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Feature

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Student Loan Discharge Decisions Poke Holes in the *Brunner* Test

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The conventional wisdom regarding student loans is that they are in effect nondischargeable. While the Bankruptcy Code allows discharge of student loans upon a showing of "undue hardship," judicial interpretation of that term has set the bar exceptionally high. Specifically, nine circuits evaluate "undue hardship" via the *Brunner* test, named after the 1987 case.[1] In the world of *Brunner*-as-applied, even serious personal hardships are not "undue" enough to justify discharge, with courts instead requiring a showing of "total incapacity" or a "certainty of hopelessness."[2] While *Brunner* has enjoyed surprising ubiquity and longevity, changes to the Bankruptcy Code and a new reality of student borrowing have given rise to a recent groundswell of cases that question *Brunner*'s continued use.

In the last quarter-century, education costs and student loan debt have increased geometrically. According to the Bureau of Labor Statistics, between 1980 and 2010, the cost of college increased at a rate approximately five times the rate of inflation.[3] Default rates on student loans in the U.S. have nearly doubled since 2006,[4] with total outstanding student loan debt now topping $1 trillion — or about twice the GDP of Belgium.[5] With costs and debt continuing to spiral, these troubling statistics may only be the tip of the proverbial iceberg.

The student debt explosion, coupled with the post-recession increase in jobless and underemployed graduates, has led to growing public awareness, as well as a few abortive attempts at legislative action. Congress proposed student loan relief bills in 2010, 2011 and 2013 that sought to unwind a 2005 amendment that excepted *private* student loans from discharge.[6] None of the bills, however, have survived committee. Given the present congressional gridlock, there is little hope of a legislative band-aid in the near term.

While Congress has been ineffectual, two recent bankruptcy cases indicate that the judiciary might, in incremental fashion, be reintroducing a debtor's ability to discharge student loans. Specifically, in 2013, the Seventh Circuit and Ninth Circuit Bankruptcy Appellate Panel (BAP) issued decisions that were critical of *Brunner* in *Krieger v. Educational Credit Management Corp.* and *Roth v. Educational Credit Management Corp. (In re Roth)*, respectively.[7] *Krieger* and *Roth* have widened a decade-long circuit split that now threatens to compromise *Brunner*'s hold on the majority.

History of Student Loan Discharge and the *Brunner* Test

Prior to 1976, the honest-but-unfortunate debtor could discharge his or her student loan just as they could any other unsecured debt. However, in the early 1970s, Congress became concerned with reports of recent graduates seeking to discharge their student loans just before beginning potentially lucrative careers.[8] Whether real or

1 *In re Brunner*, 46 B.R.752, 756 (S.D.N.Y. 1985), *aff'd*, *Brunner v. New York Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

2 *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393 (4th Cir. 2005); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 307 (3d Cir. 1995).

3 Tim Fernholz, "Why It's So Hard to Stop College Cost Inflation in the U.S.," *Quartz* (Aug. 2, 2013), available at http://qz.com/103658/why-its-so-hard-to-stop-college-cost-inflation-in-the-us/#103658/why-its-so-hard-to-stop-college-cost-inflation-in-the-us/.

4 "National Student Loan Two-Year Default Rates," U.S. Department of Education, available at www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html (last visited Dec. 19, 2013).

5 Rohit Chopra, "Too Big to Fail: Student Debt Hits a Trillion," *Consumer Financial Protection Bureau Blog* (March 21, 2012), available at www.consumerfinance.gov/blog/too-big-to-fail-student-debt-hits-a-trillion/.

6 *See* Private Student Loan Bankruptcy Act of 2013, H.R. 532, 113th Cong. (2013); Fairness for Struggling Students Act of 2011, S. 114, 113th Cong. (2013); Private Student Loan Bankruptcy Act of 2011, H.R. 2028, 112th Cong. (2011); Fairness for Struggling Students Act of 2011, S. 1102, 112th Cong. (2011); Private Student Loan Bankruptcy Act of 2010, H.R. 5043, 111th Cong. (2010); Fairness for Struggling Students Act of 2010, S. 3219, 111th Cong. (2010).

7 *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013); *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908 (B.A.P. 9th Cir. 2013).

8 Nat'l Bankr. Rev. Comm'n, *Bankruptcy: The Next 20 Years, Final Report*, n.518 (1997) (citing Hearings on H.R. Rep. 95-595, 95th Cong. 159 (1977)).

imagined,[9] the prospect of widespread abuse resulted in Congress passing the Education Amendments Act of 1976, which made student loans funded by the government nondischargeable for five years absent a showing of "undue hardship."[10] Shortly thereafter, the exception was codified as 11 U.S.C. § 523(a)(8).[11]

The Bankruptcy Code remained unchanged through 1987, when *Brunner v. New York Higher Education Services Corp.* was decided.[12] In *Brunner*, a debtor sought to discharge her student loans just nine months after graduating and shortly before the due date of her first required payment, citing unstable finances and an inability to secure employment in the months following her graduation.[13] On appeal, the district court articulated the now-famous *Brunner* test, which uses a three-prong framework to evaluate whether a debtor has established an "undue hardship."[14] Specifically, the *Brunner* test requires a debtor to show:

> (1) that the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the loans;
>
> (2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
>
> (3) that the debtor has made good-faith efforts to repay the loans.[15]

Each of *Brunner*'s three prongs must be satisfied in order to obtain a discharge.[16] Applying the newly minted test, the district court found the debtor's alleged hardship to be lacking.[17] The Second Circuit affirmed and endorsed the *Brunner* test, paving the way for *Brunner* to become the majority rule.[18] Although the application of *Brunner* varies slightly by circuit, nine circuits have formally adopted the test.[19]

After *Brunner* was decided, Congress made four significant amendments to § 523(a)(8) that expanded the types of debt that were excepted from discharge. In 1990, Congress expanded § 523(a)(8) to apply to *non-loan* student debt and extended the nondischargeability period for student loans from five to seven years.[20] In 1998, the nondischargeability period was made ubiquitous, excepting all student loans from discharge regardless of their age.[21] Lastly, Congress passed the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA), taking the unprecedented step of expanding § 523(a)(8) to encompass *private* student loans.[22] Despite these fundamental changes to § 523(a)(8) over the last 25 years, the unaltered *Brunner* test continues to be the nationwide lodestar in student loan discharge cases.

Eighth Circuit Rejects the *Brunner* Test, First Circuit BAP Criticizes Its Use

Although the most acute criticisms of *Brunner* have come in recent decisions, the move away from *Brunner* is not a new trend. The assault on its supremacy began in 2003, when the Eighth Circuit decided *Long v. Educational Credit Management Corp. (In re Long)*.[23] In *Long*, a single mother with serious mental health ailments obtained a discharge of her student loans.[24] On appeal, the Eighth Circuit expressly refused to apply *Brunner*, stating that its application in lieu of a more flexible test "diminish[ed] the inherent discretion contained in § 523(a)(8)(B)."[25] Instead of forcing the debtor to climb the *Brunner* mountain, the *Long* court provided a more lenient path, analyzing the totality of the circumstances, including (1) the debtor's past, present and likely future financial circumstances; (2) her reasonably necessary living expenses; and (3) any other relevant facts and circumstances.[26] Thus, a circuit split was born.

Seven years later, the First Circuit BAP weighed in on the *Brunner*/*Long* circuit split in *Bronsdon v. Educational Credit Management Corp. (In re Bronsdon)*.[27] In *Bronsdon*, a 64-year-old woman with no "disability or debilitating medical condition" obtained discharge of her student loans.[28] Following an appeal of the debtor's discharge, the BAP held that "*Brunner* takes the [undue hardship] test too far" by forcing debtors to show "extraordinary circumstances" that are not required by the Bankruptcy Code.[29] Describing *Brunner* as "overkill," the BAP formally rejected the loanholder's assertion that *Brunner* controlled and instead applied the totality of the circumstances test *à la Long* in affirming the debtor's discharge.[30]

Long and *Bronsdon* chose judicial discretion over *Brunner*'s rigid requirements, as the latter lacks a textual foundation in the Bankruptcy Code. By exposing *Brunner*'s flaws, the decisions inspired other circuits to question its wisdom, causing the rebellion against *Brunner* to grow.

The Seventh Circuit and Ninth Circuit BAP Reverse Course to Attack *Brunner*

In April 2013, the judiciary handed down two more decisions that chart a trend away from *Brunner*. The first was *Krieger v. Educational Credit Management Corp.*, a Seventh Circuit decision written by the influential Judge Frank Easterbrook.[31] Therein, a chroni-

9 *Id.* at 209 (stating that "the 1970 Commission acknowledged that student loan abuse was more perception than reality"); *see also* Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 94th Cong., pt. 2, at 1096 (1976) (Rep. Don Edwards expressing concern over lack of evidence of significant abuse in light of legitimate purposes of bankruptcy law); Hearings on H.R. Rep. 95-595, 95th Cong. 148 (1977) (Rep. James O'Hara stating that excepting student loans from discharge was a "discriminatory remedy for a 'scandal' [that] exists primarily in the imagination").

10 Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), codified at 20 U.S.C. § 1087-3 (1976).

11 The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2591 (1978), codified at 11 U.S.C. § 523(a)(8).

12 *In re Brunner*, 46 B.R.752 (S.D.N.Y. 1985), *aff'd*, *Brunner v. New York Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

13 *Id.* at 753.

14 *Id.* at 756.

15 *Id.*

16 *Id.*

17 *Id.* at 758.

18 *Brunner v. New York Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

19 *See Brunner v. New York Higher Educ. Servs. Corp.*, 831 F.2d at 396; *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 300 (3d Cir. 1995); *United Student Aid Funds v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1241 (11th Cir. 2003); *United States Dept. of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1311 (10th Cir. 2004); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005).

20 *Id.*

21 Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a) (1998).

22 Bankruptcy Abuse and Consumer Protection Act, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005).

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

24 *Id.* at 551-52.

25 *Id.* at 554.

26 *Id.*

27 *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791 (B.A.P. 1st Cir. 2010).

28 *Id.* at 795.

29 *Id.* at 800-01.

30 *Id.* at 801-05.

31 *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013).

cally unemployed debtor could not pay her student loans while caring for her elderly mother and sought discharge.[32] On appeal to the Seventh Circuit, the loanholder argued that the debtor failed to satisfy *Brunner*'s good-faith prong because she was unwilling to commit to an income-based repayment plan.[33]

Referring to the language of *Brunner* as a "judicial gloss" over the text of § 523(a)(8), Judge Easterbrook cautioned against any judicial interpretation that supersedes the statute itself.[34] He also explained that withholding discharge based on a debtor's unwillingness to agree to *future* income-based repayment necessarily fails "because it is always possible to pay in the future should prospects improve."[35] Noting that successive cases adopting *Brunner* have turned an "undue hardship" standard into one requiring an extraordinary showing of a "certainty of hopelessness," Judge Easterbrook ruled in favor of the debtor.[36]

Meanwhile, a couple of thousand miles to the west, the Ninth Circuit BAP was preparing to issue its decision in *Roth v. Educational Credit Management Corp. (In re Roth)*.[37] In *Roth*, a 64-year-old debtor sought to discharge $95,000 of student loans incurred 15 years before, citing physical and mental ailments.[38] Despite a seemingly hopeless situation, the bankruptcy court denied the discharge based on the debtor's failure to renegotiate her loans or participate in a repayment plan.[39] On appeal, the BAP held that "failure to negotiate or accept an alternate payment plan is not dispositive" of a finding of good faith.[40] After considering the debtor's circumstances, the BAP remanded the case with instructions to grant a discharge of the debtor's student loans.[41]

Despite the BAP's relaxation of *Brunner*'s good-faith prong, *Roth* will be remembered for a concurring opinion written by Hon. **Jim Pappas**,[42] who pointed out that § 523(a)(8) and student borrowing have changed since *Brunner* was decided in 1987.[43] Congressional amendments fundamentally changed § 523(a)(8), yet *Brunner* persists unaltered.[44] Furthermore, today's student "must borrow heavily to finance their futures" due to "the mammoth costs of a modern education."[45] These changes have not only made *Brunner*'s application overly harsh, but also impractical. Where courts in 1987 were tasked with analyzing a debtor's circumstances over a period of five years or less, courts today must "attempt to predict a debtor's potential to repay a six-digit educational obligation over his or her entire lifetime."[46] Given these obstacles Judge Pappas labeled *Brunner* a "relic of times long gone."[47]

The gravamen of Judge Pappas's concurrence is that the test was developed in 1987 to address Marie Brunner, who sought the discharge of *$9,000* in loans after *nine months*, is inapposite when applied to Janet Roth, who, in 2013, sought the discharge of *$95,000* in loans after *15 years*. Urging the circuit to provide judges with more discretion, Judge Pappas argued that "Congress ... presumably intended that bankruptcy courts have the flexibility to make fact-based decisions in individual cases," and concluded by requesting the Ninth Circuit to join with the Eighth Circuit in writing a poison-pen letter to *Brunner*.[48]

The Seventh Circuit and Ninth Circuit BAP's recent reversals suggest that the stagnant reliance on *Brunner* is ebbing. A wave of bankruptcy cases citing *Krieger* and *Roth* is developing, with courts in the rogue circuits already welcoming the modern analysis.[49] Even courts in circuits where *Brunner* is unquestioned are taking notice, acknowledging the new "dissatisfaction with the *Brunner* standard."[50] Although still bound to *Brunner* by Eleventh Circuit precedent, one bankruptcy court admitted that "there is merit to the argument that the rigors of the *Brunner* test are no longer appropriate to curb borrower abuse."[51] Given this initial reaction, more courts are likely to follow the trend set by *Krieger* and *Roth*.

Conclusion

The overarching purpose of the Bankruptcy Code is to provide a "fresh start" for the honest-but-unfortunate debtor.[52] As the Code existed in 1987, *Brunner* arguably effectuated that purpose. Courts were understandably skeptical of debtors seeking to jettison student loans without attempting repayment for at least five years. However, changes to the Bankruptcy Code and a new reality of student borrowing have since rendered *Brunner* outmoded. As student loan debt and rates of default skyrocket without congressional intervention, courts will increasingly be forced to "predict a debtor's potential to repay a six-digit educational obligation over his or her entire lifetime."[53] As citations to *Krieger* and *Roth* increase, it may be only a matter of time until *Brunner* is widely recognized for what it is: an antique of the 1980s, the shoebox-sized cellphone of § 523(a)(8) jurisprudence. abi

Editor's Note: *For more on this topic, see* Graduating with Debt: Student Loans under the Bankruptcy Code *(ABI, 2013), available for purchase at the ABI Bookstore (bookstore.abi.org).*

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32 *Id.* at 883.
33 *Id.* at 883-84.
34 *Id.* at 884.
35 *Id.*
36 *Id.* at 885.
37 *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908 (B.A.P. 9th Cir. 2013).
38 *Id.* at 911-12.
39 *Id.* at 913-14.
40 *Id.* at 917.
41 *Id.* at 920.
42 *See Roth*, 490 B.R. at 920-23.
43 *Id.* at 920-22.
44 *Id.*
45 *Id.* at 922.
46 *Id.*
47 *Id.* at 920.
48 *Id.* at 923.
49 *See generally Myhre v. U.S. Dep't of Educ. (In re Myhre)*, 2013 Bankr. LEXIS 3012 (Bankr. W.D. Wis. 2013); *Evans v. United States Dep't of Educ. (In re Evans)*, 2013 Bankr. LEXIS 5118 (Bankr. D. Haw. 2013); *Holcomb v. SLM Corp. (In re Holcomb)*, 2013 Bankr. LEXIS 3678 (Bankr. N.D. Ind. 2013).
50 *Ward v. United States Dep't of Educ. (In re Ward)*, 2013 Bankr. LEXIS 3260 at *14-15 (Bankr. E.D.N.C. 2013).
51 *Wolfe v. United States Dep't of Educ. (In re Wolfe)*, 2013 Bankr. LEXIS 4200 at *12 (Bankr. M.D. Fla. 2013).
52 *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).
53 *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 922 (B.A.P. 9th Cir. 2013).