corporation*.⁴ Regardless of the test, “undue hardship” remains an indefinite concept, and often leads to fact-specific inquiries.⁵

¹ 11 U.S.C. § 523(a)(8) (2018).

² *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005).

³ *See Brunner v. New York State Higher Education Services Corporation*, 831 F.2d 395 (2d Cir. 1987).

⁴ *See* 322 F.3d 549, 554 (8th Cir. 2003).

⁵ *See In re King*, 368 B.R. 358, 368 (Bankr. D. Vt. 2007); *see also* *Jackson v. Educ. Res. Inst. (In re Jackson)*, 2007 WL 2295585, *4, 2007 Bankr.LEXIS 2713, *14 (Bankr. S.D.N.Y. 2007); *see also In re Benjumen*, 408 B.R. 9, 15 (Bankr. E.D.N.Y. 2009).

I. DIFFERENT “UNDUE HARDSHIP” STANDARDS

A. THE BRUNNER TEST

Nine circuits currently use the *Brunner* Test to evaluate student debt in bankruptcy cases.⁶ The *Brunner* Test was established by the Second Circuit in *Brunner v. New York State Higher Education Services Corporation*.⁷ In order to satisfy the *Brunner* Test, a debtor must show that (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living if forced to repay the loans; (2) 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) the debtor has made good faith efforts to repay the loans.⁸ This inquiry is highly fact sensitive and “has a reputation for being harsh on debtors”⁹

i. “Minimal Standard of Living” under the *Brunner* Test

The first prong of the test, namely determining a “minimal standard of living,” is inherently subjective. Some courts situated in the Fifth Circuit have used the federal poverty guideline as “a useful yardstick for determining what is a minimal standard of living.”¹⁰ However, using the poverty guideline for determining a “minimal standard of living” is an outlier standard.¹¹

⁶ See *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)); *In re Faish*, 72 F.3d 298 (3d Cir. 1995); *In re Frushour*, 433 F.3d 393, 398 (4th Cir. 2005); *In re Gerhardt*, 348 F.3d 89, 92 (5th Cir. 2003); *In re Oyler*, 397 F.3d 382 (6th Cir. 2005); *Matter of Roberson*, 999 F.2d 1132 (7th Cir. 1993); *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1307 (10th Cir. 2004); *In re Cox*, 338 F.3d 1238 (11th Cir. 2003).

⁷ See *Brunner*, 831 F.2d 395.

⁸ See *id.*

⁹ See *In re Frushour*, 433 F.3d at 399.

¹⁰ *Justice v. Educ. Credit Mgmt. Corp.* (*In re Justice*), No. 14-13684-JDW, 2016 Bankr. LEXIS 4100, at 9 (Bankr. N.D. Miss. Nov. 28, 2016); see also *Knox v. Sallie Mae* (*In re Knox*), No. 0506951EE, 2007 Bankr. LEXIS 3873, at 5 (Bankr. S.D. Miss. Nov. 6, 2007).

¹¹ See *Tenn. Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433, 438 (6th Cir. 1998) (stating debtors “need not live in abject poverty before a discharge is forthcoming”); see also *O'Donohoe v. Panhandle-*

Other courts use the more complicated “means test tables” in order to determine a “minimal standard of living.”¹² The means test tables is “a mechanical test, based only superficially on a debtor's reality, the purpose of which is to create a bright line presumptive test of eligibility.”¹³ In *In re Demmons*, the Bankruptcy Court in the Eastern District of Louisiana used the means test tables to show that “the means test tables for Louisiana debtors would allow [the debtors] \$3,095 per month for housing, utilities, transportation, health care and a living allowance” The court concluded that the “debtors are nowhere near spending that amount of money per month.”¹⁴

It is clear, that an analysis under the first prong of the *Brunner* test is dependent on the court in which a debtor seeks discharge due to the varying approaches courts take for determining “minimal standard of living.” One recent example of a court’s creativity under this first prong is *Hutsell v. Navient (In re Hutsell)*, where a bankruptcy court in the Northern District of Ohio determined that payments made by the debtor’s parents to supplement the debtor’s income were “noncompulsory charity.”¹⁵ Therefore, the court excluded these funds from the “minimal standard of living” analysis.¹⁶

ii. “Undue Hardship” According to the *Brunner* Test

The heart of the *Brunner* Test lies in the second prong, namely a plaintiff-debtor establishing that the “undue hardship” is likely to persist. A finding under this prong, like the first prong, will be dependent on the circuit in which the debtor files. The majority approach is

Plains Higher Educ. Auth. (*In re O'Donohoe*), No. 12-33870, 2013 Bankr. LEXIS 2415, at 9 (Bankr. S.D. Tex. June 13, 2013).

¹² See *Demmons v. R3 Educ., Inc. (In re Demmons)*, Nos. 14-11638, 15-1024, 2016 Bankr. LEXIS 3659, at 18 (Bankr. E.D. La. Oct. 7, 2016).

¹³ *In re Parada*, 391 B.R. 492, 497 (Bankr. S.D. Fla. 2008).

¹⁴ See *In re Demmons*, No. 14-11638, 2016 WL 5874831, at *4.

¹⁵ See *In re Hutsell*, 620 B.R. 604 (Bankr. N.D. Ohio 2020).

¹⁶ See *id.*

the “certainty of hopelessness” standard.¹⁷ Under this standard, the inquiry is not “merely a present inability to fulfill financial commitment,” but rather the “circumstances must be indicative of a certainty of hopelessness . . .” that a debtor’s state of financial affairs is likely to persist for a significant portion of the repayment period.¹⁸ For this reason, many discharges under the “certainty of hopelessness” standard involve debtors with some kind of medical condition.¹⁹

Some courts have found the “certainty of hopelessness” standard too rigorous.²⁰ Some courts have determined that in “applying [the second] prong, courts need not require a ‘certainty of hopelessness’” and thus take “a realistic look . . . into [a] debtor’s circumstances and the debtor’s ability to provide for adequate shelter, nutrition, health care, and the like.”²¹ Courts that do not use the “certainty of hopelessness” standard use different inquiries in order to determine “undue hardship.” Recently, the Fifth Circuit used the “intolerable difficulty” standard to determine that the debtor’s situation would not persist and held that “student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor.”²² Other courts have used an “unlikely” standard. A bankruptcy court in the Northern District of Iowa found that “it is unlikely that Debtor’s financial resources will improve in the future.”²³

Finally, in proving “undue hardship,” certain circuits, like the Eleventh Circuit, require expert testimony to supplement a debtor’s claim of continued incapacity.²⁴ However, the

¹⁷ See *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884–85 (7th Cir. 2013).

¹⁸ See *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005).

¹⁹ See *In re Mosley*, 494 F.3d 1320, 1325 (11th Cir. 2007) (“[T]he crucial requirement is that the debtor show how his medical conditions prevent him from working. . . .”); see also *In re Davis*, 373 B.R. 241 (W.D.N.Y. 2007) (rejecting undue hardship claim based on debtor’s alleged depression where debtor admitted that her ailment “never caused her to lose a job or miss an interview or employment opportunity”).

²⁰ See generally *Krieger*, 713 F.3d at 884–85.

²¹ *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004).

²² *Thomas v. Dep’t of Educ. (In re Thomas)* 931 F.3d 449, 454 (5th Cir. 2019).

²³ *Fern v. FedLoan Servicing (In re Fern)*, 553 B.R. 362, 368 (Bankr. N.D. Iowa 2016).

²⁴ See *CMC v. Mosley (In re Mosley)*, 494 F.3d 1320, 1325 (11th Cir. 2007).

majority approach views expert testimony as an extraneous requirement that would unnecessarily raise costs for a debtor seeking discharge.²⁵

iii. “Good Faith Efforts to Repay” Under the *Brunner* Test

The third and final prong of the *Brunner* Test is whether the debtor has made good faith efforts to repay the loans. In other words, “good faith efforts” are the debtor’s “efforts to obtain employment, maximize income, and minimize expenses.”²⁶ This requirement also means that the “undue hardship” the debtor is facing must have been caused by factors beyond the debtor’s control.²⁷

Certain circuits impose more rigorous analysis than others. For instance, the Fourth Circuit found the debtors failed the third prong of the *Brunner* Test where “the payments the [debtors] made on their student loans are insufficient to demonstrate good faith because they failed to make payments on their student loans during a time period when their income substantially exceeded their necessary expenses.”²⁸

However, other courts take a less rigid approach to this third prong. The *Brunner* court itself found that this third prong was satisfied even when the discharge proceeding was only seven months after the debtor was out of school and occurred within a month of when mandatory payments were set to start.²⁹ Recently, in *Hutsell v. Navient*, the bankruptcy court for the Northern District of Ohio explained that “good faith ‘is essentially an inquiry into whether the

²⁵ See *In re O'Donohoe*, 2013 Bankr. LEXIS 2415, at 11 (citing *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 359–60 (6th Cir. 2007)) (“[A] debtor is not required to present expert testimony to corroborate his own testimony about his health.”); see also *In re White*, 2008 Bankr. LEXIS 4617, at 14.

²⁶ *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (quoting *O’Hearn v. Educ. Credit Management Corp.*, 339 F.3d 559, 564 (7th Cir. 2003)); see also *Hedlund v. Educational Resources Institute, Inc.*, 718 F.3d 848, 852 (9th Cir. 2013).

²⁷ See *In re Hutsell*, 620 B.R. 604 (Bankr. N.D. Ohio 2020).

²⁸ *In re Mosko*, 515 F.3d at 326; see also *In re Fields*, 286 Fed. Appx. 246, 250 (6th Cir. 2007) (rejecting undue hardship claim because debtor's failure to make payments did not result from factors beyond her control); *In re McNemar*, 352 B.R. 621, 624 (Bankr. N.D. W. Va. 2006) (rejecting undue hardship claim because of debtor's voluntary cessation of payments on loan).

²⁹ See *In re Brunner*, 46 B.R. 752, 758 (Bankr. S.D.N.Y. 1985).

debtor has consciously or irresponsibly disregarded his or her repayment obligation – or, instead, whether there is some justification for the debtor’s default and ongoing inability to repay the loan.”³⁰ The *Hutsell* court determined that the good faith requirement was satisfied even after assuming that the debtor made no efforts to repay the loan and after “a family member had offered to repay [the debtor’s] loans in a lump sum . . . but Plaintiff was unable to determine how much she owed and where to send payments.”³¹ “[N]either of these facts [were] dispositive” due to the debtor’s litany of health issues and the amount of debt she owed, which was less than \$30,000.³² Like the previous prongs, the third prong of the *Brunner* Test will largely depend on the circuit and district in which a debtor files, and sufficient “good faith efforts” will vary depending on the circuit.

B. THE “TOTALITY OF THE CIRCUMSTANCES” TEST

The First and Eighth Circuits use the “Totality of the Circumstances” Test for discharging student loans.³³ This standard is best explicated in the Eighth Circuit’s decision to adopt the “Totality of the Circumstances” standard.³⁴ This test focuses on determining whether a debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt, while also allowing for a minimal standard of living.³⁵ The main analysis for this test is “(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.”³⁶ Furthermore,

³⁰ *Hutsell*, 620 B.R. at 604 (quoting *Trudel v. U.S. Dep’t of Educ. (In re Trudell)*, 514 B.R. 219, 228–29 (B.A.P. 6th Cir. 2014).

³¹ *Hutsell* at 604.

³² *See id.*

³³ *See In re Bronsdon*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

³⁴ *See Long v. Educational Credit Management Corporation (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003).

³⁵ *See id.*

³⁶ *In re Long*, 322 F.3d at 554.

“this determination will require a special consideration of the debtor's present employment and financial situation - including assets, expenses, and earnings - along with the prospect of future changes - positive or adverse - in the debtor's financial position.”³⁷ Thus, while the totality of the circumstances analysis has some overlapping considerations with the *Brunner* Test, this minority approach is more fact-intensive than the *Brunner* Test. Under the totality of the circumstances test, a judge is encouraged to “consider all relevant facts and circumstances of a particular case.”³⁸

II. VARIOUS FORMS OF DISCHARGE

Another consideration for a bankruptcy judge is the discharge options available to a debtor. Typically, after a finding of “undue hardship,” the result will be the discharge of the debtor’s *entire* student debt. In limited circumstances, a bankruptcy court will *partially* discharge a debtor’s student loan debt after a finding of “undue hardship.”³⁹ Some circuits go further and find that a partial discharge can be granted even without a finding of “undue hardship.”⁴⁰ Finally, some courts have granted a discharge of the debtor’s remaining balance after their participation in an Income-Based Repayment Plan (“IBRP”).⁴¹ In *Erbschloe*, a Chapter 7 debtor who was the victim of a sexual assault, and who was not able to use her studio art degree because she suffered from a “snapping scapula,” did not satisfy the second prong of the *Brunner* Test. The court held that she was still responsible for \$19,300 in student debt.⁴² However, if after her participation in

³⁷ *Id.* at 555; *see also* *Murphy v. Educ. Credit Management Corp.*, 511 B.R. 1 (D. Mass. 2014).

³⁸ *Nash v. Connecticut Student Loan Foundation*, 330 B.R. 323 (D. Mass. 2005).

³⁹ *See Saxman v. Educ. Credit Mgmt. BJR Corp. (In re Saxman)*, 325 F.3d 1168, 1175 (9th Cir. 2003) (“We hold that a bankruptcy court may exercise its equitable authority to partially discharge student debt under the Bankruptcy Code . . .” but “[o]nly the portion that results in undue hardship should be discharged.”).

⁴⁰ *See In re Hornsby*, 144 F.3d at 439 (“In a student-loan discharge case where undue hardship does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act.”).

⁴¹ *See Erbschloe v. U.S. Dep't of Educ. (In re Erbschloe)*, 502 B.R. 470, 483–85 (Bankr. W.D. Va. 2013).

⁴² *See id.*

the IBRP she remained with student loan debt, then the balance remaining after the repayment period was discharged under § 523(a)(8).⁴³

CONCLUSION

Discharge of a debtor's student loan debt will depend on the debtor's particular circumstances (*i.e.*, whether they are a sympathetic debtor), as well as the circuit in which the debtor seeks their discharge. A majority of circuits use the *Brunner* Test, which asks three questions to determine whether the debt should be discharged. A minority of circuits use the Totality of Circumstances Test, which asks similar questions to the *Brunner* Test, but has proven more favorable to debtors. Most discharge proceedings will result in the full discharge of the debtor's loan. However, a minority of courts will partially discharge (even without a finding of "undue hardship") a student loan debt, or alternatively, find creative ways to help the debtor such as discharging the balance of a debtor's loan after a period of repayment.

Student loan forgiveness has been a major topic of recent discussion within the legislative branch. While more than eighty student loan forgiveness bills and legislation were introduced in Congress's 2019-2020 session, only two bills became law.⁴⁴ Thus, in conjunction with the discharge available under section 523(a)(8) of the Bankruptcy Code, a practitioner should monitor student loan discharge legislation.

⁴³ *See id.*

⁴⁴ The first was Consolidated Appropriations Act, 2021 (H.R. 133), which extends the tax-free status of employer-paid student loan repayment assistance programs by five years (until December 31, 2025). The second piece of legislation was in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (H.R. 748), which provided for a student loan payment pause and interest waiver through September 30, 2020, on federal education loans that are held by the U.S. Department of Education. This pause was extended by President Biden. *See* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/pausing-federal-student-loan-payments/>.