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Student Loan Debt Dischargeability – Courts Discuss Limits of *Brunner* Test

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Since 1977, certain kinds of student loan debt has been difficult to discharge without a showing of ''undue hardship,'' as that term is found in 11 U.S.C. § 523(a)(8). Initially, Congress limited this exception to discharge to relatively new debt – loans under five years old. In 1990, Congress amended the section to apply to seven-year old loans. Then, in 1998, Congress eliminated the expiration period entirely. All public student loan debt, no matter how old, is now nondischargeable without a showing of ''undue hardship.'' Congress extended this protection to private loans in 2005.

Congress did not define the term ''undue hardship'' when it used that term in Section 523(a)(8), and at the time it enacted that section, the term appeared nowhere else in the Bankruptcy Code. The situation is not much changed today, as while the term has now been added to another section of the Code, Section 524(m)(1), the method for determining hardship in that Section—relating to reaffirmation agreements—cannot be practically applied to Section 523(a)(8). That has left, and still leaves, the courts to determine the meaning of ''undue hardship.''

Courts did not take long in defining this term. The Second Circuit adopted a test in 1987 that every other circuit later adopted, with the exception of the First and Eighth. That test is the so-called ''Brunner Test,'' adopted by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). The Brunner Test sets forth three factors which a debtor must satisfy in order to obtain a discharge. The First and Eighth Circuits continue to use a ''totality of the circumstances'' test which looks to a broad range of factors, none of which are dispositive to the issue.

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The date upon which the Ninth Circuit adopted the Brunner Test has now become the keystone to an argument as to how courts in the Ninth Circuit should determine whether ''undue hardship'' exists under Section 523(a)(8). The argument is this: the Ninth Circuit ruled in 1998 that it would adopt the Brunner Test, in *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111-12 (9th Cir. 1998). At the time of this decision, however, student loans could be discharged if they were at least seven years old—and private student loan debt could be discharged no matter what its age. Many now argue that the Brunner Test, today, is too strict now that debtors cannot automatically discharge their debt which is seven years old.

The Brunner Test looks at (1) whether the debtor can make payments now, while also maintaining a minimal standard of living, (2) whether that situation is likely to persist, and (3) whether the debtor made a good faith effort to repay the loans. The problem with that test, some courts assert, is that it misses several other important considerations, and in doing so, limits a bankruptcy court's discretion to find that certain debt is an undue hardship.

Take, for example, the case of a debtor who is 40, divorced, with two children for whom he pays child support. He works, gets overtime on a regular basis, and makes just enough to pay his minimal expenses and child support, plus enough to pay interest on his student loan debt. To this, add the following consideration: the debtor in six months will no longer need to make child support payments. His expenses will go down significantly, and that will give him enough additional income to pay more on his student loan debt, though not enough to fully pay it off.

According to the Brunner Test, that hypothetical debtor likely could not obtain a discharge, as (1) he can make some payments on his student loan now, though they are minimal, (2) his current financial situation will not persist, as his expenses will soon be dramatically reduced, and (3) options now exist for debtors to enroll in a Federal income-based student loan repayment program, which enable debtors to make monthly payments based on a percentage of a debtor's income. At the end

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of a 25-year period, the debtor's remaining student loan debt is be discharged.

On Nov. 10, 2015, a bankruptcy court in the Western District of Missouri—a court in the Eighth Circuit which does not apply the Brunner Test, but a ''totality of the circumstances'' approach, analyzed these facts and ruled that the debtor's student loan debt could be discharged. *Abney v. United States Dep't of Educ. (In re Abney)*, 2015 BL 370918, 540 B.R. 681 (Bankr. W.D. Mo. Nov. 10, 2015). In *Abney*, the court stated that despite the fact that the debtor would soon have more surplus income to pay off his loan, it was not equitable to require him to do so. He had contributed little towards his own retirement and had worked diligently in the past to pay down the debt. The court stated that it was not fair to condemn the debtor to a 25-year repayment period during which the debtor likely would not be able to save much toward his retirement, would not be able to pay off all of the principal debt, and upon reaching the age of 65, likely would have a taxable event (forgiveness of the remaining loan principle) which would be difficult for the debtor to repay. In *Abney*, the debtor certainly benefitted because he appeared to be hardworking and willing to pay his student loan debt as much as possible. But he also benefitted from not being required to satisfy the Brunner Test—a potentially insurmountable burden given the particular facts of his case.

Recently, courts in the Ninth Circuit have begun to push back against using the Brunner Test. In 2013, the U.S. Bankruptcy Appellate Panel for the Ninth Circuit decided *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 922 (B.A.P. 9th Cir. 2013). There, the BAP discharged a debtor's debt. In a concurring opinion, Judge Pappas set forth his belief as to why courts in the Ninth Circuit should no longer be obligated to apply the Brunner Test. He commented upon the massive recent increase in student loan debt (to more than $1 trillion), and Congress's elimination of the option to discharge student loan debt by simply waiting seven years, and concluded that the Brunner Test was ''a relic of a bygone era.'' He concluded that the Ninth Circuit should come up with a new test that takes into account the modern realities of student loan debt.

Courts in other circuits have taken note as well. On Jan. 6, 2016, in *In re Nightingale*, 2016 BL 2404 (Bankr. D.N.C. 2016), a bankruptcy court in North Carolina was required to apply the Brunner Test, as required by Fourth Circuit precedent. The court spent most of its decision explaining how the Brunner Test was no longer useful, particularly in the case of the 67-year old debtor with significant health problems. While it found that the debtor did not present enough evidence as to the second prong of the Brunner Test to grant her motion for summary judgment (the evidence was unclear as to whether her medical problems would persist) the court found that ''under the unique circumstances and record of this case,'' it would reopen the evidence to allow the debtor to provide further evidence as to that.

While not rejecting the Brunner Test, the *Nightingale* decision is an example of how courts now appear reluctant to apply it strictly, at least in cases where debtors are sympathetic. But contrast this result to a decision entered that same day, also in North Carolina but in a different district, where a 41-year old debtor did not suffer from any disability, had a Ph.D in psychology, and earned just enough income to meet his student loan payments and other expenses. In *In re Dunlap*, 2016 BL 2390 (Bankr. D.N.C. 2016), the bankruptcy court denied a motion to dismiss a complaint seeking nondischargeability after conducting just enough of an analysis to conclude that the debtor did not satisfy the first factor of the Brunner Test. The *Dunlap* court did not criticize the Brunner Test even slightly.

Would *Dunlap* have been decided differently in the Eighth Circuit, where *Abney* came out the other way, based on similar facts? The debtors were the same sex, age, gainfully employed, and their child support expenses would terminate soon. Perhaps the debtor would have lost his case even in a totality of the circumstances test, as the *Abney* debtor could not make full payments on his student loans, while the *Dunlap* debtor could. Perhaps in the Eighth Circuit, the *Dunlap* debtor still would have lost because he had a doctorate, while the *Abney* debtor was a truck driver without one. In any event, the divergence between *Nightingale* and *Dunlap* shows that courts required to apply the Brunner Test will deviate from it only if the circumstances are exceptional.

Abney is evidence that a looser test regarding undue hardship is already being applied in the Eighth Circuit, and by association, the First. Practitioners in the Ninth Circuit should consider adding to any analysis of undue hardship a discussion as to whether the Brunner Test still makes sense—the criticism leveled by Judge Pappas in *Roth* and echoed in *Nightingale*. That criticism will only go so far, as evidenced by *Dunlap*, but with a sympathetic debtor, a court may be receptive to the argument that Brunner's three factors should modified or re-interpreted in a situation where, if a slightly different test could be used, a debtor would be entitled to a discharge.

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