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The Prospect of a Debtor's Future Employment is a Factor Courts Consider When Discharging Student Loan Debt

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INTRODUCTION

Under title 11 of the United States Code (the "Bankruptcy Code"), a debtor's student loan debt is not dischargeable unless "excepting such debt from discharge . . . would impose an undue hardship on the debtor."¹ A majority of courts apply a three-prong test, known as the *Brunner* test, to determine if student loan debt may be discharged.² Under this analysis, courts will generally consider a debtor's prospects for future employment in deciding whether a student loan debt should be discharged. In connection therewith, courts will often take into account a debtor's educational background and possession of a professional degree, a debtor's transferrable job skills, and a debtor's employment history and efforts to find employment.

This memorandum addresses these factors that courts analyze when determining if a debtor's potential future employment is considered under *Brunner*. Part I focuses on the debtor's educational background and possession of an educational degree. Part II concentrates on a

¹ 11 U.S.C. § 523 (a)(8) (2018).

² See Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 303 (3d Cir. 1995) (noting the *Brunner* test has been adopted by a majority of the Courts of Appeals when addressing what standard should be applied to determine whether undue hardship exists).

debtor's possession of job skills to indicate a potential for future employment. Part III examines a debtor's previous employment history and adequate efforts at seeking current employment.

DISCUSSION

I. A Debtor's Prospects for Future Employment is Considered an "Additional Circumstance" Under the Second *Brunner* Prong

According to *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, a debtor must establish the following three elements to receive a discharge of student loan debt:

(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.³

The "additional circumstances" under the second *Brunner* prong are a non-exhaustive list of potential factors that courts may consider.⁴ These circumstances may include, among other things, "illness, disability, age, lack of useable job skills, or the existence of a large number of dependents."⁵ Though non-exhaustive, the analysis of "additional circumstances" is "fact-intensive," where the debtor must show that his circumstances are significant enough to render it unlikely that the debtor will ever be able to honor his repayment obligations.⁶

II. A Debtor's Educational Background and Possession of an Educational Degree are Factors that Courts Will Consider When Determining Potential for Future Employment

Courts will generally consider a debtor's "education and intellect" when determining whether prospects for future employment exist.⁷ A debtor's educational background and abilities are

³ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

⁴ *Educ. Credit Mgmt. Corp. v. Curiston*, 351 B.R. 22, 29 (D. Conn. 2006).

⁵ *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 386 (6th Cir. 2005).

⁶ *See In re Boykin*, 313 B.R. 516, 522 (Bankr. M.D. Ga. 2004).

⁷ *See Najafian v. Educ. Credit Mgmt. Corp.*, No. 1:12-cv-01408, 2013 WL 1399340, at *4 (E.D. Va. Apr. 5, 2013).

often analyzed to gauge whether, and to what extent, a debtor may maximize his future income.⁸ Additionally, courts engage in this analysis because a debtor’s possession of an educational degree may coincide with a showing of promise in a particular field, thereby indicating revenue generation.⁹

In *Najafian*, for example, the United States District Court for the Eastern District of Virginia determined that the debtor failed to meet the second *Brunner* prong because of “her extensive education” and thus her likelihood of future gainful employment.¹⁰ There, the debtor’s education spanned more than thirty-two years, over which time she obtained several Master’s and Bachelor’s degrees from numerous, highly accredited universities.¹¹ Through these degrees, the debtor “maximized her income” and lived “a frugal lifestyle” during her repayment period.¹² Therefore, the court concluded the debtor failed to satisfy *Brunner*’s “additional circumstances” standard.¹³

On the other hand, a debtor’s limited education may indicate an “improbable potential for work.”¹⁴ In *Matter of Seibert*, the United States Bankruptcy Court for the Southern District of Ohio determined that the debtor’s financial situation would not “change for the better in the foreseeable future.”¹⁵ There, the debtor had obtained no professional or graduate degree.¹⁶ He possessed an eighth-grade education.¹⁷ Furthermore, this limited education rendered his potential

⁸ See *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 624 (6th Cir. 2004).

⁹ See *In re Erbschloe*, 502 B.R. 470, 479 (Bankr. W.D. Va. 2013); see also *In re Nightingale*, 529 B.R. 641, 652 (Bankr. M.D.N.C. 2015) (determining the debtor failed to satisfy the second *Brunner* prong as she possessed both a Bachelor’s and Master’s degree, suggesting potential “employability” and income production).

¹⁰ 2013 WL 1399340, at *2.

¹¹ *Id.* at *1.

¹² *Id.* at *5.

¹³ *Id.* at *4.

¹⁴ *In re Seibert*, 10 B.R. 704, 705 (Bankr. S.D. Ohio 1981); see also *In re Boykin*, 313 B.R. 516, 522 (Bankr. M.D. Ga. 2004) (holding the failure to obtain an educational degree, coupled with “non-marketable job skills above the minimum wage level,” favors discharging student loan debt).

¹⁵ 10 B.R. at 705.

¹⁶ *Id.*

¹⁷ *Id.*

work “improbable” and his potential for gainful employment in the future unlikely.¹⁸

Consequently, the court concluded that such facts “mold this case into one of classic undue hardship.”¹⁹

III. A Debtor’s Job Skills Provide Courts with an Indication of Debtor’s Potential for Future Employment

Courts will generally consider a debtor’s job skills when determining whether prospects for future employment exist.²⁰ Specifically, possessing “lucrative job skills” portrays an individual capable of generating income.²¹ Moreover, a debtor’s “transferable job skills” indicate a debtor capable of holding numerous forms of employment.²² For instance, courts may gain insight into whether these “transferable skills” exist by analyzing a debtor’s educational degrees and previously held jobs.²³

In *In re Erbschloe*, the United States Bankruptcy Court for the Western District of Virginia determined that the debtor showed signs of future employment.²⁴ There, the debtor obtained entry-level employment in an administrative position with a new set of job skills.²⁵ The court found this would allow her to transition into a different position with a new employer for higher pay, better hours, and potentially benefits.²⁶ Moreover, being “resourceful, responsible, and determined” were skills that the court deemed indicative of someone who will find future

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See In re Wetzel*, 213 B.R. 220, 226 (Bankr. N.D.N.Y. 1996) (noting that the debtor’s job skills and prospects of obtaining full-time future employment precluded finding her current financial difficulties were likely to continue).

²¹ *In re Hlady*, 616 B.R. 257, 275 (Bankr. E.D.N.Y. 2020).

²² *See In re Erbschloe*, 502 B.R. 470, 479 (Bankr. W.D. Va. 2013).

²³ *Educ. Credit Mgmt. Corp. v. DeGroot*, 339 B.R. 201, 214 (D. Or. 2006) (denying discharge of student loan debt where debtor possessed a “wide range of skills” acquired through various accounting licenses, advanced degrees, and previous corporate employment).

²⁴ 502 B.R. at 479.

²⁵ *Id.*

²⁶ *Id.*

employment.²⁷ As such, relying on the debtor’s transferrable job skills, the court concluded that the debtor failed to satisfy the second *Brunner* prong.²⁸

Conversely, a lack of useable job skills is a factor “traditionally viewed as sufficient additional circumstances under *Brunner*.”²⁹ Moreover, absence of marketable or transferable job skills may be indicative of an inability to obtain future employment.³⁰ For example, in *In re Rosen*, discharge of a student loan debt was granted after the court found the debtor’s financial status was likely to deteriorate in the future.³¹ There, the court determined that the debtor had not obtained any transferrable skills from trainings or prior work experience in various labor positions.³² Moreover, given the debtor’s lack of skills, the court reasoned that the debtor would be unable to maintain any sort of significant revenue-generating future employment.³³ Consequently, the debtor satisfied the second *Brunner* prong.³⁴

IV. When Determining a Debtor’s Potential Future Employment, Courts will Consider a Debtor’s Work History and a Debtor’s Efforts to Find Future Employment

“One of the best indicators of what will come in the future, comes from events that have occurred in the past.”³⁵ As such, a debtor’s work history is a “relevant and significant consideration” in projecting whether a debtor’s current financial state is likely to persist.³⁶ Furthermore, a history of holding steady employment, especially in high-paying positions,

²⁷ *Id.*

²⁸ *Id.* at 480.

²⁹ *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993).

³⁰ *See In re Rosen*, 179 B.R. 935, 941 (Bankr. D. Or. 1995).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *In re Crawley*, 460 B.R. 421, 439 (Bankr. E.D. Pa. 2011) (considering debtor’s employment history when concluding there was no trend towards economic stability).

³⁶ *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994).

typically indicates strong prospects for future employment.³⁷ Conversely, an employment history consisting of short-term employment, interspersed with periods of unemployment, would satisfy the second *Brunner* prong.³⁸

Additionally, debtors are under a good faith duty to adequately search for employment to maximize their income potential.³⁹ Though these efforts do not need to result in obtaining a job, debtors still need to show they actively sought employment.⁴⁰ Moreover, nothing in the Bankruptcy Code suggests a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim it would be an undue hardship to repay his loans.⁴¹ Consequently, while employment outside of the debtor's practice area may not be ideal, courts applying *Brunner* may require the debtor to work outside his/her field of study if necessary.⁴²

In *In re Frushour*, the United States Court of Appeals for the Fourth Circuit determined that the debtor showed signs of future employment, thereby failing to satisfy the second *Brunner* prong.⁴³ There, the debtor, "an intelligent individual with a range of job skills," had an employment history displaying she previously held several jobs where she made almost double her current income.⁴⁴ Additionally, the court found that no undue hardship existed because the debtor was satisfied with her current, lower-paying job, she had not actively sought higher-paying employment, and she had a previous history of larger income jobs.⁴⁵ Being that the debtor

³⁷ See Educ. Credit Mgmt. Corp. (*In re Frushour*), 433 F.3d 393, 401 (4th Cir. 2005).

³⁸ *In re Thompson*, 329 B.R. 145, 178–79 (Bankr. E.D. Va. 2005).

³⁹ *In re Kraft*, 161 B.R. 82, 87 (Bankr. W.D.N.Y. 1993).

⁴⁰ See *In re Barrett*, 545 B.R. 625, 645 (Bankr. N.D. Cal. 2016) (concluding the debtor was entitled to discharge of his student loan debt after showing he extensively networked, sent resumes to hundreds of employers, and made a good faith effort to obtain legal work).

⁴¹ *In re Frushour*, 433 F.3d at 401.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

provided no indication as to why she could not return to her former higher-paying positions, the court concluded that the debtor did not satisfy the “additional circumstances” requirement under *Brunner*.⁴⁶

In contrast, a debtor who exhibited a pattern of periodic, unstable lucrative employment satisfied the second *Brunner* prong.⁴⁷ In *In re Thompson*, though the debtor actively sought jobs when unemployed, the debtor’s “stint of sustained unemployment” was part of a pattern that the court determined was remarkably unstable.⁴⁸ Consequently, the court reasoned that this pattern had little, if any, chance of improving in the foreseeable future.⁴⁹ Moreover, the court noted that this pattern would continue to impair the debtor’s ability to keep employment on a permanent basis for the remainder of her loan repayment period.⁵⁰ Thus, given the unstable employment history, the court held that the debtor sufficiently demonstrated “additional circumstances” under *Brunner*.⁵¹

CONCLUSION

A court will generally consider a debtor’s potential future employment as an “additional circumstance” under the second *Brunner* prong. The court’s analysis is based upon whether the debtor possesses a strong educational background and/or degree, whether the debtor maintains transferrable job skills, and whether the debtor has a history of stable employment and has made adequate efforts to seek current employment.

⁴⁶ *Id.*

⁴⁷ *See In re Thompson*, 329 B.R. 145, 178–79 (Bankr. E.D. Va. 2005).

⁴⁸ *Id.* at 179.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*