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Assessing the Two Tests Courts Use to Determine Dischargeability of Student Loan Debt

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Introduction

The purpose of bankruptcy is to give honest debtors a “fresh start.”¹ For debtors with student loans this purpose is not automatic, rather, the viability of the student loan programs takes precedence.² For student loans, the default rule is they are not dischargeable in bankruptcy.³ Title 11 of the United States Code (the “Bankruptcy Code”) spells this out. Under section 523(a)(8) of the Bankruptcy Code, student loans must create an “undue hardship” to be discharged.

The issue is how courts determine undue hardship under section 523(a)(8). The term “undue hardship” is not defined in the Bankruptcy Code, rather, it is left for each court to define.⁴ Courts apply one of two tests to determine undue hardship: the three-prong *Brunner* test, or the totality of the circumstances test.⁵ This memorandum explores the different methods used

¹ See *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991).

² See *Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 191 (1st Cir. 2006).

³ See *Educ. Credit Mgmt. Corp. v. Jespersion*, 571 F.3d 775, 775. (8th Cir. 2009).

⁴ See *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003).

⁵ See *Murphy v. Educ. Credit Mgmt. Corp.*, 511 B.R. 1, 3 (D. Mass. 2014).

to define undue hardship under section 523(a)(8). Part I outlines each of the three prongs of the *Brunner* test. Part II examines each factor of the totality of the circumstances test.

I. The Brunner Test

The *Brunner* test has been adopted by most jurisdictions.⁶ Under this test courts look to the following prongs:

(1) [whether] 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) [whether] 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) [whether] the debtor has made good faith efforts to repay the loans.⁷

To satisfy the *Brunner* test, each prong must be proven by a preponderance of the evidence.⁸ Below, each prong of the test is discussed. With each prong, both instances where debtors have satisfied and instances where they have not, are highlighted.

A. Minimal Standard of Living

Under the first prong of the *Brunner* test, a debtor must show an inability to maintain a “minimal” standard of living if forced to repay their student debt.⁹ The debtor’s adverse financial position must be more than temporary, “but need not prove utter hopelessness.”¹⁰ The debtor does not have to live in poverty or forego necessary expenses that include “healthcare [], food, and a modest amount of recreation and entertainment . . .

⁶ See *Chenault v. Great Lakes Higher Educ. Corp. (In re Chenault)*, 586 B.R. 414, 418 (B.A.P. 6th Cir. 2018) (“The Sixth Circuit Court of Appeals, along with the majority of courts, apply the test articulated in *Brunner* to determine whether undue hardship exists.”).

⁷ *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁸ See *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 916–17 (B.A.P. 9th Cir. 2013).

⁹ *Brunner*, 831 F.2d at 396.

¹⁰ *Educational Credit Mgmt. Corp. v. Rhodes*, 464 B.R. 918, 923 (W.D. Wash. 2012).

incident to modern life.”¹¹ Courts look to “specific articulable facts, not unfounded optimism”¹²

A debtor cannot maintain a minimal standard of living satisfying *Brunner* if their monthly expenses, which already result in a nominal surplus at the end of the month, are expected to increase. For example, if a debtor’s preexisting tenuous financial situation is worsened by having to purchase a new vehicle, a court may find the debtor is unable to maintain a minimal standard of living.¹³ Similarly, where a debtor lacks an emergency fund and has relied on their parents to pay expenses, an inability to pay because of increasing expenses satisfies this prong.¹⁴

Conversely, when a debtor’s budget includes expenses that are not minimal, the debtor will not satisfy this prong. For example, this prong is not satisfied where a debtor goes out of network for medical visits, spends needlessly on childcare, and overspends on a range of general expenses.¹⁵ A debtor who could have minimized expenses “if they had the mind to” will not satisfy this prong.¹⁶

B. Additional Circumstances

The second prong of the *Brunner* test requires the debtor to prove the existence of additional circumstances that signal a prolonged inability to repay.¹⁷ An inability to repay must come from “factors beyond the debtor’s control.”¹⁸ Additional circumstances need

¹¹ See *Clavell v. United States Dept. of Educ. (In re Clavell)*, 611 B.R. 504, 517 (Bankr. S.D.N.Y. 2020)

¹² *Nightingale v. North Carolina State Educ. Assistance Auth. (In re Nightingale)*, 543 B.R. 538, 547 (Bankr. M.D.N.C. 2016).

¹³ See *Edwards v. Navient Solutions, Inc. (In re Edwards)*, 561 B.R. 848, 851 (D. Kan. 2016)

¹⁴ See *id.*

¹⁵ See *Pobiner v. Educ. Credit Mgmt. Corp. (In re Pobiner)*, 309 B.R. 405, 418 (E.D.N.Y. 2004).

¹⁶ *Id.*

¹⁷ See *Brunner*, 831 F.2d at 396.

¹⁸ *In re Lozada*, 604 B.R. 427, 436 (S.D.N.Y. 2019)

not necessarily be exceptional.¹⁹ Relevant evidence includes the showing of a present medical condition that debilitates one's ability to maintain employment and its unlikelihood to improve.²⁰ Included in this is psychological or emotional disabilities.²¹ Letters from physicians regarding health history, history of prescriptions, and medical evaluations are all relevant in proving these ailments.²² Courts look at the evidence to make the best judgments about the future.²³

The additional circumstances prong of *Brunner* can be satisfied by a debtor showing an inability to work a full-time job because of a severe physical ailment. For instance, this prong is met where a debtor is unable to work full time because of health issues sustained after a car accident.²⁴ Similarly, a debtor's age and pre-existing health conditions that render them unable to work full time can satisfy this factor.²⁵

Despite a debtor's stated injuries, if they are in the position to work full time in a promising field, their additional circumstances do not satisfy *Brunner*. A debtor fails to meet this prong if they are young, have quality job prospects, and lack a condition that prevents them from working.²⁶ Absent a showing of an inability to work, suffering from "anxiety and depression, with obsessive-compulsive tendencies" does not satisfy this prong.²⁷

C. Good Faith Efforts to Repay

¹⁹ See *Mendenhall v. Navient Corp.* (*In re Mendenhall*), 621 B.R. 472, 489 (Bankr. D. Idaho 2020).

²⁰ See *In re Lowe*, 321 B.R. 852, 859 (Bankr. N.D. Ohio 2004).

²¹ See *In re Nightingale*, 529 B.R. at 651.

²² *Id.* (looking to a physicians note that labeled the "plaintiff . . . 'temporarily' and 'totally disabled'").

²³ See *In re Clavell*, 611 B.R. at 529.

²⁴ See *Carlson v. UNIPAC Student Loan* (*In re Carlson*), 273 B.R. 481, 484 (Bankr. D. S.C. 2001).

²⁵ See *Larson v. U.S Dept. of Educ.* (*In re Larson*), 426 B.R. 782, 795 (Bankr. N.D. Ill 2010).

²⁶ See *Owens v. U.S Dep't of Educ.* (*In re Owens*), 525 B.R. 719, 722 (Bankr. C.D. Ill. 2015).

²⁷ *Id.*

Under the third and final prong of *Brunner*, a debtor must show they acted in good faith to repay the loan.²⁸ To prove good faith, the debtor must convey their existing circumstances are a result of factors beyond their control.²⁹ This includes whether any payments were made prior to discharge.³⁰ Additionally, courts look to whether the debtor sought deferments or forbearances.³¹ Furthermore, courts consider debtors' efforts "to obtain employment, maximize income, and minimize expenses."³²

A debtor acts in good faith under *Brunner* when they attempt to find work, maximize income, minimize expenses, and seek deferments. For example, this prong is satisfied when a debtor keeps expenses modest and makes payments despite lacking income.³³ Likewise, where a debtor demonstrates their commitment to student loan repayment by attempting to stay current despite consumer debts "pile[ing] up," this prong is satisfied.³⁴ Moreover, a debtor moving cities to secure a full-time job satisfies the good faith prong of *Brunner*.³⁵

Conversely, a debtor who fails to minimize expenses and make acceptable monthly repayments will not satisfy this prong. For instance, a debtor who takes on additional debt during a non-repayment period and unsuccessfully performs under a repayment plan fails this *Brunner* prong.³⁶ Additionally, where a debtor unnecessarily increases expenses and

²⁸ *Brunner*, 831 F.2d at 396.

²⁹ See *Standish v. Navient (In re Standish)*, 628 B.R. 692, 699 (Bankr. D. Kan. 2020).

³⁰ See *In re Roth*, 490 B.R. at 917.

³¹ *Shells v. U.S. Dept. of Educ. (In re Shells)*, 530 B.R. 758, 766 (Bankr. E.D. Cal. 2015)

³² *Jones v. Educ. Credit Mgmt. Corp. (In re Jones)*, 495 B.R. 674, 690 (Bankr. E.D.Pa. 2013).

³³ See *In re Nitcher*, 606 B.R. 67, 79 (Bankr. D. Or. 2019).

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *In re Shells*, 530 B.R. at 766.

inexplicably fails to adequately repay their loan despite a proven ability to do so fails this prong.³⁷

II. Totality of the Circumstances Test

Both the Eighth and First Circuits have adopted the totality of the circumstances test. The Eighth Circuit has fully adopted this test.³⁸ The First Circuit utilizes both tests.³⁹ However, most courts in the First Circuit have adopted the totality of the circumstances test over the *Brunner* test.⁴⁰ The totality of the circumstances test includes the following factors: “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and his dependents reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding that particular bankruptcy case.”⁴¹ The test calls for “fairness and equity” and “examin[ation] o[f] the unique facts and circumstances” that surround each debtors situation. *Id.* The burden is on the debtor to prove, by a preponderance of the evidence, that the debt should be discharged.⁴² Below, each factor of the test is discussed. With each factor, both instances where debtors have satisfied and instances where they have not are highlighted.

A. Past, Present, and Future Financial Resources

Under the first factor, courts consider the debtor’s past, present, and reasonably reliable future financial resources.⁴³ Courts do not just look at the debtor’s current situation, but likely

³⁷ See *Johnson v. Sallie Mae (In re Johnson)*, 550 B.R. 874, 881 (Bankr. M.D. Ala. 2016).

³⁸ See *In re Long*, 322 F.3d at 554.

³⁹ See *In re Nash*, 446 F.3d at 190.

⁴⁰ See *Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks)*, 331 B.R. 18, 28 (Bankr. D. Mass. 2005) (finding the *Brunner* tests “good faith” requirement lacks textual foundation).

⁴¹ *Long*, 322 F.3d at 554.

⁴² See *Jespersion*, 571 F.3d at 775.

⁴³ See *Long*, 322 F.3d at 554.

future income “based upon [their] education and employment history.”⁴⁴ The debtor’s personal lifestyle choices are also evaluated.⁴⁵

A debtor satisfies this factor when their earning capacity has not and will continue to not be significant due to reasons beyond their control. For example, this factor is satisfied where a debtor’s inability to maintain a job is the result not of a lifestyle choice but of a medical issue.⁴⁶ Similarly, where it is proven that a debtor has relied upon, and will continue to exclusively rely upon, disability benefits this factor is met.⁴⁷

Conversely, a debtor does not satisfy this factor when their earning capacity has been and will continue to be poor for reasons within their control. For instance, this factor is not satisfied when a debtor chooses to forgo full time employment in favor of part time employment absent a medical justification.⁴⁸ Likewise, a debtor who voluntarily chooses to abandon a lucrative employment field in which they are trained in favor of a lesser paying one satisfies this factor.⁴⁹

B. Debtors Reasonable and Necessary Living Expenses

Under the second factor of the totality of the circumstances test, courts consider a calculation of the debtor’s and their dependents reasonable necessary living expenses.⁵⁰ To be considered reasonable and necessary, living expenses must be “modest and commensurate with the debtor’s resources.”⁵¹ Additionally, expenses are necessary when they play a “primary causal role in the provision and maintenance of the minimal standard of living.”⁵² A debtor’s expenses are reasonable and necessary under the totality of the circumstances test when they afford a

⁴⁴ *Brown v. Am. Educ. Servs., Inc. (In re Brown)*, 378 B.R. 623, 627 (Bankr. W.D. Mo. 2007).

⁴⁵ *See In re Nielsen*, 2013 WL2299626 at *2–3 (Bankr. S.D Iowa).

⁴⁶ *See Brooks v. Educ. Credit Mgmt. (In re Brooks)*, 406 B.R. 382, 390 (Bankr. D. Minn. 2009).

⁴⁷ *Id.*

⁴⁸ *See Kemp v. U.S. Dept. of Educ. (In re Kemp)*, 580 B.R. 879, 884 (W.D. Ark. 2017).

⁴⁹ *See Echelbarger v. United States of America (In re Echelbarger)*, 600 B.R. 39, 48 (Bankr. S.D. Ind. 2019).

⁵⁰ *See Long*, 322 F.3d at 554.

⁵¹ *DeBrower v. Pa. Higher Educ. Assistance Agency (In re DeBrower)*, 387 B.R. 587, 590 (N.D. Iowa 2008).

⁵² *Race v. Educ. Credit Mgmt. Corp. (In re Race)*, 303 B.R. 616, 624 (Bankr. D. Minn. 2004).

minimal standard of living. A debtor satisfies this factor when their earnings go exclusively to basic expenses such as “food, shelter, clothing, [and] medical treatments.”⁵³ Additionally, this prong is met where a debtor can prove that increases in both rent and car payments are necessary in maintaining their minimal standard of living.⁵⁴

A debtor’s expenses, however, are not reasonable or necessary when they include leisure items at a time where debtors expenses have increased. A debtor with a tight budget must drop leisure items to satisfy this factor.⁵⁵ Leisure items such as “cellphone videogame fees; cigarettes; and digital music, and video services” will not satisfy this factor when expenses are anticipated to increase.⁵⁶ Similarly, absent a medical justification, extravagant spending on entertainment is not reasonable or necessary.⁵⁷

C. Other Relevant Facts and Circumstances

The third factor of the totality of the circumstances test has courts consider any other relevant facts and circumstances surrounding that particular bankruptcy case.⁵⁸ One such circumstance is the eligibility of income-based repayment plans.⁵⁹ In determining the amount of weight to give eligibility, courts are aware of the “likelihood [] a debtor [will] mak[e] significant payment[s] under the [income-based repayment plan], and also of the additional hardships which may be imposed by these programs.”⁶⁰ Courts have authority to “fashion equitable relief in appropriate circumstances” and enforce payment of the plan itself but discharge the undue tax

⁵³ *Martin v. Great Lakes Higher Educ. Group (In re Martin)*, 584 B.R. 886, 893 (Bankr. N.D. Iowa 2018).

⁵⁴ *Id.*

⁵⁵ *See Mudd v. U.S Dept. of Educ. (In re Mudd)*, 624 B.R. 676, 688 (Bankr. D. Neb. 2020).

⁵⁶ *Id.*

⁵⁷ *See Smith v. U.S. Dept. of Educ. (In re Smith)* 582, B.R. 556, 562 (Bankr. D. Mass. 2018).

⁵⁸ *See Long*, 584 B.R. 886.

⁵⁹ *See In re Nielsen*, WL1760738 at *1.

⁶⁰ *Abney v. United States Dept. of Educ. (In re Abney)*, 540 B.R. 681, 689 (Bankr. W.D.Mo. 2015).

burden that may result from the plan.⁶¹ Additionally, courts consider the surrounding mental health of the debtor.⁶²

When there is a negative impact on both a debtor's credit and emotional well-being, the third factor of the totality of the circumstances is met. For instance, a debtor satisfies this factor when their bad credit, caused by their debt, impacts both their ability to obtain a loan and their emotional well-being.⁶³ An income repayment plan can hurt a debtor's credit by increasing the balance of their loans.⁶⁴ A debtor pointing to the debt as a barrier keeping them from getting ahead is "persuasive" testimony that satisfies this factor.⁶⁵

Alternatively, the third factor is not met where a debtor is unable to show a physical or mental condition that caused their inability to repay. For example, this factor is not met where monthly payments are "not [] exorbitant" and the debtor lacks any condition impacting repayment.⁶⁶ This factor is not met where a debtor fails to produce a history of mental illness related to stress.⁶⁷ Similarly, this factor is not satisfied where it is proven that despite a debtor's physical ailments, they have been able to maintain a full-time job.⁶⁸

Conclusion

With little guidance from section 523(a)(8) of the Bankruptcy Code, courts have come up with their own methods to determine undue hardship. The *Brunner* test, used by a majority of circuits, calls for debtors to satisfy its three prongs to meet the undue hardship burden. The totality of the circumstances test, adopted by the Eighth circuit and some courts in the First,

⁶¹ *Ayele v. Educ. Credit Mgmt Corp. (In re Ayele)*, 468 B.R. 24, 36 (Bankr. D. Mass. 2012) (reasoning the potential tax liability at the end of the payment plan would be "a tremendous 'undue hardship.'").

⁶² *Reynolds v. Pa. Higher Educ. Assistance Agency (In re Reynolds)*, 425 F.3d 526, 534 (8th Cir. 2005).

⁶³ *See In re Fern*, 553 B.R. 362, 368 (Bankr. N.D Iowa. 2016).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Winsborough v. U.S. Dept. of Educ. (In re Winsborough)*, 341 B.R. 14, 20 (Bankr. W.D. Mo. 2006).

⁶⁷ *Id.*

⁶⁸ *Id.*

requires debtors to prove three factors to substantiate undue hardship. Debtors must satisfy one test or the other to receive the “fresh start” bankruptcy offers.