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STUDENT LOAN LITIGATION IN BANKRUPTCY

Hon. Kathy A. Surratt- States, Bankr. E.D. Mo.

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United States Bankruptcy Court for the Eastern District of Missouri

Student Loan Litigation in Bankruptcy

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Student Loan Litigation in Bankruptcy[1]

A.Tests for undue hardship to discharge student loans under §523(a)(8)

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

Brunner Test. *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge student loans a debtor must establish by a preponderance of the evidence that: (1) the debtor cannot maintain a minimal standard of living; (2) additional circumstances exist to show that the debtor's financial condition is likely to persist for a significant portion of the repayment period; and (3) the debtor made a good faith attempt to repay the loan.

Case Summary

Facts: Marie Brunner, pro se debtor, appealed from a decision of the United States District Court for the Southern District of New York, which held that it was an error for the Bankruptcy Court to discharge her student loans based on "undue hardship," 46 B.R. 752 (S.D.N.Y.1985). The District Court determined that Brunner did not establish her eligibility for a discharge of her student loans based on undue hardship. The record demonstrates no "additional circumstances" indicating a likelihood that her current inability to find any work will extend for a significant portion of the loan repayment period. Brunner is not disabled, nor elderly, and she has—so far as the record discloses—no dependents. No evidence was presented indicating a total foreclosure of job prospects in her area of training. At the time of the hearing, only ten months had elapsed since Brunner's graduation from her master's degree program. Finally, as noted by the District Court, Brunner filed for the discharge within a month of the date the first payment of her loans came due. Moreover, she did so without first requesting a deferment of payment, a less drastic remedy available to those unable to pay because of prolonged unemployment. Such conduct does not evidence a good faith attempt to repay her student loans.[2]

Holding: The Second Circuit Court of Appeals affirmed, holding that:

(1) for a debt to be dischargeable on basis of "undue hardship," debtor must show an inability to maintain a "minimal" standard of living for self and dependents if forced to repay loans, that additional circumstances exist indicating that state of affairs is likely to persist for a significant portion of the repayment period of student loans, and that debtor has made good-faith efforts to repay loans,[3] and

(2) Chapter 7 debtor failed to establish that her current inability to find work would extend for a significant portion of the 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.[4]

[1] The *Brunner* test is generally followed by the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.
[2] *Brunner*, 831 F.2d at 396-97.
[3] *Brunner*, 831 F.2d at 396.
[4] *Id.*

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

Totality of Circumstances Test. The Eighth Circuit developed a totality of the circumstances test in *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549, 554 (8th Cir. 2003), where the court must consider (1) debtor's future financial condition, (2) debtor's and dependent's reasonable and necessary living expenses, and (3) other relevant facts and circumstances surrounding each particular bankruptcy case.

Case Summary

Facts: Educational Credit Management Corporation (hereinafter "ECMC") appealed the Bankruptcy Appellate Panel's (hereinafter "BAP") decision affirming the Bankruptcy Court's discharge of Nanci Long's student loan debt. This case required the Eighth Circuit Court of Appeals to address the undue hardship provision found in 11 U.S.C. § 523(a)(8)(B). ECMC argues that the Bankruptcy Court erred in its determination that repayment of the debt would impose an undue hardship on appellee. ECMC also contends that the BAP relied on an incorrect review standard to reach its decision.[5] The Eighth Circuit Court of Appeals reversed and remanded to the BAP.

Nanci Long (hereinafter "Appellee"), was a thirty-nine-year old, single-mother. In 1987, she passed her state-board examination. Until 1990, she worked as a chiropractor in various clinics. Appellee owned and operated a successful chiropractic practice from 1990 until 1993. At some point in 1993, Appellee began to experience extreme fatigue, depression, and diminution of her mental faculties. These symptoms increasingly affected her work, causing a substantial drop in her clientele. In 1995, Appellee terminated her chiropractic practice altogether, citing an inability to handle life changes. She continued in a downward economic and emotional spiral. At one point, she attempted suicide. At the time of the trial, she was gainfully employed and was pursuing an additional college degree. According to Appellee, her symptoms included severe, short-term memory loss, persistent ache, dramatic weight gain, and anxiety about being in public places. In order to treat her condition, appellee takes various prescription drugs and sleeps in excess of twelve hours per day.[6]

The Bankruptcy Court found that Appellee's medical condition will persist into the future and will interfere with her future earning potential. The Bankruptcy Court concluded that the severity and historical intensity of Appellee's illness and overall prognosis would prevent Appellee from earning enough money to "dig herself out of these...loans."[7] After conducting a review for clear error, a divided BAP summarily affirmed the Bankruptcy Court's decision. On appeal, ECMC argues that the BAP should have used the de novo standard in its review of the Bankruptcy Court's undue hardship determination. ECMC also contends that Appellee's student loans were not dischargeable under § 523(a)(8)(B), because the loans did not impose an undue hardship.[8]

[5] *In re Long*, 322 F.3d at 551.
[6] *Id.*
[7] *In re Long*, 322 F.3d at 551-552.
[8] *Id.*

Holding: The Eighth Circuit Court of Appeals held that:

A less restrictive approach to the "undue hardship" inquiry is preferred.[9] The Eighth Circuit Court of Appeals is convinced that requiring bankruptcy courts in the Eighth Circuit to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B). "Therefore, we continue—as we first did in *Andrews*—to embrace a totality-of-the-circumstances approach to the 'undue hardship' inquiry."[10] "We believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy."[11]

In evaluating the totality-of-the-circumstances, reviewing Bankruptcy Courts in the Eighth Circuit should consider: (1) debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.[12]

Simply put, if debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt while still allowing for a minimal standard of living-then the debt should not be discharged. Certainly, this determination will require a special consideration of 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.[13]

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

Brunner plus "Total Incapacity" to Repay Test. The Fifth Circuit added to the *Brunner* test by holding that discharging student loans requires the debtor to specifically prove "a total incapacity ... in the future to pay [his] debts for reasons not within [his] control." *In re Gerhardt*, 348 F.3d 89, 92 (5th Cir. 2003) *citing In re Faish,* 72 F.3d 298, 307 (3d Cir.1995). In other words, the debtor must show that circumstances out of her control have resulted in a 'total incapacity' to repay the debt now and in the future.

Case Summary

Facts: Chapter 7 debtor sought discharge of his student loans. The Bankruptcy Court for the Eastern District of Louisiana entered judgment in favor of debtor, and creditor appealed. The District Court reversed.

Over a period of years, Jonathon Gerhardt obtained over $77,000 in government-insured student loans to finance his education at the University of Southern California, the Eastman School of Music, the University of Rochester, and the New England Conservatory of Music. Gerhardt is a professional cellist. He subsequently defaulted on each loan owed to the United States Government. In 1999, Gerhardt filed for Chapter 7 bankruptcy and thereafter filed an adversary proceeding seeking discharge of his student loans pursuant to 11 U.S.C. § 523(a)(8). The Bankruptcy Court discharged Gerhardt's student loans as causing undue hardship. On appeal, the District Court reversed, holding that it would not be an undue hardship for Gerhardt

[9] *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re Andrews),* 661 F.2d 702, 704 (8th Cir.1981).
[10] *In re Long*, 322 F.3d at 554.
[11] *Id.*
[12] *Andresen v. Nebraska Student Loan Program, Inc.* (*In re Andresen*), 232 B.R. 127 (8th Cir. B.A.P. 1999).
[13] *In re Long*, 322 F.3d at 554-555.

to repay his student loans.[14] Finding no error, the Fifth Circuit Court of Appeals affirmed the District Court's judgment.

Holding: The Fifth Circuit Court of Appeals affirmed, holding that:

To justify discharging debtor's student loans, the *Brunner* test requires a three-part showing:

(1) that debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] 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 debtor has made good faith efforts to repay the loans.[15]

Because the Second Circuit presented a workable approach to evaluating the undue hardship determination, the Fifth Circuit Court of Appeals *expressly* adopted the *Brunner* test for purposes of evaluating a Section 523(a)(8) decision.[16]

"The second prong of the *Brunner* test asks if 'additional circumstances exist indicating that this state of affairs is likely to persist [for a significant period of time].'"[17] "'Additional circumstances' encompass 'circumstances that impacted on the debtor's future earning potential but which [were] either not present when the debtor applied for the loans or [have] since been exacerbated.'"[18]

Thus, the Fifth Circuit ultimately held that "proving that the debtor is 'currently in financial straits' is not enough."[19] "Instead, the debtor must specifically prove "a total incapacity ... in the future to pay [his] debts for reasons not within [his] control."[20]

d. In re Matter of Thomas, 931 F.3d 449 (5th Cir. 2019)

Brunner plus "Intolerable Difficulties" Test. The Fifth Circuit also tightened the *Brunner* test by ruling that a debtor may not discharge a student loan unless repayment would impose intolerable difficulties on the debtor. *In re Matter of Thomas*, 931 F.3d 449 (5th Cir. 2019).

Case Summary

Facts: Chapter 7 debtor brought adversary proceeding against the Department of Education seeking determination that she was entitled to undue hardship discharge of $7,806.45 student loan debt. The United States Bankruptcy Court for the Northern District of Texas denied

[14] *In re Gerhardt*, 348 F.3d at 90-91.
[15] *In re Gerhardt*, 348 F.3d at 91 (*quoting Brunner,* 831 F.2d at 396).
[16] *Id.*
[17] *In re Gerhardt*, 348 F.3d at 92 (quoting *Brunner*, 831 F.2d at 396).
[18] *In re Gerhardt,* 348 F.3d at 92 (quoting In re Roach, 288 B.R. 437, 445 (Bankr.E.D. La. 2003)).
[19] *In re Gerhardt*, 348 F.3d at 92 (*quoting In re Brightful,* 267 F.3d 324, 327 (3d Cir.2001)).
[20] *In re Gerhardt*, 348 F.3d at 92 (*quoting In re Faish,* 72 F.3d 298, 307 (3d Cir.1995) (*quoting In re Rappaport,* 16 B.R. 615, 617 (Bankr.D.N.J.1981)).

discharge of student loan debt. Debtor appealed and the District Court affirmed. Debtor appealed again.[21]

Vera Frances Thomas, the Appellant, is over 60 years old and had to file a Chapter 7 bankruptcy case in 2017. Ms. Thomas suffers from diabetic neuropathy, a degenerative condition that causes pain in her lower extremities. Ms. Thomas is now unemployed and subsists on a combination of public assistance and private charity. In February 2012, however, she had worked for eight years at a call center in Southeastern Virginia and was earning $11.40 per hour with benefits. That year, Ms. Thomas decided to enroll at a local community college to improve her career prospects (she had a high school diploma, but no higher education credits). She obtained two $3,500 loans through the Department of Education, the first on February 14, 2012 and the second on September 21, 2012 to finance her first two semesters of courses. Ms. Thomas did not return for a third semester, and her loans went into repayment in December 2013. In spring 2014, she made payments of $41.24 and $41.61 on the loans.[22]

Ms. Thomas' health began to decline significantly in 2014 when she was diagnosed with diabetic neuropathy. The condition, which often reduces circulation in patients' lower extremities, caused muscle weakness, numbness, and pain in her legs and feet after prolonged standing. Ms. Thomas frequently took unpaid leave from work at the call center to manage her symptoms and incurred significant medical expenses. In 2016, her employer was acquired by another company, and the new employer fired her for violating company policies. Because she was terminated for cause, Ms. Thomas was ineligible for unemployment benefits.[23]

To defray costs, Ms. Thomas moved to Texas to live with her then-boyfriend. She obtained work with Perfumania, then Whataburger, and finally UPS. But each job required her to be on her feet, and she could not maintain these positions. Since quitting UPS in 2017, Ms. Thomas has not obtained employment that comports with her need for sedentary work. Unable to make payments on her student loans and other significant debts, Ms. Thomas filed Chapter 7 bankruptcy in Dallas and received a general discharge of her debts. Seeking a discharge of her student loan debt as well, Ms. Thomas initiated an adversary complaint in Bankruptcy Court against the Department of Education.[24]

Holding: The Fifth Circuit Court of Appeals affirmed, holding that:

Debtor's inability to pay her student loans and maintain a minimal standard of living was not likely to persist throughout a significant portion of the loans' repayment period. The plain meaning of the words chosen by Congress is that student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor.[25] The threshold by definition must be greater than the ordinary circumstances that might force one to seek bankruptcy relief.[26]

[21] *In re Matter of Thomas*, 931 F.3d 449.
[22] *In re Matter of Thomas*, 931 F.3d 450.
[23] *Id.*
[24] *Id.*
[25] *In re Matter of Thomas*, 931 F.3d at 454.
[26] *Id.*

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

Brunner plus "Acting in Good Faith" Test. Tenth Circuit adopted its version of the *Brunner* test in *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004).

Case Summary

Facts: Plaintiff/Appellee Nancy Jane Polleys sought a bankruptcy court discharge of federally guaranteed student loans. Defendant/Appellant Education Credit Management Corporation (hereinafter "ECMC") is a non-profit company and fiduciary of the Department of Education that is charged with collecting such loans. It now holds these loans. Ms. Polleys initiated an adversary proceeding in bankruptcy, contending that the loans were dischargeable because payment of them would impose an undue hardship within the meaning of 11 U.S.C. § 523(a)(8). The Bankruptcy Court agreed and discharged the loans. The District Court affirmed. ECMC appealed."[27]

At the time of trial, Ms. Polleys was a 45–year old single mother of a teenaged girl. In 1993, she obtained a degree in accounting financed with student loan funds. She has not repaid any amount on these loans. Her loans were later consolidated, and at the time of trial had a balance of approximately $51,000; repayment would require $420 per month over a period of 20 years. Ms. Polleys was previously employed as an accountant. In 1994, she worked for one year in that capacity and earned $33,000. She had a job in public accounting in 1997, earning $13,771. According to Ms. Polleys, she was laid off from that job when the employer realized she was taking antidepressant medication and she asked for too much help. Ms. Polleys also tried self-employment but could only get small bookkeeping jobs that paid less than $400 per month. Since 1997, Ms. Polleys's annual income has been as high as $16,000 and as low as $3,000.

Ms. Polleys and her daughter live in a rental property owned by her parents and pay no rent or utilities. She has a 1993 Subaru, which has significant body damage, but owns very little other property and no real property. Her budget contains no funds for emergencies. She qualifies for food stamps, and her income is below the federal poverty guidelines, as it was in the year before trial. Although her daughter is eligible for Medicaid, Ms. Polleys herself has no health insurance. Ms. Polleys is apparently in good physical health, but she has been diagnosed with and continues to suffer from a psychological condition known as 'cyclothymic disorder'.[28]

Holding: The Tenth Circuit Court of Appeals affirmed, holding that:

(1) showing of a certainty of hopelessness was not required to demonstrate inability to maintain minimum standard of living if forced to repay loans;

(2) whether debtor has made good faith efforts to repay loans should depend on the legitimacy of the basis for seeking a discharge;

(3) debtor had inability to maintain minimum standard of living if forced to repay student loans which was likely to persist for significant portion of loan repayment period;

(4) debtor sought discharge in good faith; and

[27] *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d at 1304.
[28] *Id.* at 1305.

(5) debtor demonstrated undue hardship, entitling her to discharge.[29]

B. Recent Cases

a. *Tingling v. Educ. Credit Mgmt. Corp. et al.*, 990 F.3d 304 (2d Cir. 2021)

Recent reaffirmance of *Brunner* by the Second Circuit. *Tingling v. Educ. Credit Mgmt. Corp. et al.*, 990 F.3d 304 (2d Cir. 2021).

Case Summary

Facts: Chapter 7 debtor filed an adversary complaint seeking [a] determination that her educational loans were dischargeable and subsequently moved to seal the case and for a default judgment against the United States Department of Education (hereinafter "DOE"). After loan guarantor's motion to intervene was granted and debtor's default motion was denied, trial was held. The Bankruptcy Court for the Eastern District of New York determined that debtor failed to satisfy the *Brunner* test and, accordingly, that her student loans were not dischargeable. Debtor, proceeding pro se, appealed. The District Court affirmed. Debtor appealed."[30]

In August 2016, [D]ebtor/Appellant Janet Tingling (hereinafter "Tingling") sought relief from her student debt by filing a complaint against student loan holder United States Department of Education and others. On consent of the parties, the Bankruptcy Court granted the motion of Educational Credit Management Corporation to intervene as the assignee of eight of the loans. On April 15, 2019, the Bankruptcy Court entered a final judgment, holding that Tingling's student loans were non-dischargeable and that Tingling had failed to prove undue hardship. Tingling appealed to the District Court, which affirmed the Bankruptcy Court's judgment…The District Court further held that the Bankruptcy Court did not abuse its discretion when it adopted the July 31, 2018 joint pretrial memorandum as the basis for its Pretrial Order and declined to incorporate Tingling's later unilateral revisions."[31]

Holding: The Second Circuit Court of Appeals affirmed, holding that:

(1) The Bankruptcy Court did not abuse its discretion in basing its Pretrial Order on the joint pretrial memorandum dated July 31, 2018.[32] Nor was it an abuse of discretion for the Bankruptcy Court to not permit Tingling to unilaterally modify that joint pretrial memorandum, as the interests of justice in this case did not so require.[33]

(2) Tingling failed to make the factual showing to establish "undue hardship" under *Brunner*, as would be required to discharge her educational loans.[34]

[29] *Id.* at 1302.
[30] *In re Tingling*, 990 F.3d at 304.
[31] *Id.* at 306-307.
[32] *Id.* at 304.
[33] *Id.*
[34] *Id.*

b. *Educ. Credit Mgmt. Corp. v. Goodvin,* 2021 WL 1026801 (D. Kan. 2021)

Compare *Tingling* to *Educ. Credit Mgmt. Corp. v. Goodvin,* 2021 WL 1026801 (D. Kan. 2021) that found that debtor could satisfy the *Brunner* test because debtor could not pay accruing interest on the student loan and still maintain a minimal standard of living.

Case Summary

Facts: After he filed for Chapter 7 bankruptcy, Debtor Jeffrey Goodvin initiated in the Bankruptcy Court an adversarial proceeding against the United States Department of Education (hereinafter "DOE") and defendant Educational Credit Management Corporation (hereinafter "ECMC"), by which Mr. Goodvin sought discharge of certain student loans held by DOE and ECMC pursuant to 11 U.S.C. § 523(a)(8).[35] At the time of trial, Mr. Goodvin was 57, single, and had no dependents. In total, Mr. Goodvin owed $77,000 on his student loans, which are accruing interest at a rate of $503 per month."[36] On July 15, 2020, the Bankruptcy Court conducted a trial at which the parties offered documentary evidence and stipulations of fact and at which Mr. Goodvin testified. On September 1, 2020, the Bankruptcy Court issued a written opinion in which it made various findings of fact; concluded that Mr. Goodvin had shown the necessary 'undue hardship'; and partially discharged the student loan debt, specifically discharging Mr. Goodvin's debt on a 1992 consolidation loan held by ECMC, but excepting from discharge the debt on ECMC's other loan and on DOE's loans.[37]

ECMC appealed that decision to the United States District Court for the District of Kansas. ECMC challenged particular findings of fact relating to Mr. Goodvin's expenses, and it argued that the Bankruptcy Court erred in concluding that Mr. Goodvin satisfied the undue hardship standard. ECMC also argued that, if that standard is deemed satisfied, the Bankruptcy Court abused its discretion in discharging only the debt on one loan instead of spreading the partial discharge among all debts on a pro rata basis. The Court rejected ECMC's arguments, and it therefore affirmed the Bankruptcy Court's partial discharge.[38]

Holding: The United States District Court for the District of Kansas held that:

(1) disposable income insufficient even to pay accruing interest can prove "undue hardship" under 11 U.S.C. § 523(a)(8); and

(2) the availability of an income-based repayment program will not automatically preclude the discharge of student loans.[39]

c. *Parvizi v. United States Dep't of Educ.*, et al., (*In re Parvizi*), 2021 Bankr. LEXIS 1283 (Bankr. D. Mass. May 12, 2021)

Bankruptcy Court in Massachusetts discharged part of debtor's student loans under Section 105(a) after finding that in Massachusetts the bankruptcy courts use the totality of the circumstances test. *Parvizi v. United States Dep't of Educ.*, et al.

[35] *Educ. Credit Mgmt. Corp. v. Goodvin*, 2021 WL 1026801, at *1.
[36] *Id.* at *2.
[37] Id. at *1.
[38] *Id.*
[39] *See* Bill Rochelle, *Inability to Cover Accruing Interest Was Pivotal on Discharging Student Loans*, AMERICAN BANKRUPTCY INSTITUTE (Mar. 22, 2020).

Case Summary

Facts: As of the trial date, Debtor was 51 years old, had no physical or mental conditions that impede her ability to work, and did not have any dependents. From 1997 through 2012, Debtor received various student loans to fund her extensive education. As a result of that education, Debtor has obtained multiple degrees and is fluent in at least four languages. In 1990, Debtor obtained a bachelor's degree in philosophy and biochemistry from Clark University. Thereafter, she attended medical school but voluntarily left before receiving a degree. In 2007, Debtor received $100,000 from her father and offered to compromise her extant $123,000 student loan balance for $45,000. The United States Department of Education (hereinafter "DOE") rejected the offer because, based on Debtor's financial statement, the DOE believed that Debtor had an ability to pay the loan...In 2008, Debtor returned to medical school at St. George's University School of Medicine (financed by additional student loans) and graduated with a Doctor of Medicine in 2012. In June 2012, Debtor began a four-year residency program in psychiatry at the University of Vermont, earning $50,000 per year. But Debtor did not complete the residency program and left in January 2013. Debtor testified that, as a result of a conflict with her supervisor, Debtor was put on a remediation plan and was then placed on leave pending an appea. Debtor admitted that she decided not to pursue the appeal and, instead, chose to resign. Despite her many attempts, Debtor was never offered an interview for, nor admitted to, another residency program. Since 2014, Debtor has primarily obtained employment in the education field. For tax years 2016 through 2019, Debtor's annual income was $21,588, $20,876, $41,336, and $28,668, respectively. Debtor estimated that she earned $2,500 per month in early 2020.[40]

The DOE holds two types of Debtor's student loans - federal government funded loans through the William D. Ford Federal Direct Loan Program (hereinafter the "Direct Loans") and privately funded student loans that are guaranteed and held by the federal government through the Federal Family Education Loan Program (hereinafter the "FFELP Loans"). As of September 10, 2020, the outstanding total balance of the Direct and FFELP Loans totaled $653,843.22, comprised of $478,070.53 in unpaid principal and $175,772.80 in interest. Debtor has not made any payments toward the student loans with the exception of offsets of her income tax refunds in the amount of $3,960.95, which were credited to her student loan account. The parties have stipulated that the Direct Loans are currently eligible for participation in the Revised Pay As You Earn (hereinafter "REPAYE") income driven repayment plan, and that the FFELP Loans would also be eligible upon consolidation.[41]

Holding: The United States Bankruptcy Court for the District of Massachusetts held that:

Although undue hardship is not defined in the Bankruptcy Code, [the] parties have stipulated that the test to be applied in this case is the "totality of the circumstances" test, which this Court, along with the other bankruptcy courts in this district, has previously adopted.[42] The totality of the circumstances analysis is aimed at determining the answer to the question: Can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student

[40] *Parvizi v. United States Dep't of Educ.*, et al. at 2-6.
[41] *Id.* at 9-10.
[42] *Schatz v. U.S. Dep't. of Educ.* (*In re Schatz*), 584 B.R. 1, 7 (Bankr. D. Mass. 2018), *vacated and remanded on other grounds*, 602 B.R. 411 (B.A.P. 1st Cir. 2019).

loans?[43] In answering this question, the Court should consider all relevant evidence—debtor's income and expenses, debtor's health, age, education, number of dependents and other personal or family circumstances, the amount of the monthly payment required, the impact of the general discharge under Chapter 7 and debtor's ability to find a higher-paying job, move or cut living expenses. In addition, other factors not listed here may impact a particular debtor's case.[44]

Based on the totality of the circumstances, Debtor has not proven by a preponderance of the evidence that excepting her student loans from discharge would impose an undue hardship pursuant to § 523(a)(8). However, the Court does find that to the extent Debtor is unable to repay the student loans in full by the end of any applicable income-contingent repayment program, the negative amortization of the debt and accrued interest would undoubtedly constitute an undue hardship to Debtor at that time. Debtor was 51 years old at the time of trial and will be in her mid to late 70's by the time she completes an income-based repayment plan... Judgment was entered for DOE, except that pursuant to § 105(a), the Court will order that any student loan debt remaining unpaid upon Debtor's completion of the REPAYE program or any comparable program is deemed discharged as an undue hardship pursuant to § 523(a)(8).[45]

d. *In re Randall*, 628 B.R. 772 (Bankr. D. Md. 2021)

Maryland Bankruptcy Court granted a partial discharge of student loans in *In re Randall*, 628 B.R. 772, (Bankr. D. Md. 2021).

Case Summary

Facts: Terry Lucille Randall (hereinafter "Plaintiff") is 68 years old. She received her first college degree, a bachelor's degree in psychology, in 2004 from Morgan State University. She then received a master's degree in human services and public policy in 2008 from Sojourner-Douglass College. Plaintiff further pursued, but did not complete, a master's degree in business administration from Strayer University. Plaintiff financed her education with assistance from her parents and with loans from, among others, Defendant. Plaintiff testified that she is currently employed as a community medical technician, earning approximately $13 per hour with some opportunity for overtime. Plaintiff explained that she has worked an exceptional number of overtime hours during the past year primarily due to the global COVID-19 pandemic and a shortage of workers. Plaintiff stated that she did not believe her current level of overtime pay would continue after the pandemic recovery.[46]

Plaintiff did not deny receiving student loans to finance her education, including student loans from Defendant in an amount now due and owing of $190,800.35. Plaintiff further acknowledged that, with respect to the amounts due to Defendant, she has only been able to repay approximately $3,764.43. Plaintiff lists approximately $516,918.04 of total student loan debt in her bankruptcy schedules.[47]

[43] *Hicks v. Educ. Credit Mgmt. Corp.* (*In re Hicks*), 331 B.R. 18, 31 (Bankr. D. Mass. 2005).
[44] *Parvizi v. United States Dep't of Educ.*, et al. at 15-16.
[45] *Id.* at 18-19.
[46] *In re Randall,* 628 B.R. 772 at 778.
[47] *Id.* at 779.

Holding: The United States Bankruptcy Court for the District of Maryland held that:

Plaintiff, within her limits, made good faith attempts to repay or otherwise address her student loan debt. The Court concluded that requiring Plaintiff to repay Defendant in full would impose an undue hardship on Plaintiff. The Court based this conclusion on, among other factors, Plaintiff's earning capacity, nominal assets, minimal existing expenses, limited opportunities for decreasing expenses or increasing wages, age, fluctuation in overtime hours and income generally, and past attempts to repay her debt given her limitations.[48] Therefore, the Court supported a finding of undue hardship. That said, "the Court did not ignore that Plaintiff has some ability to repay some portion of her student loan debt."[49] "The Code does not directly address, however, the scenario when some resources might be available to repay some of the debt but repayment of the entire debt is not possible at all, or at least not without an undue hardship."[50] "Although some courts have determined that any ability to repay requires a complete denial of discharge, the Court did not read the Code in that manner. Rather, the Court agreed with those decisions allowing a partial discharge of student loan debt when debtor has established undue hardship."[51]

Balancing all of the evidence and considering the language and purpose of the Code, the Court determined that Plaintiff should be required to pay a total of $12,000 (plus interest at the federal judgment rate) to Defendant on account of the student loan debt. Plaintiff does not have to pay that amount all at once; rather, the Court found that Plaintiff should have an ability to make monthly payments towards that amount over a ten-year period. The Court recognized that such monthly payments are likely feasible for Plaintiff now but may not be so in a few years depending on Plaintiff's circumstances. As such, the Court expressly noted that Plaintiff may prepay some or all of the non-dischargeable debt she will owe to Defendant under the terms of this Court's ruling without penalty or additional interest charges. In sum, the Court ultimately held that $12,000 of Defendant's debt is non-dischargeable under Section 523(a)(8) of the Code and that such debt shall accrue interest at the federal judgment rate until paid in full. Repaying that amount plus the remaining balance that would be due on those student loans would impose an undue hardship on Plaintiff under Section 523(a)(8) of the Code and the *Brunner* test.[52]

e. *Homaidan v. Sallie Mae, Inc.,* 3 F.4th 595 (2d Cir. 2021)

Case held that private student loans were not excepted from discharge. *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595 (2d Cir. 2021).

Case Summary

Facts: The question in this case is whether the private educational loans that Plaintiff/Appellee Hilal K. Homaidan (hereinafter "Homaidan") took out from Defendant/Appellants Sallie Mae Inc., Navient Solutions, LLC, and Navient Credit Finance Corporation (hereinafter collectively, "Navient") were dischargeable.[53]

[48] *Id.* at 785.
[49] *In re Randall,* 628 B.R. 772 at *785* (*citing In re Nitcher*, 606 B.R. 67, 79 (Bankr. D. Or. 2019)).
[50] *In re Randall,* 628 B.R. 772 at *785-786* (*citing Mosko v. Am. Educ. Servs.*, No. 04-52834, 2005 WL 2413582, at *8 (Bankr. M.D.N.C. Sept. 29, 2005)).
[51] *In re Randall,* 628 B.R. 772 at *786* (*citing In re Alderete*, 412 F.3d 1200, 1206–07 (10th Cir. 2005)).
[52] *In re Randall,* 628 B.R. 772 at 787-788.
[53] *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595 at 598.

Homaidan received the loans (hereinafter “Navient loans”), graduated from Emerson College, and later filed for Chapter 7 bankruptcy. The Bankruptcy Court's 2009 discharge order was ambiguous as to whether the Navient loans were discharged. Navient pursued repayment after the discharge order was issued, and Homaidan complied. Among them were two direct-to-consumer Tuition Answer Loans, totaling $12,567, from Sallie Mae Inc., a corporation to which Navient is the successor. Although the loans helped underwrite Homaidan's college education, they were not made through Emerson's financial aid office, nor—Homaidan alleges—were they made solely to cover Emerson's cost of attendance. They went straight to Homaidan's bank account, and the loan proceeds exceeded the cost of Emerson's tuition. Soon after graduating, Homaidan filed for Chapter 7 bankruptcy in the Bankruptcy Court for the Eastern District of New York. The petition listed the Navient loans as liabilities. Homaidan eventually obtained a discharge order from the Bankruptcy Court, but the order did not specify which debts were discharged.[54]

After paying off the loans in full, Homaidan reopened the bankruptcy case and commenced this adversary proceeding against Navient seeking, among other things, actual damages for Navient's alleged violation of the discharge order. The Bankruptcy Court for the Eastern District of New York determined that the Navient loans were not excepted from discharge under 11 U.S.C. § 523(a)(8)(A)(ii) and therefore denied Navient's motion to dismiss.[55]

Navient maintains that § 523(a)(8)(A)(ii) prevented the loans from being discharged in Homaidan's bankruptcy. That provision excepts from discharge “obligation[s] to repay funds received as an educational benefit, scholarship, or stipend.” 11 U.S.C. § 523(a)(8)(A)(ii). Under Navient's reading of that provision, the term “educational benefit” would encompass virtually all private student loans. But that reading cannot be reconciled with the text and structure of § 523(a)(8), both of which confirm that § 523(a)(8)(A)(ii) excepts from discharge a far narrower category of debt.[56]

Holding: The Second Circuit Court of Appeals, affirmed holding that:

(1) lenders were not estopped from advancing their interpretation of the subsection of the Bankruptcy Code at issue simply because they had unsuccessfully advanced that interpretation of the provision in other cases, and

(2) as a matter of apparent first impression for the Court, debtor's private student loans did not constitute “funds received as an educational benefit” and so were not excepted from discharge.[57]

“Educational benefit” is therefore best read to refer to conditional grant payments similar to scholarships and stipends. The Reserve Officer Training Corps and the National Health Service Corps, for example, pay tuition in exchange for a promise to serve in the military after graduation or to practice medicine in an underserved region.[58] A recipient who breaks that

[54] *Id.*
[55] *Id.*
[56] *Id.* at 599.
[57] *Id.* at 595.
[58] *Id.* at 605 citing Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 292 (2019).

promise incurs an "obligation to repay [the] funds" that they previously received "as an educational benefit." Per § 523(a)(8)(A)(ii), that obligation cannot be discharged in bankruptcy.[59]

f. *McCoy v. United States of America*, 810 Fed. Appx. 315 (5th Cir. 2020)

Supreme Court denied petition for certiorari in *McCoy v. United States of America*, an appeal from the Fifth Circuit after the Acting Solicitor General filed a pleading indicating that the Education Department might revise regulations and related policies in the future. This review was started in 2018 by the Trump administration. The government also said that there were procedural problems with this appeal that would not make it appropriate for considering a nationwide standard for student loan discharge. Fifth Circuit opinion *McCoy v. United States of America*, 810 Fed. Appx. 315 (5th Cir. 2020).

Case Summary

Facts: Chapter 7 Debtor sought judgment discharging her student loan debt. After trial, the Bankruptcy Court for the Southern District of Texas declared that loans were not discharged. Debtor appealed, and the United States District Court for the Southern District of Texas affirmed. Debtor appealed to the Fifth Circuit Court of Appeals."[60]

Thelma McCoy incurred a large amount of student loan debt (currently totaling over $345,000) in pursuit of advanced degrees, beginning when she was in her forties. She consolidated her loans and entered into an income-based repayment plan. When her degrees did not yield the well-paying jobs she hoped for, she filed for bankruptcy seeking relief from the consolidated student loan debt. At the time of her bankruptcy filing, and throughout this litigation, her repayment plan has required zero dollars per month due to her low income. If her income does not improve, McCoy will continue to have a zero-dollar repayment obligation. Under the structure of the repayment plan, her debt may be forgiven twenty-five years following her first payment under the plan. *See* 34 C.F.R. § 685.221(f)(1), (f)(3)(ii)(D)(2013). However, under current law, such forgiveness has tax implications unless McCoy were to qualify for an employment-based exception; any forgiven amount will be subject to whatever taxation laws are in effect at the time the debt is forgiven. *See* 26 U.S.C. §§ 61(a)(11), 108(f)(1). Student loan debt is usually not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(8). However, there is an exception, which McCoy asserted, for circumstances where failure to discharge would impose an undue hardship on Debtor. The Bankruptcy Court found no undue hardship, and the district court affirmed.[61]

Holding: The Fifth Circuit Court of Appeals affirmed, holding that:

The Bankruptcy Court did not clearly err in its determination that debtor's inability to pay her student loans was not likely to persist, and thus debtor was not entitled to "undue hardship" discharge of student loan debt.[62]

The impact of a zero-dollar monthly payment under an income-based repayment plan on the first prong of *Brunner* has not been decisively determined by our court previously, and we

[59] *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595 at 605.
[60] *McCoy v. United States of America*, 810 Fed. Appx. 315 at 315-16.
[61] *Id.*
[62] *Id.*

conclude that we need not address it because McCoy has failed to establish that the bankruptcy court (as affirmed by the district court) erred in its findings on the second prong.[63]

Under the Fifth Circuit precedent, "'[a]dditional circumstances' encompass circumstances that impacted on the debtor's future earning potential, but which were either not present when the debtor applied for the loans or have since been exacerbated."[64] McCoy argued that "[a]t least two major additional circumstances" demonstrate that the state of affairs is likely to persist: "(1) she is elderly—at 62 she is less than three years away from the minimum retirement age; and (2) she suffers from severe mental and physical disabilities, which are not likely to recede or resolve."

The Bankruptcy Court determined that McCoy could not satisfy the second prong of the *Brunner* undue hardship test because, although her payments are set at zero dollars per month, she had not shown additional circumstances demonstrating her inability to pay a higher monthly amount would persist. Therefore, McCoy failed to meet her burden of proof.

In affirming the Bankruptcy Court's determination that McCoy failed to satisfy the second prong, the District Court noted that Bankruptcy Courts have considered the timing of additional circumstances.[65] The District Court correctly determined that the Bankruptcy Court did not clearly err in its determination about the second prong of the *Brunner* undue hardship test. Accordingly, the Fifth Circuit Court of Appeals found no need to reach the third prong.

g. *In re Rosenberg*, 610 B.R. 454, 456 (Bankr. S.D.N.Y. 2020)

Chapter 7 debtor-attorney brought adversary proceeding for determination that he was entitled to 'undue hardship' discharge of his $221,385.49 in consolidated student loan debt. Both parties cross-moved for summary judgment.[66]

Case Summary

Facts: Debtor/Plaintiff, Kevin Jared Rosenberg, asked the Court to declare the debt owed to Educational Credit Management Corporation (hereinafter "ECMC") dischargeable, pursuant to § 523(a)(8) in a summary judgment motion. The Bankruptcy Court for the Southern District of New York granted Plaintiff's motion for summary judgment. However, Defendant's cross-motion for summary judgment was denied.

Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on March 12, 2018. On June 18, 2018, Debtor filed an adversary proceeding to have his student loan debt declared dischargeable, pursuant to 11 U.S.C. § 523(a)(8). "On November 14, 2018, the parties entered into a consent order, which authorized ECMC to intervene in this adversary proceeding as the 'holder [] of one ... federal consolidation loan owed by Plaintiff' (hereinafter the "Student Loan")."[67]

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[63] *Id.* at 316-318.
[64] Id. at 316-17 citing *In re Gerhardt*, 348 F.3d at 92.
[65] *See In re Thoms*, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001) (stating that a pertinent additional circumstance would be one "which was either not present when the debtor applied for the loans or has since been exacerbated" because "[o]therwise, the debtor could have calculated that factor into its cost-benefit analysis at the time the debtor obtained the loan").
[66] *In re Rosenberg*, 610 B.R. at 454.
[67] *Id.* at 456-57.

Debtor received a discharge of his debts on July 26, 2019. ECMC filed a Cross Motion for Summary Judgement and opposition to Debtor's motion (hereinafter the "Cross Motion") on October 8, 2019. The parties agree that there are no genuine issues of material fact and that this issue is ripe for summary judgment. The Court held a hearing on October 29, 2019 and asked the parties to provide the Court with evidence as to the current promissory note, the current terms of the loan, the current principal balance, and a payment history. ECMC filed a response which contained the payment history since consolidation of the loan.[68]

Debtor began borrowing money to fund his education in August 1993. From 1993 until 1996, Petitioner continued to borrow money to pay for his undergraduate education at the University of Arizona. After obtaining a Bachelor of Arts degree in History, he served in the United States Navy on active duty for five years. After completing his tour of duty, Debtor attended Cardozo Law School at Yeshiva University where he applied for and received additional student loans to cover his tuition and board from 2001 through 2004. After graduating from law school, Debtor consolidated his Student Loan on April 22, 2005 in the original principal amount of $116,464.75. The total outstanding balance of this Student Loan as of November 19, 2019 was $221,385.49 with an interest rate of 3.38% per annum.[69]

Holding: The United States Bankruptcy Court for the Southern District of New York held that:

Debtor has a negative income each month, he has no money available to repay his Student Loan and maintain a "minimal" standard of living. This prong of the *Brunner* test is met.[70]

The repayment period has ended. Debtor is in default and his loan was accelerated. As of November 19, 2019, Debtor is responsible for the repayment of the full amount of $221,385.49. His circumstances will certainly exist for the remainder of the repayment period as the repayment period has ended and the loan is due and payable in the full amount. The second prong of the *Brunner* test is, therefore, satisfied.[71]

Lastly, Debtor made 10 payments, in varying amounts, during the 26 months that Debtor was responsible for making payments, which is approximately a 40% rate of payment over a thirteen-year period. Additionally, Debtor did not sit back for 20 years but made a good faith effort to repay his Student Loan. Debtor actively called and requested forbearance on at least five separate occasions, all of which were granted by the servicer.[72]

Therefore, Debtor has demonstrated a good faith effort to repay the loan and has satisfied the "undue hardship" standard of 11 U.S.C. § 523(a)(8).[73]

[68] *Id. at 457.*
[69] *Id.*
[70] *Id.* at 460-61.
[71] *Id.* at 461.
[72] *Id.* at 462
[73] *Id.*

C. Recent Law Review Article

a. How the Courts Have Gone Astray in Refusing to Discharge Student Loans: The Folly of Brunner, of Rewriting Repayment Terms, of Issuing Partial Discharges and of Considering Income-Based Repayment Plans, 95 Am. Bankr. L.J. 53, 54 (2021).

Author: Hon. Alan M. Ahart, Retired Bankruptcy Judge for the Central District of California.

Law Review Synopsis

To determine whether undue hardship exists, nine federal circuits have adopted a specious test that was promulgated in 1985 by the federal district in *Brunner v. N.Y. State Higher Educ. Services Corp.* (*In re Brunner*) and affirmed and adopted by the Second Circuit…This paper demonstrates how the *Brunner* undue hardship test misconstrues 11 U.S.C. § 523(a)(8) and how the courts ought to interpret this section when determining whether educational loans should be discharged in bankruptcy. Some courts have concluded that an educational loan can be partially discharged and/or restructured. This article further explains how these courts have erred. Building from different laws in two other federal circuits, this article provides the framework for determining whether an educational loan should be discharged.[74]

The article concludes by pointing out that: "[t]he Courts of Appeals in all, but two federal circuits have adopted the *Brunner* test to determine whether an educational loan should be discharged under § 523(a)(8)."[75] The article further indicates the [t]hree elements of the *Brunner* test are wide of the mark: a bankruptcy court should not be required to demonstrate a "certainty of hopelessness," "extraordinary circumstances," or that her situation will persist for a long time, or that she has made good faith efforts to repay the loan. Many courts in these *Brunner* circuits have rewritten the repayment terms and/or ordered these loans partially discharged. Other courts in various federal circuits have considered the debtor's eligibility to participate in an income-based repayment plan when deciding whether an educational loan should be discharged.[76] Judge Ahart asserts these actions are mistaken.

According to Judge Ahart, "a bankruptcy court must decide whether the debtor's reasonable future financial resources would [adequately] cover payment of the student loan debt over the remaining term of the loan, while still permitting for a minimal standard of living."[77] However, if the court does not find "undue hardship" then the student loan should not be discharged.[78] Thus, a money judgment must be entered in favor of the creditor.[79] On the other hand, if the court determines that "undue hardship" is established then the court ought to simply order a discharge of the entire balance of the student loan.[80]

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[74] Alan M. Ahart, *How the Courts Have Gone Astray in Refusing to Discharge Student Loans: The Folly of Brunner, of Rewriting Repayment Terms, of Issuing Partial Discharges and of Considering Income-Based Repayment Plans*, 95 Am. Bankr. L.J. 53, 54 (2021).
[75] *Id.* at 78-79.
[76] *Id.* at 79
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*