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**Discharging Student Loan Debt Under *Brunner*: Interpreting the Second Prong's  
"Additional Circumstances" Requirement**

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**INTRODUCTION**

Under title 11 of the United States Code (the "Bankruptcy Code"), an individual debtor is not entitled to a discharge of his or her student loan debt "unless excepting such debt from discharge... would impose an undue hardship on the debtor and the debtor's dependents."<sup>1</sup> Because the Bankruptcy Code does not define the term "undue hardship," the courts have applied a broad range of standards which has resulted in a "state of considerable confusion."<sup>2</sup> Currently, the majority of circuit courts have adopted the test formulated by the United States Court of Appeals for the Second Circuit to determine what qualifies as an undue hardship.<sup>3</sup>

This memorandum explores the application of *Brunner's* undue hardship test in discharging student loan debt pursuant to the Bankruptcy Code. Part I of this memorandum sets forth the elements of the test; part II specifically focuses on the second prong and explains how

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<sup>1</sup> See 11 U.S.C. § 523(a)(8).

<sup>2</sup> See Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 300 (3<sup>rd</sup> Cir. 1995).

<sup>3</sup> See *Brunner v. N.Y. State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987); see also *Thomas v. Dep't of Educ. (Matter of Thomas)*, 931 F.3d 449, 452 (5<sup>th</sup> Cir. 2019) (recognizing the *Brunner* test has been adopted by the majority of the circuit courts, including the Second, Fourth, Seventh, Tenth and Eleventh).

courts interpret this prong; and part III revisits the plain language of the *Brunner* test and discusses how dicta has subsumed this language, thereby making it very a high burden for debtors to meet.

### I. The *Brunner* Test

The United States Court of Appeals for the Second Circuit established a three-prong test for evaluating “undue hardship” claims in *Brunner v. N.Y. State Higher Educ. Serv. Corp.*<sup>4</sup> Under this test, a debtor must prove:

(1) that the debtor cannot maintain, based on current income and expenses, a “minimal standard of living for herself and her 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 the debtor has made good faith efforts to repay the loans.<sup>5</sup>

The high burden required by this test is reasonable in light of the “clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt.”<sup>6</sup>

There is a presumption against discharging student loan debt, and the debtor has the burden of proof, which requires proving all three elements before a court can grant discharge.<sup>7</sup> If the debtor fails to satisfy any one of the elements in the *Brunner* test, “the bankruptcy court’s inquiry must end there, with a finding of no dischargeability.”<sup>8</sup> Additionally, the analysis under *Brunner* does not consider equitable concerns or other extraneous factors that would support a finding of dischargeability.<sup>9</sup> There is no distinction between sympathetic and unsympathetic debtors, as all debtors are held to the same standard.<sup>10</sup>

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831 F.2d at 395.

<sup>5</sup> *Id.* at 396.

<sup>6</sup> *See id.*

<sup>7</sup> *See Rifino v. United States of America, et. al. (In re Rifino)*, 245 F.3d 1083, 1088 (9<sup>th</sup> Cir. 2001).

<sup>8</sup> *See Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3<sup>rd</sup> Cir. 1995).

<sup>9</sup> *See id.* at 306.

<sup>10</sup> *See Thomas v. Dep’t of Educ. (Matter of Thomas)*, 931 F.3d 449, 454 (5<sup>th</sup> Cir. 2019).

## II. Analysis of *Brunner's* Second Prong: What Additional Circumstances are Necessary to Demonstrate the Debtor's State of Affairs are Likely to Persist for a Significant Portion of the Student Loans Repayment Periods?

The second prong of the *Brunner* test has been interpreted to be a “demanding requirement.”<sup>11</sup> A debtor must prove that additional circumstances exist indicating that his current hardships and challenges are likely to persist for a significant portion of the repayment period.<sup>12</sup> Additional circumstances are those 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.”<sup>13</sup> Accordingly, the dischargeability of student loans should be based upon the “certainty of hopelessness,” and not simply the debtor’s inability to fulfill financial commitments.<sup>14</sup> Thus, it is necessary for the debtor to prove “a total incapacity...in the future to pay [his] debts for reasons not within [his] control.”<sup>15</sup>

### a. Employment Opportunities

A debtor will be unable to satisfy the second prong of *Brunner* if the debtor can obtain a higher paid employment position or additional steady employment.<sup>16</sup> There is nothing in the Bankruptcy Code that suggests a debtor may work only in a field that he was trained in, obtain a low-paying job in that field, and then claim it would be an undue hardship to repay his student loans.<sup>17</sup> This is because it is not uncommon for individuals to take jobs outside their field of choosing to facilitate the repayment process.<sup>18</sup>

For example, in *Matter of Gerhardt*, the court denied discharge of student loan debt because the debtor was capable of finding additional employment that would ease his repayment

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<sup>11</sup> See *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4<sup>th</sup> Cir. 2005).

<sup>12</sup> See *Brunner*, 831 F.2d at 396.

<sup>13</sup> See *United States Dep’t of Educ. v. Gerhardt (Matter of Gerhardt)*, 348 F.3d 89, 92 (5<sup>th</sup> Cir. 2003).

<sup>14</sup> See *Roberson v. Ill. Student Assistance Comm’n. (Matter of Roberson)*, 999 F.2d 1132, 1136 (7<sup>th</sup> Cir. 1993).

<sup>15</sup> See *Matter of Gerhardt*, 348 F.3d at 92 (citation omitted).

<sup>16</sup> See *id.* at 93; see also *In re Frushour*, 433 F.3d at 401.

<sup>17</sup> See *Matter of Gerhardt*, 348 F.2d at 93.

<sup>18</sup> See *In re Frushour*, 433 F.3d at 401.

process.<sup>19</sup> The debtor held a master's degree in music, earned less than \$1,900 per month as a professional musician, and collected unemployment during his off seasons.<sup>20</sup> The court recognized that even though it would be unlikely to obtain a higher paid position as a musician, the debtor was more than capable of finding additional work, such as teaching full-time, teaching at night-school, or working as a music store clerk.<sup>21</sup> Additionally, the court explained if this debtor could claim undue hardship just because he chose to work in his field which pays poorly, then all professional musicians would also qualify for an undue hardship discharge.<sup>22</sup> Because the debtor failed to demonstrate the type of exceptional circumstances necessary to satisfy the second prong of *Brunner*, the court denied discharge of the student loan debt.<sup>23</sup>

Similarly, in *In re Frushour*, the court held “[h]aving a low-paying job...does not in itself provide undue hardship, especially where the debtor is satisfied with the job, has not actively sought higher-paying employment, and has earned a larger income in previous jobs.”<sup>24</sup> There, the debtor held a degree in the arts, and worked in several different areas including real estate, sales and restaurant management.<sup>25</sup> At the time the debtor filed an adversary complaint to discharge her student loan debt, the debtor was self-employed as a decorative painter with an income of approximately \$10,000.<sup>26</sup> However, in her prior employment positions, the debtor was making double her income.<sup>27</sup> The debtor provided no indication as to why she could not return to a similar type of work, nor did she try to find more lucrative work.<sup>28</sup> And although the debtor was content with her low-paying position as a decorative painter, as it was her original goal to work in the arts,

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<sup>19</sup> See *Matter of Gerhardt*, 348 F.2d at 92–93.

<sup>20</sup> *Id.* at 92.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 93.

<sup>23</sup> See *id.*

<sup>24</sup> See *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4<sup>th</sup> Cir. 2005).

<sup>25</sup> *Id.* at 397.

<sup>26</sup> *Id.*

<sup>27</sup> See *id.* at 401.

<sup>28</sup> See *id.*

the court found that insufficient to create an undue hardship.<sup>29</sup> Thus, the court denied discharge of her student loan debt because the debtor could not provide any additional circumstances beyond the debt itself to demonstrate an undue hardship.<sup>30</sup>

### **b. Temporary Hardships**

A debtor who is experiencing a temporary hardship will not satisfy the second prong of *Brunner*, and therefore will be precluded from discharging his student loan debt.<sup>31</sup> In *Matter of Roberson*, the court denied the debtor's request to discharge his unpaid balance of student loans because the debtor's dire financial straits were only temporary.<sup>32</sup> At the time the debtor filed for bankruptcy and requested a discharge of his student loan debt, the debtor had just lost his driver's license due to two convictions for driving under the influence, was laid off from his job, was divorced, and was left unable to pay back his creditors.<sup>33</sup> The court determined that there were slight prospects for employment in the near future due to the debtor's lack of transportation, but the court recognized the debtor would be eligible for a new license in two years.<sup>34</sup> Thus, these impediments, although dismal, would not prohibit gainful employment in the future.<sup>35</sup> Therefore, the court found the debtor's conditions would not persist for an extended period of time and denied discharge of his student loan debt.<sup>36</sup>

Likewise, in *Matter of Thomas*, the court found the debtor's present inability to pay her student loan debt would not persist throughout a significant portion of the loan repayment period.<sup>37</sup> There, the debtor had a degenerative condition, and although she was unemployed when she filed

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 404.

<sup>31</sup> *See* Roberson v. Ill. Student Assistance Comm'n. (*Matter of Roberson*), 999 F.2d 1132, 1137 (7<sup>th</sup> Cir. 1993); *see also* Thomas v. Dep't of Educ. (*Matter of Thomas*), 931 F.3d 449, 452 (5<sup>th</sup> Cir. 2019).

<sup>32</sup> 999 F.2d at 1132.

<sup>33</sup> *See id.* at 1133.

<sup>34</sup> *See id.* at 1134.

<sup>35</sup> *See id.* at 1137.

<sup>36</sup> *See id.* at 1137.

<sup>37</sup> 931 F.3d at 452.

for discharge of her student loan debt, the court found she was capable of sedentary employment at that time and in the future.<sup>38</sup> Additionally, the debtor's unemployment was a result of being fired for violating company policies, not a result of physical problems outside of her control.<sup>39</sup> Therefore, the court denied discharge of her student loan debt, concluding the debtor did not meet the undue hardship burden as her temporary circumstances were within her control.<sup>40</sup>

### III. Eluding from Dicta and Revisiting the Plain Language of the *Brunner* Test

The high burden and harsh results of continuously denying discharge of student loan debt under the *Brunner* test have, in effect, flowed from other cases interpreting *Brunner*.<sup>41</sup> Although dicta from prior decisions has subsumed the plain language of the test and have therefore made it a difficult burden to meet, it is in fact possible for debtors to meet the burden under *Brunner*.<sup>42</sup>

Most notably, *Brunner* does not require a debtor to show that his circumstances will persist forever.<sup>43</sup> Rather *Brunner* requires the debtor's present state of affairs persist only for a significant portion of the repayment period.<sup>44</sup> In considering the debtor's state of affairs, a lengthy history of financial struggles may be a valid indicator of more of the same financial struggles in the future.<sup>45</sup> Additionally, the more time that has passed since the student loans became due, the more likely it is for the debtor to satisfy the second prong of *Brunner*.<sup>46</sup> Finally, it is not required to determine

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<sup>38</sup> See *id.* at 450.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* at 453.

<sup>41</sup> See *Rosenberg v. N.Y. State Higher Educ. Serv. Corp (In re Rosenberg)*, 610 B.R. 454, 458 (Bankr. S.D.N.Y. 2020); see also *Bukovics v. Navient (In re Bukovics)*, 2020 WL 949936 at 10 (Bankr. N.D. Ill. 2020).

<sup>42</sup> See *In re Rosenberg*, 610 B.R. at 457 (finding a debtor satisfied all three prongs of *Brunner* and therefore was entitled to discharge of student loan debt); see also *In re Bukovics*, 2020 WL 949936 at 12 (granting student loan discharge to a debtor who offered substantial evidence of inability to find employment and longstanding financial difficulties).

<sup>43</sup> See *In re Rosenberg*, 610 B.R. at 458; see also *In re Bukovics*, 2020 WL 949936 at 9–10.

<sup>44</sup> See *In re Rosenberg*, 610 B.R. at 461.

<sup>45</sup> See *In re Bukovics*, 2020 WL 949936 at 10.

<sup>46</sup> See *id.*

whether the debtor's state of affairs was created by choice.<sup>47</sup> It is only necessary to determine whether state of affairs exist that hinder the debtor's ability to repay the loans.<sup>48</sup>

## CONCLUSION

An individual debtor is entitled to discharge his or her student loan debt if he satisfies the "undue hardship" burden. This requires satisfaction of all three prongs of the *Brunner* test: the debtor cannot maintain a minimal standard of living; additional circumstances exist indicating the debtor's state of affairs will persist throughout the repayment period; and the debtor has made a good faith effort to repay the loans. Courts have interpreted this as a very high burden to meet, but it is not an impossible burden. For a debtor to satisfy the second prong, it is imperative that the debtor makes a conscious effort to seek other employment opportunities, whether it is a higher-paid position or an additional job. Although the debtor's circumstances inhibiting repayment cannot be temporary, it is not necessary that the circumstances last forever. Rather, the debtor is only required to demonstrate his circumstances will persist for a significant portion of the repayment period.

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<sup>47</sup> See *In re Rosenberg*, 610 B.R. at 461.

<sup>48</sup> See *id.*