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The High Burden of a “Minimal Standard of Living” under the First Prong of the *Brunner* Test

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Introduction

Under section 523(a)(8) of title 11 of the United States Code (the “Bankruptcy Code”), student loan debt is not dischargeable unless the debtor can show “undue hardship.” Courts have concluded that section 523(a)(8) creates a presumption that student loans are nondischargeable, finding that the burden of challenging this presumption rests upon the individual debtor.¹ The United States Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, articulated what has become the standard test (the “*Brunner* test”) for determining undue hardship. Subsequently, the *Brunner* test has been adopted by the majority of courts for analyzing student loan discharge.²

Part I of this Memorandum sets out and describes the three-prong *Brunner* test. Part II elaborates on the first prong of the *Brunner* test, and analyzes the factors courts consider when determining if a debtor can maintain a minimal standard of living while also repaying their student loans. Part III highlights a case out of the Southern District of New York, which adopted

¹ *In re Davis*, 608 B.R. 693, 703 (Bankr. N.D. Ill. 2019).

² *In re Perkins*, 318 B.R. 300, 305 (Bankr. M.D.N.C. 2004) (including the Court of Appeals for the Fourth, Ninth, Third and Seventh Circuits.)

a more straight forward interpretation of the *Brunner* test, and lead to the discharge of the debtor's student loans in bankruptcy.

Discussion

I. The *Brunner* Test Used to Define “Undue Hardship”

The language “undue hardship” comes from 11 U.S.C §523(a)(8), which provides:

A discharge. . . does not discharge an individual debtor from any debt – unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtors’ dependents, for – (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend.³

The district court in the case of *Brunner v. New York State Higher Educ. Servs. Corp.*,⁴ noted the lack of appellate authority on the definition of “undue hardship” in the context of §523(a)(8) and accordingly, based on legislative history and decisions of other district and bankruptcy courts, established a three-part test determining the standard of “undue hardship.” On appeal, the Second Circuit adopted the district court’s test, which requires the debtor to prove each of the following by a preponderance of the evidence: (1) the 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) 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.⁵ Should the plaintiff fail on any element, the inquiry is over and the court must deny discharge of the debtor’s student loans.⁶

I. “Minimal Standard of Living” Defined Solely through Case Law

³ 11 U.S.C. §523(a)(8).

⁴ 831 F.2d 395, 396 (2d Cir. 1987).

⁵ *Id.*

⁶ *In re Davis*, 608 B.R. at 703.

The first prong of the *Brunner* test requires a debtor to prove by a preponderance of the evidence that the debtor cannot maintain, based on current income and expenses, a “minimal standard of living” for himself and his dependents if forced to repay the student loan.⁷ While setting out this standard that a debtor must meet, the court in *Brunner* failed to define what constitutes a “minimal standard of living” to satisfy this part of the test.⁸ Since there is no bright-line test to determine a “minimal standard of living” in each case, courts have interpreted the standard by using prior case law as a guide.

A. Debtor Must Maximize Income and Minimize Expenses

In applying the “minimal standard of living” prong of the *Brunner* test, the court will generally evaluate the income and expenses of the debtor’s household, while focusing on the expenses that are necessary to maintain a realistic basic standard of living.⁹ A minimal standard of living includes basic necessities, such as food, clothing, shelter, medical care and transportation for the debtor and any dependents.¹⁰ However, it may include more. The debtor does not need to live in abject poverty to satisfy this prong of the *Brunner* test, but the debtor must make a “significant effort to ‘live within the strictures of a frugal budget for the foreseeable future’”.¹¹ Additionally, courts have held that “minimal standard” is not the same as “pre-existing,” meaning the quality of life the debtor had been living, or “comfortable,” but also not “reduced to poverty.”¹² The main point is that a debtor who is seeking to discharge his loans must maximize his income and minimize his expenses.¹³ Just being “financially burdened” by

⁷ *Brunner*, 831 F.2d at 396.

⁸ *Id.*

⁹ *In re Murrell*, 605 B.R. 464, 469 (Bankr. N.D. Ohio, Mar. 29, 2019).

¹⁰ *Id.*

¹¹ *Id.* at 470 (citing *Larson v. United States (In re Larson)*, 426 B.R. 782, 789 (Bankr. N.D. Ill. 2010)).

¹² See *In re Nixon*, 453 B.R. 311, 327 (Bankr. S.D. Ohio 2011).

¹³ *In re Murrell*, 605 B.R. at 469.

the repayment of student loans is not enough to satisfy this test.¹⁴ Therefore, a court will scrutinize the debtor’s lifestyle, with a specific focus on expenses, to decide whether or not the debtor could make adjustments to his expenses in order to pay at least some of his student loan obligations.¹⁵ The following cases exemplify what courts look at when making a “minimal standard of living” determination, and illustrate the deep scrutiny courts use when examining a debtor’s income and expenses.

B. “Minimal Standard of Living” is a Factual Inquiry Determined on a Case by Case Basis

To analyze the minimal standard of living prong, a court must “examine current income and expenses and determine, through the application of common sense, a minimal standard of living level which is sensitive to the particular circumstances.”¹⁶ In *In re Pincus*, the bankruptcy court for the Southern District of New York court explained that the minimal standard of living factor of the *Brunner* test has been interpreted to require a showing beyond significant forbearance in personal and financial matters or beyond a restricted budget.¹⁷ This “forbearance” though, does not require the debtor to live at or below the poverty level.¹⁸ In that instance, the court held the debtor’s loans non-dischargeable because his expenses were excessive in light of the sacrifice expected of an individual to repay his student loan obligations.¹⁹ For example, the court stated that the debtor’s monthly telephone bill of \$80.00 could be significantly reduced given the prevalence of inexpensive cell phone contracts, as well as his cable bill of \$65.00 per month, because it included two premium channels.²⁰ at 318. Also, the debtor spent \$400.00 per month on food, a significant portion of which was spent on take-out.²¹ The court noted that the debtor

¹⁴ *Id.*

¹⁵ *Id.* at 470.

¹⁶ *In re Pincus*, 280 B.R. 303, 317 (Bankr. S.D.N.Y. 2002).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

could prepare his own meals to be more cost-effective.²² The court also reviewed and concluded that his other expenses, including clothing, laundry/dry-cleaning, and recreation, were excessive.²³ Overall, the court concluded that even though the debtor currently had a negative monthly income, his expense budget was unreasonable and therefore he failed the first prong of the Brunner test.²⁴

In *Perkins*, the bankruptcy court for the Middle District of North Carolina held that the debtor failed the “minimal standard of living test” because she clearly failed to minimize her expenses.²⁵ For example, the debtor’s rent was deemed excessive because the debtor lived in a gated apartment complex with a pool and an exercise room despite less expensive available alternatives.²⁶ Although a minimal standard of living does not require a debtor to live in poverty, it does require her to reduce her expenses to an amount that is minimally necessary to meet her basic needs.²⁷ Here, the court analyzed the debtor’s expenses and picked out what it deemed “unnecessary” in order to reduce her monthly expenses from \$4,730.00 to \$1,615.00.²⁸ This case highlights the very narrow view of what expenses a court deems “necessary” in order to maintain a minimal standard of living.

In *Davis*, the bankruptcy court for the Northern District of Illinois denied discharge of a debtor’s student loans because he failed to minimize his expenses and maximize his income.²⁹ The court noted that the debtor spent hundreds of dollars per month on discretionary expenses for entertainment and recreational purposes, such as concert tickets and travel expenses.³⁰ Also,

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *In re Perkins*, 318 B.R. at 307.

²⁶ *Id.*

²⁷ *Id.* at 305.

²⁸ *Id.* at 309 (eliminating expenses such as charitable contributions, magazine subscriptions, movies, support for debtor’s mother, and home maintenance).

²⁹ *In re Davis*, 608 B.R. at 704.

³⁰ *Id.*

debtor spent \$84.00 per month on multiple television and streaming services. Together, these unnecessary expenses proved to the court that “the Debtor does not lead a frugal lifestyle and that he spends improvidently.”³¹ Due to these high expenses, the debtor failed to show that repayment of the student loan obligations would necessitate major personal and financial sacrifices on his part nor that he attempted to minimize these expenses.³² The court also focused on the fact that debtor failed to maximize his income or even make an effort to do so.³³ Indeed, the debtor was a well-educated individual with a J.D. and L.L.M who had been practicing law for over ten years.³⁴ Even though his income had increased almost \$10,000 since 2014, he had not applied for any new positions in the past 4-5 years after he received his L.L.M.³⁵ Therefore, due to debtor’s failure to maximize his income and minimize his expenses, he was denied discharge of his student loan obligations.³⁶

II. A Different Approach to *Brunner* in the Southern District of New York

Chief Bankruptcy Judge Cecilia Morris in the Southern District of New York took a complete 180-degree approach when interpreting the *Brunner* test in a student loan discharge case. In *In re Rosenberg*, Judge Morris granted the discharge of over \$200,000 of debtor’s student loans, applying the *Brunner* test as she found it was “originally intended.”³⁷ Judge Morris emphasized that *Brunner* has been criticized for creating too high of a burden for most debtors.³⁸ The court further stated that “the harsh results that often are associated with *Brunner* are actually

³¹ *Id.*

³² *Id.*

³³ *Id.* at 705.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *In re Rosenberg*, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).

³⁸ *Id.* at 458.

the result of cases interpreting *Brunner*.³⁹ Retributive dicta such as “proof of certainty of hopelessness” has been cited so frequently in cases applying the *Brunner* test that it took over the actual language of the test, which is plain and straightforward.⁴⁰ Therefore, the court applied the *Brunner* test as it was originally intended, not how subsequent cases have chosen to interpret it.⁴¹

In *Rosenberg*, the court emphasizes that the first prong of the *Brunner* test is based on “current” income and expenses.⁴² Section 101(10A) of the Bankruptcy Code defines “current monthly income” as the average monthly income of a debtor from all sources in the six-month period prior to commencement of the bankruptcy case.⁴³ The debtor in *Rosenberg* listed current income as \$2,456.24, and current expenses as \$4,005.00.⁴⁴ This left the debtor with a negative current monthly income of -\$1,548.74 at the time he filed for bankruptcy.⁴⁵ Without any further analysis, the court held that due to the debtor’s negative income each month, he has no money to repay his student loans while also maintaining a “minimal standard of living” and therefore has met the first prong of the *Brunner* test.⁴⁶ Judge Morris’ approach to the Brunner test is highly differentiated from past cases where courts deeply scrutinized the debtor’s income and expenses when determining the dischargeability of student loans.

When comparing Judge Morris’ interpretation of *Brunner* to the courts in the cases discussed above in section I of this Memorandum, the straight forward analysis used by Judge Morris does not require rigid scrutiny of the debtor’s income and expenses. For example, in *Pincus*, the fact that the debtor had a negative monthly income would have been the end of the inquiry with regards to if he could maintain a minimal standard of living while also repaying his student loan

³⁹ *Id.*

⁴⁰ *Id.* at 459.

⁴¹ *Id.*

⁴² *Id.* (“It should be noted that the test asks the court to base its determination as to whether Petitioner can maintain a ‘minimal’ standard of living using only Petitioner’s ‘current income and expenses’.”)

⁴³ 11 U.S.C §101(10A).

⁴⁴ *In re Rosenberg*, 610 B.R. at 460.

⁴⁵ *Id.*

⁴⁶ *Id.* at 460-61.

obligations. In *Perkins*, the court would not have spent the time going through the debtor's expenses with a fine-tooth comb, reducing them down over \$3,000 until she had a positive monthly income. Again, the inquiry with regards to the first prong of the test, would have ceased at the debtor's negative monthly income. In *Davis*, the court would not have looked at the debtor's efforts to maximize his income by searching and applying for new, higher paying positions. The analysis of "minimal standard of living" under Judge Morris' recent opinion is straight forward and clear cut. If other courts start to follow Judge Morris' approach, it could lead the trend of dischargeability of student loan obligations to go in the complete opposite direction.

Conclusion

Determining whether a debtor can maintain a "minimal standard of living" if forced to repay their student loans is not guided by an exact test that can be applied to each set of facts. Courts have developed guidelines through years of case law that aid in the analysis of each debtor's income and expenses. Overall, it is an analysis that must be done on a case by case basis, taking into consideration each debtors' specific circumstances. The *Brunner* test, in general, and especially the first prong, is a very high burden to meet. But, as exemplified in the above case comparisons, due to Chief Judge Morris' in *In re Rosenberg*, courts may begin to adopt a more straightforward interpretation of what the *Brunner* test requires of each debtor.