Dischargeability of Student Loan Debt in Bankruptcy

By Tara E. Nauful and Dawn M. Hardesty

Title 11 U.S.C. § 523(a)(8) of the United States Bankruptcy Code provides that, in order to obtain a discharge of an otherwise nondischargeable student loan, an individual in bankruptcy (the "debtor") must establish that he and his dependents would suffer an undue hardship if he were required to repay the student loan.

In December 2005, the Fourth Circuit adopted the so-called *Brunner*[1] three-part test for determining dischargeability of student loan debt in chapter 7 cases. The Court had previously applied the *Brunner* test for determining the dischargeability of student loan debt in chapter 13 cases.[2] In expressly adopting the *Brunner* test for chapter 7 cases, the Court stated:

> Since Congress did not provide express standards to guide the undue hardship analysis, the *Brunner* test best incorporates the congressional mandate to allow discharge of student loans only in limited circumstances. Uniformity among the courts is also important in the bankruptcy context.

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

Under the *Brunner* test, a debtor seeking the dischargeability of a student loan debt must show by a preponderance of the evidence that:

1. based on current income and expenses, the debtor cannot maintain a "minimal" standard of living for herself and her dependents 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.

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[1] *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[2] *See Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005) ("This circuit has never explicitly adopted any one test in the Chapter 7 context, although we have applied the *Brunner* factors in the Chapter 13 context.") (citing *Ekenasi v. Educ. Res. Inst. (In re Ekenasi)*, 325 F.3d 541, 546-49 (4th Cir. 2003)).

Frushour, 433 F.3d at 400 (adopting three-part test set forth in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987)).

Since the Fourth Circuit's formal adoption of the *Brunner* test, it appears that the Fourth Circuit has never found a student loan to be dischargeable. *See, e.g., Pettaway v. Dep't of Educ.*, No. 13-2104, 2014 WL 1273651 (4th Cir. Mar. 31, 2014) (affirming district court's order finding the debtor's student loan debt non-dischargeable; district court affirmed bankruptcy court order based on lack of evidence that debtor's claimed medical condition prevented her from working and on the court's finding that the debtor's gambling habit showed she had not made a good faith effort to repay her loans); *Najafian v. Educ. Credit Mgmt. Corp. (In re Najafian)*, 539 Fed. Appx. 287 (4th Cir. 2013) (affirming district court's order denying the debtor's request for a hardship discharge without explanation; district court's order affirming bankruptcy court order was based on debtor's extensive education, her refusal to find a job other than as an ophthalmologist, and her refusal to participate in debt forgiveness alternatives); *Spence v. Educ. Credit Mgmt. Corp. (In re Spence)*, 541 F.3d 538 (4th Cir. 2008) (finding that debtor failed to establish the second and third factors required under the *Brunner* test due to the debtor's level of education, ability to work full-time, and lack of efforts to maximize her income); *Educ. Credit Mgmt. Corp. v. Mosko (In re Mosko)*, 515 F.3d 319 (4th Cir. 2008) (finding that debtors had not shown "a good-faith effort to obtain employment and maximize income," that debtors had additionally failed to minimize their expenses, that debtors had failed to demonstrate good faith due to their failure to make payments during a period when their income substantially exceeded their expenses, and that the debtors failed to adequately pursue loan consolidation options); *Steiger v. Educ. Credit Mgmt. Corp.*, 221 Fed. Appx. 279 (4th Cir. 2007) (reversing district court's order granting partial discharge of the debtor's student loans without explanation, other than to state that the undue hardship standard was not met).

With one exception, since *Frushour,* South Carolina's bankruptcy judges have also declined to find undue hardship in cases involving student loan dischargeability. *See Straub v. Sallie Mae Educ. Credit Mgmt. Corp. (In re Straub)*, 435 B.R. 312 (Bankr. D.S.C. 2010) (granting student loan creditor's

motion for summary judgment, finding that the debtor had not established any of the prongs of the *Brunner* test); *O'Neal v. The Educ. Res. Inst. (In re O'Neal)*, 390 B.R. 821 (Bankr. D.S.C. 2008) (finding that the debtor, who co-signed student loans for a friend from a foreign county, could not discharge the student loan obligations because she had not satisfied the third prong of the *Brunner* test and suggesting that the second prong was also not met).

The one case where the South Carolina Bankruptcy Court did find that a debtor had met his burden of proof occurred in the case of *Marcotte v. Brazos Higher Education Service Corp. (In re Marcotte)*, 455 B.R. 460 (Bankr. D.S.C. 2011). *Marcotte* involved a permanently disabled debtor who was unable to work, and who relied on his parents for food and housing. Under the facts of this case, the Court found that the debtor's student loan debt should be discharged through his chapter 7 bankruptcy case.

Strictly speaking, it is not **impossible** for a debtor to obtain a discharge of student loan obligations. However, it is apparent from the case law that, for this to occur, a debtor must be able to demonstrate that he, through no fault of his own, is in dire circumstances, and that his future circumstances appear hopeless. *See Frushour*, 433 F.3d at 401 (stating that the second factor in the three-part test requires a "certainty of hopelessness"). Anything less, it appears, will leave a debtor obligated to pay student loan debt even after the entry of his bankruptcy discharge.

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