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DISCHARGING STUDENT LOANS VIA BANKRUPTCY: UNDUE HARDSHIP DOCTRINE IN THE FIRST CIRCUIT

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INTRODUCTION

Student loans are presumptively non-dischargeable through bankruptcy, but the undue hardship doctrine provides an equitable "safety valve" for the indigent.[1] To date, the United States First Circuit Court of Appeals has yet to select a single legal test for determining undue hardship under the United States Bankruptcy Code ("Bankruptcy Code").[2] Within the jurisdiction of the First Circuit, bankruptcy courts are free to choose an approach to evaluate undue hardship.[3] In an effort to ensure consistency throughout the bankruptcy courts within the First Circuit, it would be ideal if the First Circuit would choose one of the undue hardship tests. However, until the First Circuit changes its position, the concept of undue hardship will be left open to judicial interpretation. This note explores the various undue hardship tests available to the First Circuit, and provides examples of how those tests have been applied by different courts. The two dominant tests in the First Circuit, the *Brunner* test and the Totality of the Circumstances test, will be explored in depth.

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[1] Nash v. Conn. Student Loan Found. (*In re* Nash), 330 B.R. 323, 324 (Bankr. D. Mass. 2005).

[2] *See* Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 735 (Bankr. D. Mass. 2006).

[3] Educ. Credit Mgmt. Corp. v. Kelly (*In re* Kelly), 312 B.R. 200, 206 (B.A.P. 1st Cir. 2004).

I. BACKGROUND

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") amended the Bankruptcy Code, 11 U.S.C. § 523(a)(8). The purpose of the amendment was, in part, to ensure the continued prevention of abuse by graduates attempting to discharge student loans "on the eve of a lucrative career."[4] Furthermore, the amendment sought to protect the solvency and perpetuity of student loan programs.[5]

The Bankruptcy Code provides that a Chapter 7 debtor is entitled to discharge all debts which arose prior to filing a bankruptcy petition.[6] This is a fundamental principle underlying the Bankruptcy Code, because it provides an honest debtor with a "fresh start".[7] A major exception to the "fresh start" concept is the undue hardship doctrine, which provides that most student loan debt is exempt from the general rule of discharge unless such debt "would impose an undue hardship on the debtor and the debtor's dependents."[8] A student loan will not be discharged "[u]nless the debtor affirmatively secures a hardship determination."[9] An educational debt will not be discharged unless the debtor can establish by a preponderance of the evidence that repayment of the debt would impose an undue hardship on the debtor and the debtor's dependants.[10]

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[4] Andresen v. Neb. Student Loan Program Inc. (*In re* Andresen), 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999).

[5] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. Corp. (*In re* Brunner), 46 B.R. 752, 754 (S.D.N.Y. 1985), aff'd, 831 F.2d 395 (2d Cir. 1987).

[6] 11 U.S.C. § 727(a), (b) (2009).

[7] Burkhead v. United States (*In re* Burkhead), 304 B.R. 560, 565 (Bankr. D. Mass. 2004) (citing Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 744 (Bankr. D. Me. 2000)).

[8] 11 U.S.C. § 523(a)(8) (2009).

[9] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004).

[10] *See* Smith v. Educ. Credit Mgmt. Corp. (*In re* Smith), 328 B.R. 605, 610–11 (B.A.P. 1st Cir. 2005).

The initial burden is on the creditor to prove that the debt exists and that it is the type of loan exempt from general Chapter 7 discharge. Once the creditor satisfies that requirement, the burden then shifts to the debtor to prove undue hardship.[11] In addition to filing a Chapter 7 bankruptcy petition, a debtor must also initiate an adversarial proceeding against their student loan creditors in order to attempt to discharge student loan debt.

While undue hardship remains statutorily undefined as of the last revision of the Bankruptcy Code,[12] several courts have formulated different tests to determine undue hardship. For example, there is the *Bryant* Poverty Level test,[13] the *Brunner* test,[14] the Totality of the Circumstances test,[15] and the *Johnson* test.[16] Neither the *Bryant* test nor the *Johnson* test have been used in the First Circuit, they are being highlighted merely to provide other schools of thought for determining undue hardship, and to provide a backdrop of the jurisprudential landscape. The *Brunner* test and the Totality of the Circumstances test dominate the First Circuit. "Most courts within the First Circuit have adopted the 'totality of circumstances' test. . . . Nevertheless, several courts within this circuit have applied the *Brunner* test."[17] The Bankruptcy Code does not provide for a particular test. As a result, the Bankruptcy Appellate Panel for the First Circuit has held the bankruptcy courts are free to choose their own approach when analyzing undue hardship cases.[18]

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[11] *See* Educ. Credit Mgmt. Corp. v. Savage (*In re* Savage), 311 B.R. 835, 839 (B.A.P. 1st Cir. 2004).

[12] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 P.L. 8 § 220, 119 Stat. 23 (codified at 11 U.S.C. § 523(a)(8)).

[13] Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913 (Bankr. E.D. Pa. 1987).

[14] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987).

[15] Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d. 702 (8th Cir. 1981).

[16] Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), 5 B.C.D. 532 (Bankr. E.D. Pa. 1979).

[17] Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 736 (Bankr. D. Mass. 2006).

[18] *See id.*

There is limited legislative history on undue hardship, but many courts have cited a 1973 Report of the Commission on the Bankruptcy Laws of the United States when formulating or adopting a test:

> [Student loans] should not be dischargeable as a matter of policy before [the debtor] has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt. In order to determine whether nondischargeability of the debt will impose an "undue hardship" on the debtor, the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents at a minimal standard of living within their management capability, as well as to pay the educational debt.[19]

The above quote provides the only legislative intent as to the original meaning of undue hardship. The analysis in the above quote is the starting point from which all of these tests are formulated. The undue hardship doctrine is an elusive standard. Courts have historically struggled to formulate tests for its application.[20] Typically, student loans are exempt from

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[19] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 25–26 (Bankr. D. Mass. 2005) (citing Communication from the Executive Director, Commission on the Bankruptcy laws of the United States, Transmitting a Report of the Commission on the Bankruptcy laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., Pt. II, 140 n.15, 140–41 n.17 (1973)).

[20] *See In re Paul*, 337 B.R. at 735.

discharge; however, a finding of undue hardship will remove that exemption and allow the debtor to discharge the student loan debt along with other debt through bankruptcy. Unfortunately, this language is not always used in a consistent manner.

II. THE TESTS

A. The *Bryant* Poverty Level Test

The *Bryant* Poverty Level test, from the Third Circuit, creates a rebuttable presumption of undue hardship. Under the *Bryant* test, if the debtor's income is below the federal poverty level, then undue hardship exists and the student loans are discharged in a bankruptcy proceeding. Conversely, if the debtor's income is above the federal poverty level, the loans are presumed to remain exempt from discharge. The debtor or the creditor can rebut this presumption by offering evidence of extenuating circumstances. This test is an attempt by the Eastern District Bankruptcy Court for the District of Pennsylvania to add some sort of objectivity to the undue hardship doctrine.[21] It should be noted that this test has not gained widespread acceptance, and it has never been used in the First Circuit.

B. The *Johnson* Test

The *Johnson* test, also from the Third Circuit, considers a debtor's salary, wages, skills, sex, employment history, current employment, education, health, transportation,

[21] *See* Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915–19 (Bankr. E.D. Pa. 1987).

dependants, and other income.[22] The bankruptcy court determines the debtor's reasonable expenses while maintaining a minimal standard of living for the debtor and the debtor's dependants.[23] Next, the court analyzes if the income can support the debtor's expenses and repayment of the loans.[24] In addition, the *Johnson* test requires either a good faith test or a policy inquiry test to be applied. The good faith test requires the debtor to show a "bona fide attempt to repay the loan."[25] A bona fide attempt may include taking advantage of all employment opportunities, minimizing expenditures, and maximizing resources.[26] The policy inquiry test requires the court to weigh the discharge against the policy behind 11 U.S.C. § 523(a)(8). If the court "concludes either that the dominant purpose of the bankruptcy petition was to discharge the student loan debt or the debtor has definitely benefitted financially from the education which the loan helped to finance," the loans will not be discharged.[27] Like the *Bryant* test, the *Johnson* test has not gained widespread acceptance, and it has never been used in the First Circuit.

C. The *Brunner* Test

The *Brunner* test, from the Second Circuit, is the most prevalent test used to determine undue hardship in a majority of the Circuits.[28] The three prongs to the *Brunner* test are as follows:

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[22] *See* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 737 (Bankr. D. Me. 2000) (citing Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), 5 B.C.D. 532, 536–39 (Bankr. E.D. Pa. 1979)).

[23] *See id.* at 737 (citing *In re Johnson*, 5 B.C.D. at 538).

[24] *Id.* at 737–38 (citing *In re Johnson*, 5 B.C.D. at 544).

[25] *Id.* at 738 (citing *In re Johnson*, 5 B.C.D. at 540 (citing A. Ahart, *Discharging Student Loans in Bankruptcy*, 52 AM. BANKR. L.J. 201, 207 (Summer 1978))).

[26] *See id.* (citing *In re Johnson*, 5 B.C.D. at 541–42, 544).

[27] *Id.* (citing *In re Johnson*, 5 B.C.D. at 544).

[28] *See, e.g.*, Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys (*In re*

> (1) The debtor cannot maintain, based on current income, a minimal standard of living for themselves and their dependants if forced to repay the loans;
> (2) 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) The debtor has made good faith efforts to repay the loans.[29]

The debtor has the burden of proving each prong of the *Brunner* test[30] by a preponderance of the evidence.[31]

The first prong, also known as the "minimal standard" prong, requires a thorough examination of the debtor's financial position. The debtor must prove that he or she cannot maintain a minimal standard of living and repay the loans. This is analyzed based on the debtor's current income and reasonable expenses.[32]

The second prong in the *Brunner* test, also known as the future prospects element, requires a showing of a likelihood that the debtor's position is likely to persist. This test requires the courts to consider 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

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Polleys), 356 F.3d 1302 (10th Cir. 2005); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F. 3d 1238 (11th Cir. 2003); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1995); Ill. Student Assistance Comm'n v. Roberson (*In re* Roberson), 999 F.2d 1132 (7th Cir. 1993).

[29] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987).

[30] *See* Lehman v. N.Y. Higher Educ. Servs. Corp. (*In re* Lehman), 226 B.R. 805, 808 (Bankr. D. Vt. 1998).

[31] *See* Grogan v. Garner, 498 U.S. 279, 287 (1991).

[32] King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358, 367 (Bankr. D. Vt. 2007).

loans."[33] "These additional circumstances must be 'extraordinary and exceptional and generally indicate a hopelessness for the indefinite future as to any possibility of repayment.'"[34] There is some debate as to whether this requires certainty of hopelessness. Many courts seem to be swayed by a probability that the debtor's current circumstances will persist for a substantial amount of time.[35] Such circumstances where undue hardship has been found include debilitating or terminal illnesses, disabilities, or responsibility for an unusually large number of dependants.[36] The third prong of the *Brunner* test resembles the *Johnson* test by requiring a showing of good faith by the debtor. [37] It requires the debtor to make a good faith effort to repay the loans.[38] This is measured by payments, and "efforts to obtain employment, maximize income, and minimize expenses."[39] "In making this assessment, a court should examine the debtor's standard of living, with a view toward ascertaining whether the debtor has attempted to minimize the expenses of [themselves] and [their] dependants."[40] The debtor has to

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[33] Neal v. N.H. Higher Educ. Assistance Found. (*In re* Neal), 354 B.R. 583, 589 (Bankr. D. N.H. 2006) (citing *In re* Brunner, 831 F.2d at 396).

[34] *Id.* (citing McClain v. Am. Student Assistance (*In re* McClain), 272 B.R. 42, 48 (Bankr. D. N.H. 2002)).

[35] *See In re King*, 368 B.R. at 367–68.

[36] Santamassino v. N.J. Higher Educ. Student Assistance Auth. (*In re* Santamassino), 373 B.R. 807 (Bankr. D. Vt. 2007) (citing *In re* Thoms, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001)); *In re King*, 368 B.R. at 370–71; Kelsey v. Great Lakes Higher Educ. Corp. (*In re* Kelsey), 287 B.R. 132, 142, 144 (Bankr. D. Vt. 2001)).

[37] Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 738 (Bankr. D. Me. 2000).

[38] *Id. See also In re Neal*, 354 B.R. at 590 (citing Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987)).

[39] King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358, 373 (citing O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559, 564 (7th Cir. 2003)).

[40] Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 870 (Bankr. E. D. Va. 2006) (quoting U.S. Dep't of Health and Human Services v. Smitley (*In re* Smitley), 347 F.3d 109, 117 (4th Cir. 2003)).

maximize his or her income potential and minimize expenses to only "reasonably necessary expenses."[41]

The circuits which have adopted the *Brunner* test, "maintain it provides a workable, easily articulated framework for courts and parties to follow while still allowing for a fact– and case-sensitive determination."[42] It is also praised as being a "simple[] rubric" that fosters certainty and predictability.[43] The certain factors of the *Brunner* test provide consistent results.[44] However, the test is highly criticized especially within the First and Eighth Circuits. "[R]equiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in [11 U.S.C.] § 523(a)(8)(B)."[45] Courts adhering to the Totality of the Circumstances test claim it is too rigid and inflexible. "The more equitable judgment is hemmed in by rules, the less equitable it becomes."[46] Despite this criticism, the *Brunner* test remains the most used test throughout the jurisdictions.[47]

The following cases are chosen to illustrate in which circumstances the courts within the First and Second Circuits have found undue hardship under the *Brunner* test.

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[41] Smith v. Educ. Credit Mgmt. Corp. (*In re* Smith), 328 B.R. 605, 613 (B.A.P. 1st Cir. 2005).

[42] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 25 (Bankr. D. Mass. 2005) (citing Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1309 (10th Cir. 2005); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); *In re* Faish, 72 F.3d 298, 306 (3d Cir. 1995)).

[43] *In re Hicks*, 331 B.R. at 25.

[44] *See id.*

[45] Nash v. Conn. Student Loan Found. (*In re* Nash), 330 B.R. 323, 325 (Bankr. D. Mass. 2005) (citing Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003)).

[46] *Id.* at 326.

[47] *See In re Hicks*, 331 B.R. at 24–25.

1) Santamassino v. New Jersey Student Assistance Authority[48]

In 2006, Joan Santamassino, a plaintiff with student loan debt, initiated an adversarial proceeding to discharge over $16,000 in student loans. The note became due in 1986, and she made "sporadic payments."[49] The guarantor paid the note in 1988. From 1989 until 2003, the debtor made 107 payments totaling $20,661. She did not make a payment after 2003.[50]

The plaintiff's mother was diagnosed with Parkinson's disease twenty-three years prior to this action. Upon her mother's deterioration, the debtor quit her law practice in New Jersey to care for her. Santamassino and her husband relocated to Vermont to care for her mother who required twenty-four hour care. In 2001, the debtor and her husband, the sole earner for the household, divorced. As a result, the debtor was forced to live exclusively on her mother's social security and pension benefits.[51]

The Bankruptcy Court for the District of Vermont applied the *Brunner* test to Santamassino's case, in order to determine if undue hardship existed. The court found the first prong of the *Brunner* test, the minimal standard requirement, was satisfied by the debtor, a decision which was not challenged by the creditor. The prong requires the debtor to show they cannot maintain a minimal standard of living and repay the student loans. The debtor's mother's social security and pension benefits totaled just over $3,100 per month, but their monthly expenses exceeded $3,500. The court deemed the expenses were reasonable, and held that the debtor could not maintain a minimal standard of living if she was required to repay the student loans.[52]

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[48] Santamassino v. N.J. Higher Educ. Student Assistance Auth. (*In re* Santamassino), 373 B.R. 807 (Bankr. D. Vt. 2007).

[49] *Id.* at 810.

[50] *See id.*

[51] *See id.* at 812.

[52] *See id.* at 811.

The court found the plaintiff had met the second prong of the *Brunner* test, the additional and exceptional circumstances requirement. This prong requires a showing that exceptional circumstances are present, prohibiting payment of the loan. It must also be shown the circumstances are likely to persist into the foreseeable future. The debtor devoted nearly all of her time to the long term care of her ill mother, including cooking, cleaning, shopping, providing personal care, helping with medications, driving her mother to appointments, paying her bills, and generally availing to the needs of her mother twenty-four hours a day.[53] This time commitment made it impossible for the debtor to earn extra income. The doctor testified that the debtor's mother's condition is "chronic and progressive."[54] She is in the late stages of the disease and she is likely to live "several more years."[55] These circumstances were additional and exceptional, thus satisfying the second prong of the *Brunner* test.[56]

Santamassino also satisfied the third prong of the *Brunner* test, the good faith requirement. The debtor repaid over half of the loan between 1983 and 2003. She made payments from 1983 to 1986, then requested and received forbearance, but later resumed payments from late 1986 through 1988. Between 1989 and 2003, she made another 107 payments.[57] Although the debtor was unable to seek or maintain employment since 2000, she still made many payments, even selling personal property to do so. The court found that her efforts to maximize income and minimize expenses satisfied the third "good faith" prong of the *Brunner* test.[58] The court also held that the debtor's mother could be considered a dependent, and that the services she provided to her mother were invaluable. The court seemed reluctant to impute bad

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[53] *See id*. at 812.

[54] Santamassino v. N.J. Higher Educ. Student Assistance Auth. (*In re* Santamassino), 373 B.R. 807, 812 (Bankr. D. Vt. 2007).

[55] *Id.*

[56] *See id*.

[57] *See id*. at 812–13.

[58] *See id*. at 813.

faith on a person foregoing a career to benefit an ailing parent.

The facts showed that the debtor satisfied the *Brunner* test. She could not maintain minimal living standards and repay the loans on just her mother's pension. The twenty-four hour care she provided to her mother was exceptional and likely to persist. She exercised good faith by making many payments on the loans when able to do so. Consequently, the court found that the debtor was entitled to discharge her student loans to avoid imposing undue hardship on the debtor.[59]

2) Markison v. Educational Credit Management Corp.[60]

The Bankruptcy Court for the District of Vermont determined that the debtor, Lynda Markison, did not satisfy her burden of proving the three *Brunner* prongs.[61] Markison had one dependant in high school, but the dependant lived with an adult sibling. The debtor earned a degree from Lyndon State College, Lyndonville, Vermont in 1994. At the time of her bankruptcy filing, the debtor's income was $21,000, plus she received money for room, board, and travel expenses associated with her employment. The creditor, Educational Credit Management Corporation, held the debtor's student loan note with a balance of $42,491 in February 2006, which accrued interest at a rate of 4.13% per year.[62]

The court found that the debtor did not satisfy the first prong of the *Brunner* test, the minimum standard requirement. In applying the first prong, the court took into consideration that the debtor traveled extensively for her job, and all of her travel expenses were covered by her employer.

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[59] *See id.* at 813–14.

[60] Markison v. Educ. Credit Mgmt. Corp. (*In re* Markison), 2007 WL 1668777 (Bankr. D. Vt.).

[61] *See id.* at 1.

[62] *See id* at 2.

Markison was employed about eighty percent of the year and averaged $1,171 in income per month. The court found her current monthly expenses to be $1,344, which was not enough to maintain a minimum standard of living if her expenses were reasonable.[63] However, Markison spent $984 per month on travel expenses, accounting for eighty percent of her income, in order to travel back to Vermont on the weekends.[64] The court found her travel expenses unreasonable, since all of her expenses would be covered if she remained at her job location.[65]

As a result of the court's determination that the travel expenses were unreasonable, the court dismissed her claim. The reasoning was that if Markison had recalculated her budget and reduced her traveling expenses, she would have had ample resources to make payments on her student loans and maintain a minimal standard of living. An inability to travel at one's discretion cannot be classified as an undue hardship.[66] The court recognized the failure of one prong of the *Brunner* test should end the analysis, and the student loan debt should remain exempt from discharge.[67] However, the court still chose to continue its analysis.

The second prong requires additional and exceptional circumstances indicating the debtor's inability to pay the loans will extend indefinitely into the future.[68] In the stipulated facts at pre-trial, the debtor admitted that she did not suffer a disability. She had only one dependant who did not even live with her. She had a decent job with benefits, even though it may not have been ideal. In the thirteen years following her graduation, she continuously found employment. The debtor's circumstances did not amount to additional and exceptional under the *Brunner* test. The court found the debtor's condition was not likely to persist for the duration of the repayment period, and that she was able

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[63] *See id*.
[64] *See id*. at 3.
[65] *See id*. at 4.
[66] *See* Markison v. Educ. Credit Mgmt. Corp. (*In re* Markison), 2007 WL 1668777, 5 (Bankr. D. Vt.).
[67] *See id*.
[68] *See id*.

bodied, healthy, and could find better employment in the future. Consequently, the debtor did not meet her burden of proof; therefore, her student loans remained exempt from discharge.[69]

Ultimately, if a debtor fails to meet one element of the *Brunner* test, the debtor's student loans will remain exempt from discharge in bankruptcy. The Bankruptcy Court for the District of Vermont analyzed the debtor's circumstances under prongs one and two of the *Brunner* test, but did not engage in a good faith discussion under the third prong. Nevertheless, the court found that the debtor was not entitled to a finding of undue hardship after failing both the first and second prongs.

3) King v. Vermont Student Assistance Corp.[70]

The Bankruptcy Court for the District of Vermont ruled that James King was entitled to a finding of undue hardship and a subsequent discharge of his student loans. King acquired loans to finance an undergraduate degree at Northeastern University in Boston and a graduate degree at Schiller University in Paris.[71] As of January 2006, King had two notes totaling over $120,000, including interest and principal. He was eligible for an Income Contingent Repayment Plan ("ICRP"), which calculated payments of $0 based on current income and marital status at the time of his filing of a bankruptcy petition.[72] In his best year between graduating and filing for bankruptcy, King grossed $20,000 and made payments on his student loans. He stopped working in 2003 and did not work again, although he applied for many jobs. He filed for bankruptcy in 2005.[73] In May 2006, King

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[69] *See id*. at 6.

[70] King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358 (Bankr. D. Vt. 2007).

[71] *See id*. at 360.

[72] *See id*. at 361.

[73] *See id*. at 359.

had a major mental breakdown accompanied by suicidal inclinations, resulting in his hospitalization for eight days.[74]

King had a history of mental illness. He began seeing a psychiatrist in 2001, and then started in 2002 to see the mental health professional who testified at his trial, Dr. Catherine Hickey.[75] Dr. Hickey testified as to King's existing and past mental health. [76] The doctor's initial diagnosis was that King suffered from major depression. The doctor treated him with medication, but his condition did not improve. Over time, Dr. Hickey observed "hypomanic episodes followed by a depressive episode,"[77] so she upgraded her diagnosis to bipolar disorder. She could not with certainty claim his state would persist indefinitely, but opined it was a "lifelong disorder . . . King has had at least one; if not several hypomanic episodes, he is definitely at risk of having others."[78]

The court concluded that King's condition, coupled with stress, made employment extremely difficult. Both King's doctor and his mother's testimony were compelling and credible. The court also determined that his mental health condition was likely to persist indefinitely into the future. One creditor conceded that King had made a good faith effort to repay his loans while he was employed.[79] Education Credit Management Corp., another creditor, claimed the availability of an Income Contingent Repayment Plan made discharge of the loans unnecessary, because the note would be in abeyance, with payments of $0, until King found adequate employment. The court was not persuaded by this argument because the mentally and emotionally unstable debtor would still face enormous debt if he found a job.

The court found King had satisfied all three prongs of the *Brunner* test, and ordered that his student loans be

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[74] *See id*.
[75] *See id*.
[76] *See* King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358, 363 (Bankr. D. Vt. 2007).
[77] *Id.*
[78] *Id*.
[79] *See id*. at 370–71.

discharged.[80] King received only $631 per month in Social Security Disability benefits. This was inadequate to maintain a minimal standard of living and make payments on his student loans, satisfying the first prong.[81] The court found that King's mental condition was additional and exceptional and likely to persist for a significant portion of the repayment period. This satisfied the second prong of *Brunner*.[82] The third prong, requiring a good faith effort to repay the loans, was also satisfied. He attempted to repay the loans when he was employed. He "maximized his income, minimized his expenses, and made reasonable efforts to find a job when he was not employed."[83]

4) Neal v. New Hampshire Higher Education Assistance Foundation[84]

Peggy and Thomas Neal initiated an adversarial proceeding to discharge six individual Stafford student loans owed by Peggy Neal. The aggregate total of the loans was $22,570, and as of August 2006, $30,449 was due. The debtors originally filed a Chapter 13 petition and made regular, but sometimes late, payments to their trustee based on a court approved payment plan. Part of the plan was to pay creditors, including the New Hampshire Higher Education Assistance Foundation (NHHEAF), with a lump sum from a pending personal injury action. Unfortunately, the attorney retained to handle the debtors' tort action failed to perform his duties and the case was dismissed. Subsequently, the debtors revised their bankruptcy filing to a Chapter 7 petition.[85]

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[80] *See id*. at 373–74.

[81] *See id*. at 367.

[82] *See* King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358, 373 (Bankr. D. Vt. 2007).

[83] *Id.*

[84] Neal v. N.H. Higher Educ. Assistance Found. (*In re* Neal), 354 B.R. 583 (Bankr. D. N.H. 2006).

[85] *See id*. at 586.

Peggy Neal was a forty-seven year old woman who was employed in the automotive industry for twelve years. From 1996 to 1999, she was enrolled as a part time student at New Hampshire Technical College, during which time she accumulated student loans to pay for the tuition. Mrs. Neal's intention was to study computers to become more marketable and to increase her earning potential.[86] In 2003, Mrs. Neal lost her job, but was able to find new employment performing data entry for $10.00 per hour. At one point, she was working a combined seventy-five hours per week as a bus driver and as a Wal-Mart cashier. She eventually quit driving a bus to have more time to care for her ailing husband, but she continued to work thirty-two hours per week at Wal-Mart because the job provided health benefits.[87]

Thomas Neal was granted a discharge of his student loans by the Department of Education after a finding in 2005 that he was disabled. While the Bankruptcy Court for the District of New Hampshire was only analyzing Peggy Neal's student loans under the undue hardship doctrine, Mr. Neal's failing health was pertinent to the court's analysis. Mr. Neal was diabetic, obese, suffered from depression, as well as chronic back pain from an injury. That back injury was the basis of the failed personal injury action mentioned above. Mr. Neal was unable to stand for any significant period, and required assistance from Mrs. Neal to dress, shower, and cook.[88]

Peggy Neal earned $1,050 per month while Thomas Neal drew $872 in disability, resulting in a combined monthly income of $1,922. Their monthly expenses at the time of trial were $2,714 and apparently modest. Peggy Neal's student loans were due January 2000. She requested and received a no pay forbearance. She never made a payment on her loans.[89]

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[86] *See id*.
[87] *See id*.
[88] *See id*. at 587.
[89] *See id*. at 588.

The court applied the *Brunner* test for undue hardship to the Neals' case. The first prong, the minimal standard of living requirement, requires debtors to maximize income and minimize expenses and still be unable to make payments on their student loans. The Neals' satisfied this prong of the test. The court determined that the Neals' spending was very frugal. The only expense of contention was a $97 cable bill, which was found to be reasonable in light of Mr. Neal's disabled condition. The court also found that Mrs. Neal only working one job was reasonable in light of her caretaker status. She was working full time at a fair wage. The court seemed to indicate that a debtor who seeks undue hardship must work full time if able to do so. The first prong was satisfied by the Neals' frugal expenses and Mrs. Neal's full time job.[90]

The second prong of the *Brunner* test considers whether additional circumstances exist, which make payment unlikely for a significant portion of the repayment period.[91] Since Mr. Neal was disabled, he was on a fixed income, which was not likely to increase. Mrs. Neal, although working full time, could only work limited hours in order to provide the care her husband required. "Mr. Neal's health is an extraordinary circumstance that limits both himself and Mrs. Neal."[92] The debtors satisfied the second *Brunner* prong because of Mr. Neal's health, and the care he required from Mrs. Neal.[93]

The third good faith prong of the *Brunner* test was also satisfied. This requires the debtors to "make monthly payments and/or attempting to negotiate an alternative payment plan with the lender."[94] Peggy Neal applied for a no pay forbearance, which was granted. At the time of the Neals' bankruptcy filing, Mrs. Neal's loans were deemed technically current. The debtors made regular payments to their Chapter 13 trustee for four years under the assumption NHHEAF was participating as a creditor in the proceeding. The debtors also

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[90] *See* Neal v. N.H. Higher Educ. Assistance Found. (*In re* Neal), 354 B.R. 583, 588–89 (Bankr. D. N.H. 2006).

[91] *See id.* at 589.

[92] *Id.* at 590.

[93] *See id*.

[94] *Id.*

proposed paying the note along with other debts from the proceeds of their pending personal injury action. Through no fault of their own, the debtors' personal injury suit was dismissed. The debtors did not exercise bad faith, therefore, they satisfied the third element of the *Brunner* test entitling them to discharge Mrs. Neal's student loans.[95]

D. The Totality of the Circumstances Test

The Totality of the Circumstances test is the most popular test in the First Circuit.[96] The Eighth Circuit has also expressly adopted the test.[97] In the First Circuit, in the absence of controlling authority, bankruptcy courts are free to choose an approach to evaluate undue hardship.[98] Most courts within the First Circuit apply the Totality of the Circumstances test.[99] The Totality of the Circumstances test reviews all relevant factors and circumstances surrounding a particular bankruptcy case. The factors include a debtor's past, present and reasonably reliable future financial resources, as well as reasonably necessary living expenses.[100] It is also essential to consider all of the factors relevant to whether a debtor can maintain himself and his dependants now and into the reasonably foreseeable future, while continuing to repay his educational debt.[101]

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[95] *See id*.

[96] *See* Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 735–36 (Bankr. D. Mass. 2006).

[97] *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

[98] *See* Educ. Credit Mgmt. Corp. v. Kelly (*In re* Kelly), 312 B.R. 200, 206 (1st Cir. B.A.P. 2004).

[99] *See In re Paul*, 337 B.R. at 736.

[100] *See* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 738, 745–46 (Bankr. D. Me. 2000).

[101] *See* Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 31 (Bankr. D. Mass. 2005).

The Totality of the Circumstances test analysis, reduced to elements, requires a debtor to prove by a preponderance of the evidence the following:

> 1) The debtor's past, present, and reasonably reliable future financial resources;
> 2) The debtor's and all dependants' reasonably necessary living expenses; and
> 3) All other relevant facts or circumstances unique to the debtor's case that prevent the debtor from paying the student loans in question, while still maintaining a minimal standard of living.[102]

In *Hicks v. Educational Credit Management Corp.*,[103] Judge Henry J. Boroff eloquently reduces the Totality of the Circumstances test to "one simple question: Can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependants and still afford to make payments on the debtor's student loans?"[104] The courts should consider all relevant factors, including a debtor's income, expenses, health, age, education, number of dependants, personal and family circumstances, monthly payments required to service student loans, effect of bankruptcy discharge of other debt, prospects for increased income, and ability to minimize expenses, and any other relevant factors.[105] Many courts condense the elements of the test into the one simple question, list all of the relevant facts, and conclude whether a finding of undue hardship is warranted.

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[102] Lorenz v. American Education Services et al. (*In re* Lorenz), 337 B.R. 423, 430–31 (B.A.P. 1st Cir. 2006) (citing *In re* Hicks, 331 B.R. at 31; *In re Kopf* at 739).

[103] *In re Hicks*, 331 B.R. at 31.

[104] *In re Lorenz*, 337 B.R. at 430–31 (citing *In re Hicks* at 31*; In re* Kopf, 245 B.R. at 739).

[105] *See* Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 736 (Bankr. D. Mass. 2006).

The Totality of the Circumstances test is praised for its flexible and meticulous fact specific approach. Proponents speculate that Congress' choice to use a broad phrase such as undue hardship was intentional. The statute is devoid of any definition or explanation of the term and does not mandate a particular test.[106] In doing so, Congress gave bankruptcy judges the authority and responsibility to decide on a case-by-case basis whether the debtor is entitled to a finding of undue hardship.[107] It is "simply an adjuration to the decision maker to make an honest and intelligent judgment after having given due consideration to all the information the parties provide . . . ."[108] The test is criticized by courts adhering to *Brunner* as undermining consistency, predictability, and fairness by allowing too much judicial discretion. This criticism is countered by the fact that lenity is not always the result of flexibility; a judge may make a sound discretionary decision with the aid of all the facts pertinent to the case.[109]

The following cases provide examples of how courts within the First Circuit have applied the Totality of the Circumstances test for undue hardship.

1) Brunell v. Citibank[110]

The Bankruptcy Court for the District of Massachusetts in *Brunell* held that the forty-one year old debtor, Jennifer Gail Brunell, who was employed in the health care industry, was not entitled to a finding of undue hardship.[111] The debtor lived in Rhode Island, was divorced, and had custody of her

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[106] *See* 11 U.S.C. § 523(a)(8) (2009).

[107] *See* Nash v. Conn. Student Loan Found. (*In re* Nash), 330 B.R. 323, 326 (Bankr. D. Mass. 2005).

[108] *Id. See also* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

[109] *See id*.

[110] Brunell v. Citibank (*In re* Brunell), 356 B.R. 567 (Bankr. D. Mass. 2006).

[111] *See id*. at 569.

three young children.[112] In September 2006, the debtor owed in excess of $200,000, which would require payments of almost $1,300 per month for thirty years to repay.[113] The debtor qualified for an Income Contingent Repayment Plan (ICR). Based on her reported income, the debtor's payment would have been $153 per month in 2005 and $260 per month in 2006.[114]

The debtor's educational history from which the loans arise is substantial. In 1987, she obtained a bachelor's degree in electrical engineering from Worcester Polytechnic Institute.[115] She earned a master's degree in psychology from Lesley College in 1995.[116] She attended a Ph.D. program at Suffolk University from 1996 until she dropped out in 2001, due to her being pregnant with twins.[117] The debtor then sought to change her career to the medical profession while being supported by her husband. However, she separated from her husband of seventeen years in 2003, and divorced in 2005.[118]

The debtor's work history was continuous. From 2004 to the time of the suit, the debtor maintained employment in the mental health field. She worked at the Attleboro Community Care Center, South Bay Mental Health Services, and at time of trial at the Early Intervention Program in Taunton where she earned $17.50 per hour plus mileage and gas reimbursement.[119] To increase her earning potential, the debtor needed to obtain a state license, which required further training and an exam. In addition to the debtor's salary, she also received $704 per month in child support, plus a

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[112] *See id*.

[113] *See id*.

[114] *See id*. at 574–75 (This court refers to an Income Contingent Repayment Plan as an ICR, compared to an ICRP *supra* p. 13).

[115] *See id*. at 569.

[116] *See* Brunell v. Citibank (*In re* Brunell), 356 B.R. 567, 570 (Bankr. D. Mass. 2006).

[117] *See id*.

[118] *See id*.

[119] *See id*. at 570–71.

percentage of any bonuses or commissions her ex-spouse may receive.[120]

A thorough examination of her expenditures was not challenged as unreasonable.[121] The court found the debtor had approximately $190 in disposable income. Brunell's expenses had fluctuated to smaller amounts in the past year.[122] Based on projected income and ICR payments, the debtor was only required to cut her budget by $70–$110 per month to make her student loan payments.[123]

The debtor failed to establish that the continued payment of her student loans would constitute an undue hardship.[124] The debtor was found to be bright and very well educated. Her prospects for better and higher paying employment were good. She was in good health. She would only be required to reduce her expenditures modestly to maintain a minimal standard of living for herself and her dependants in order to make payments on her educational debt.

2) *Dufrense v. New Hampshire Higher Education Assistance Foundation*[125]

The debtor in this case was a law school graduate who failed the bar nine times. The court found she met her burden of proof, and thus was entitled to a finding of undue hardship. She graduated from her undergraduate studies in 1994 and from law school in 1997.[126] The balance of her student loans was over $106,000. Dufrense's most recent employment was as a legal assistant and a real estate paralegal. Her ability to work full time was seriously impaired by a degenerative back

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[120] *See id*. at 571.

[121] *See id*. at 572–75.

[122] *See* Brunell v. Citibank (*In re* Brunell), 356 B.R. 567, 579 (Bankr. D. Mass. 2006).

[123] *See id*. at 579–80.

[124] *See id*.

[125] Dufrense v. N.H. Higher Educ. Assistance Found. (*In re* Dufrense), 341 B.R. 391 (Bankr. D. Mass. 2006).

[126] *See id.* at 393.

condition. Her condition required surgeries, including spinal fusion, and it was likely that she would require more surgeries in the future.[127]

She was a forty-five year old divorcee with children who were not considered dependants. Her salary averaged $43,000 in 2002 and 2003, but dropped dramatically to $12,000 in 2004, a year in which she also received over $12,000 in disability.[128] Her expenses at trial, after discharge of approximately $8,000 in Chapter 7 debts, were $1,780. Her income for 2005 included six months of full time employment at $2,800 per month and one month of temporary work at $1,280.[129] She received no disability, retirement or public assistance since 2004. The best repayment plan she could procure was a twenty year term at an interest rate of 3.375%. This would amount to payments of $621 per month and forgiveness of any unpaid portions at the end of the term.[130]

The Bankruptcy Court for the District of Massachusetts found that the exception of her student loans from discharge would impose an undue hardship on the debtor. Judge Robert Somma refused to adhere to any particular test because he did not have to in the First Circuit.[131] He stated that his considerations in reaching his conclusion were: "debtor's financial history and condition, her age, her marital status, her employment record and prospects, her family obligations, her resources actual and projected, her health and medical condition, her honest effort and good faith in addressing her debts, and all other factors and considerations presented in evidence . . . ."[132] His analysis was very similar to a typical totality of the circumstances approach, although he refused to call it that. He used all relevant factors and considerations presented into evidence.[133]

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[127] *See id.*
[128] *See id.*
[129] *See id.* at 393–94.
[130] *See id.* at 394.
[131] *See* Dufrense v. N.H. Higher Educ. Assistance Found. (*In re* Dufrense), 341 B.R. 391, 394 (Bankr. D. Mass. 2006).
[132] *Id*. at 395.
[133] *See id.*

The court held that the debtor's income was already insufficient to cover her expenses. She lived modestly at a very minimal level. Her prospects for regular future employment were uncertain at best, and her back was almost certain to deteriorate and require more surgeries.[134] Even if the loans were to remain in forbearance, the debtor would still be faced by mounting interest, stress from the debt, and a credit report with the massive debt reported. To burden a debtor who could barely work and afford modest living standards with a $621 per month student loan payment would impose an undue hardship.[135]

3) Paul v. Suffolk University[136]

The debtor in this case, Lunise Paul, did not prove that repayment of her school loans would impose an undue hardship on her and her dependants. The debtor received both a Bachelor's degree in general studies and a Masters degree in Public Administration from Suffolk University in Boston. The Commonwealth of Massachusetts and Suffolk University forgave $4,200 of the debtor's loans, stipulating that the repayment would constitute an undue hardship on the debtor.[137] Educational Credit Management Corporation ("ECMC") held seven notes totaling $53,000, and took a contrary position. The debtor's work history since graduation was at various data entry and health assistant positions ranging from ten to fifteen dollars per hour. From 2003 to the date of the trial, she worked as a home health coordinator.[138]

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[134] *See id.*

[135] *See id*.

[136] Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730 (Bankr. D. Mass. 2006).

[137] *See id.* at 731–32.

[138] *See id*. at 732.

The debtor was a thirty-four year old single mother. She had three children ranging from age three to ten. English was her second language.[139] The two fathers of the debtor's children provided no child support, and she claimed to know the whereabouts of only one of them.[140] The debtor claimed that her childcare responsibilities and poor English language skills limited her ability to procure a higher paying job, both presently and in the foreseeable future. The debtor also claimed the standard of living for her and her three dependants were below minimal standards. She did not have health insurance. She had a twelve year old vehicle that was in disrepair. She also claimed an inability to afford recreational or cultural activities for her family.[141]

The debtor's expenses were modest. She did not own a VCR or DVD player, did not subscribe to cable, and did not own a computer. She shared an apartment with her parents and paid $1,000 rent while her parents paid all of the utilities.[142] She received Women, Infants, and Children vouchers for the purchase of milk, cheese, juice, and peanut butter, but no other form of public assistance.[143] She did, however, own a $25,000 certificate of deposit, which she had received in settlement from an action against an agent of ECMC's predecessor in interest for alleged unfair debt collection and stay violations.[144] She also qualified for an ICR. Based on her income, amount borrowed, and family size, her payments would be $188 per month for nineteen and a half years.[145]

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[139] *See id*.

[140] *See id* at 733.

[141] *See id*. at 734.

[142] *See* Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 733 (Bankr. D. Mass. 2006).

[143] *See id*.

[144] *See id*. at 732, 737.

[145] *See id*. at 734 (This court also uses the acronym ICR for Income Contingent Repayment Plan, compared to an ICRP *supra* page157).

The Bankruptcy Court for the District of Massachusetts, applying the totality of the circumstances test, held that the debtor did not meet her burden of establishing undue hardship. The debtor's student loans would, therefore, remain exempt from general bankruptcy discharge.[146] The Court reasoned that the debtor had not used any of her $25,000 dollar settlement to pay down her student loans. Each year she received a significant tax return. Her 2004 return was over $7,000, approximately $585 per month in extra income. The Court also found it unreasonable that a person with the debtor's level of education could not search and acquire higher paying employment.[147]

The debtor was also found to have failed to maximize her income by not seeking support from the fathers of her children. Massachusetts General Laws provide guidelines for support and enforcement of child support orders.[148] Taking into account all of these factors, as well as the debtor's refusal to consolidate her loans and take advantage of an ICR, the Court found she failed to establish that repayment of her student loans would constitute an undue hardship.[149]

4) Gharavi v. United States Department of Education[150]

The debtor in this case, Minoo Gharavi, was granted a finding of undue hardship by the Bankruptcy Court for the District of Massachusetts, resulting in a partial discharge of most of her student loans. Only one loan remained exempt from discharge, which she would have to pay off. The debtor earned a Bachelor's degree in architecture from Texas

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[146] *See id*. at 737.

[147] *See id*.

[148] *See* Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 738 (Bankr. D. Mass. 2006).

[149] *See id*. at 738–39.

[150] Gharavi v. U.S. Dep't of Educ. (*In re* Gharavi), 335 B.R. 492 (Bankr. D. Mass. 2006).

Southern University in 1987.[151] In 1993, she decided to return to school at New England College of Optometry to pursue a doctorate in optomology. She took a leave of absence during the 1995–96 school year because she developed optic neuritis. She withdrew again during the 1996–97 school year after being diagnosed with Graves' disease. She failed out of school in the fall of 1997 because the medication that she had to take to treat her condition affected her concentration and memory.[152]

She was able to find employment as an ophthalmic technician from 2002 until trial. Her wage at the time of trial was $19.75 per hour for about forty hours per week.[153] In 2002, she was also diagnosed with multiple sclerosis. There are many side effects from the medication to treat the disease, as well as from the disease itself. The most pertinent side effect is chronic fatigue. The balance of her student loans at trial was over $63,000, and she never made a payment.[154] An analysis of Ms. Gharavi's income and expenses revealed a surplus of $62. The most generous payment schedule offered by the defendants was $419 per month.[155]

The court applied the Totality of the Circumstances test and held the debtor was entitled to a finding of undue hardship. Multiple sclerosis is a degenerative disease and the debtor's medical condition was almost certain to deteriorate over time. She made a decent wage and her fatigue prevented her from being able to work a second job. The debtor also lived with her mother, who only drew social security benefits to supplement the household income.[156] After reviewing the evidence, the court held that the debtor's circumstances warranted undue hardship and a partial discharge. All but one of the debtor's student loans were discharged.[157]

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[151] *See id*. at 494.
[152] *See id*. at 495.
[153] *See id*. at 495–96.
[154] *See id*. at 496.
[155] *See id*. at 501.
[156] *See* Gharavi v. U.S. Dep't of Educ. (*In re* Gharavi), 335 B.R. 492, 499 (Bankr. D. Mass. 2006).
[157] *See id*. at 501.

The most notable aspect of this case was the court's assessment of the monthly household expenditures on cigarettes by the debtor and her mother. The two smoked a combined thirty five packs a month, amounting to a total household expense of $175 per month on tobacco. After a lengthy discussion and citing significant authority, the Court found that this monthly tobacco expenditure was reasonable.[158]

III. CONCLUSION

The fact undue hardship is a lofty standard gets lost in the debate over which test is the most appropriate template in which to gauge undue hardship. Congress has erected a high hurdle to debtors seeking to discharge student loan obligations. The line seems to be drawn somewhere higher than mere inability to pay and a little less than certain hopelessness. "Hardship alleged . . . must be undue and attributable to truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents."[159] "Financial adversity alone is insufficient to warrant a student loan discharge on the basis of undue hardship."[160] No matter which test is employed, the debtor's circumstances must be dire and bleak.

The issue of which test will be applied is going to vary by district and judge until a case comes down with binding precedent. Until there is such a binding precedent, plaintiffs must be prepared to argue either the Totality of the Circumstances test or the *Brunner* test in the First Circuit. While the tests are similar in the evidence required to overcome the plaintiff's burden, they still differ. The most notable divergence is the *Brunner* test's good faith

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[158] *See id*. at 498–500.

[159] TI Federal Credit Union v. Delbonis, 72 F.3d. 921, 927 (1st Cir. 1995).

[160] Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 737 (Bankr. D. Mass. 2006).

requirement. While it is not required in a totality analysis, it is a relevant factor and may be part of the analysis. It is an essential element of a prima facie case in a *Brunner* jurisdiction, and failure to prove good faith by a preponderance of the evidence is failure to acquire a finding of undue hardship.