

The Honorable Lewis M. Killian, Jr.
Consumer Judges Panel 2012

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Dischargeability of Student Loans: An 11th Circuit Primer
Judge Lewis M. Killian, Jr.

- I. Student loans generally are not to be discharged under § 523(a)(8)
 - a. § 523(a)(8) provides:
 - (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt...(8)(A)(i) for 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 for an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.
 - b. The statute provides a narrow exception where “excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents.”
- II. Applicability of § 523(a)(8)
 - a. The 11th Circuit defines an “educational loan ‘made by’ a governmental unit” in *In re Shore*, 707 F.2d 1337 (11th Cir. 1983), as one in which a governmental unit is the lender and the holder of the loan obligation.
 - i. *In re Shore*, 707 F.2d 1337 (11th Cir. 1983).
 - o Facts: The debtor filed a complaint seeking discharge of an educational loan. The debtor had received the educational loan from a college that was using funds from a trust. The debtor argued the loans were made by the trust, not a governmental unit as required under § 523(a)(8).
 - o Holding: The college, which was an institution in the Georgia university system, was a “governmental unit” under 11 U.S.C. §§ 101(2) and 523(a)(8). Where the governmental unit draws the funds it loans is irrelevant to the “governmental unit” status. Thus, the student loans were excepted from discharge.
 - b. “Educational benefit” under § 523(a)(8) is clarified in *Burks v. State of LA & Bd. of Regents (In re Burks)*, 244 F.3d 1245 (11th Cir. 2001).
 - i. *Burks v. State of LA & Bd. of Regents (In re Burks)*, 244 F.3d 1245 (11th Cir. 2001).
 - o Facts: The debtor obtained educational stipends in exchange for an agreement to teach at an “other race” institution. The stipend agreement provided that the debtor would repay the stipends if the debtor failed to teach at an “other race” institution. The debtor did

not fulfill the teaching commitment and argued that the stipends were not for an “educational benefit” as required by § 523(a)(8), because the purpose of the stipends was to achieve diversity among instructors in the state’s universities.

- o Holding: The stipends were nondischargeable educational loans under § 523(a)(8). Regardless of any “diversity purpose,” the debtor received an “educational benefit.” The 11th Circuit noted that numerous courts had held that loans such as this – where funds are loaned to students to assist them with their education in exchange for an agreement to fulfill a service obligation or, in the alternative, to repay the amount received plus interest – are nondischargeable.

III. Exception for Undue Hardship

a. The *Brunner* Standard

- i. To discharge student loan debts, § 523(a)(8) requires a showing of undue hardship. The Bankruptcy Code does not define “undue hardship.” Several circuits have adopted the test set forth by the Second Circuit in *Brunner v. N.Y. State Higher Educ. Services Corp.*, 831 F.2d 395 (2nd Cir. 1987). The *Brunner* standard is a three-part test where the debtor must show, in order to establish “undue hardship”:

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.

- b. The 11th Circuit adopted the *Brunner* standard in *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003), *reh’g denied*, 82 Fed. Appx. 220, 2003 WL 22240497, *cert. denied*, 541 U.S. 991, 124 S.Ct. 2016 (2004).

- i. *In re Cox*, 228 F.3d 1238 (11th Cir. 2003).

- o Facts: Chapter 7 debtor filed an adversary complaint, seeking discharge of his student loan debt. After receiving his A.A., B.A., and J.D. degrees, and a LLM in Taxation, debtor had amounted close to \$114,000 in student loan debts. When his law practice failed, the debtor took a job with a landscaping company making \$24,000 a year. Debtor sought to discharge his student loan debts, claiming repayment would cause an undue hardship. The bankruptcy court found that there was no undue hardship because given the debtor’s education and skills, his current financial

situation would not be a permanent condition. Nevertheless, the bankruptcy court granted a partial discharge.

- o Holding: After adopting the majority view and following the *Brunner* standard, the 11th Circuit held that a court using its equitable powers may not grant a partial discharge based on an ability to pay a portion of the debt without a finding of undue hardship.
 - Note: Since a finding of undue hardship warrants a discharge of the entire student loan debt, the 11th Circuit's holding suggests there can be no partial discharge of the debt under any circumstances.

IV. Evidentiary Requirements

- a. When establishing the second prong of the *Brunner* standard, that additional circumstances exist that will cause the debtor's financial situation to persist for a significant portion of the loan repayment period, the 11th Circuit rejected a creditor's argument that corroborating medical evidence independent from a debtor's testimony is required. *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007).
 - i. *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007).
 - o Facts: Pro se debtor was the sole witness at the discharge hearing for his student loan debts. Debtor had introduced earning statements and a letter from his doctor stating debtor's various medical ailments. On appeal, creditor argued that medical expert testimony is required to satisfy the second *Brunner* prong.
 - o Holding: The bankruptcy court did not abuse its discretion in admitting debtor's testimony about how his medical conditions made it difficult for him to obtain work. Debtor was not purporting to give an opinion on his medical prognosis, but rather was testifying from personal knowledge. Debtor was not required to introduce expert testimony to establish the second *Brunner* prong.

V. First *Brunner* Prong: Minimal Standard of Living

- a. Debtor must show that he cannot repay student loans while still maintaining a minimal standard of living.
- b. "Minimal standard of living" is not necessarily debtor's preexisting lifestyle, nor is it a comfortable one. *Educ. Credit Mgmt. Corp. v. Stanley*, 300 B.R. 813 (N.D. Fla. 2003).

- i. *Educ. Credit Mgmt. Corp. v. Stanley*, 300 B.R. 813 (N.D. Fla. 2003).
 - o The district court held that the debtor was not entitled to an “undue hardship” discharge of her more than \$100,000 student loan debt. “Minimal standard of living” must be determined in light of all the relevant circumstances. Court took into account that the debtor had no dependents, was entitled to reimbursement from her former husband for one-half of any amounts paid on the student debt, earned more than four times the federal poverty level, and could have restructured the debt and ease the payment obligation under the Income Contingent Repayment Plan (“ICRP”).

VI. Second *Brunner* Prong: Additional Circumstances

- a. Debtor must show 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.
- b. Debtor’s testimony that his depression and chronic back problems were “additional circumstances” likely to render him unable to repay his student loans was sufficient to satisfy the second prong of *Brunner*. *Mosley*, 494 F.3d at 1325-27.

VII. Third *Brunner* Prong: Good Faith

- a. Debtor must show that he has made good faith efforts to repay his student loans. A debtor’s “failure to make a payment, standing alone, does not establish a lack of good faith.” *Mosley*, 494 F.3d at 1327 (quoting *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1311 (10th Cir. 2004).
 - i. “Good faith is measured by the debtor’s efforts to obtain employment, maximize income, and minimize expenses; his default should result, not from his choices, but from factors beyond his reasonable control.” *Id.*
- b. Alternative Repayment Programs
 - i. The 11th Circuit in *Mosley* rejected a per se rule that a debtor could not show good faith where he or she has not enrolled in an alternative repayment program. The programs are not always a viable option for debtors, as it may require them to trade one nondischargeable debt for another. In *Mosley*, it was questionable whether the debtor knew about the different programs, and because of his dire circumstances and inability to obtain work, alternative repayment options may not have been a realistic solution. *Mosley*, 494 F.3d at 1327.
 - o Note: In a recent unpublished opinion, the 11th Circuit affirmed the dismissal of a pro se debtor’s adversary complaint against the

assignee of his student loan lender due to the debtor's persistent refusal to comply with the court's order directing the debtor to apply for a federal loan consolidation program. The bankruptcy court had exercised "tremendous patience" by extending the deadline for applying to the program, by conducting an additional hearing to determine the debtor's eligibility and by giving numerous explanations to the debtor about why the debtor should apply for the program. Furthermore, the bankruptcy court offered to protect the debtor if he incurred any negative effects from applying and warned that failing to apply would result in dismissal. *Wieckiewicz v. Educ. Credit Mgmt. Corp.*, 443 Fed. Appx. 449, 2011 WL 4912082 (11th Cir. 2011).