From Litigation to Mediation-The Widening Road to Student Loan Relief in Bankruptcy

Neisi Garcia Ramirez, Associate Bankruptcy, Neisi.GarciaRamirez@mccalla.com

Following the controversial ruling of In re Brunner,[1] which established the well-known and now ubiquitous "undue hardship" standard for student loan discharge ability, Bankruptcy emerged as a nearly impossible path to student loan relief. The Brunner Court relied on a strict, three-pronged test which considers both the Debtor's current and likely future circumstances in order to determine if the obligation can be permanently discharged. Namely, in order to discharge his student loan obligations, a Debtor would need to demonstrate that:

1. He is unable to maintain a "minimal" standard of living for himself and his dependents if forced to repay the obligation, based on current income and expenses;

2. His hardship is "likely to persist" for a significant portion of the student loan repayment period; and

3. He made a "good-faith" repayment effort.

A majority of Bankruptcy Courts still follow at least some formulation of the Brunner test under which-absent some type of permanent or pervasive condition, student loans are simply not dischargeable.[2] This burden was subsequently expanded as in 2005 Congress appeared to broaden the reach of 11 U.S.C. § 523(a)(8) to exclude private loans from discharge under subsection (A)(ii).

However, recent judicial trends appear to signal a potential departure from this restrictive approach, in favor of more flexible interpretations of both congressional intent and the Brunner test. A growing number of Courts have pushed back by distinguishing federal versus private student loans and holding private student loans to be dischargeable under 11 U.S.C § 523(a)(8)(A)(ii).[3] Both the Fifth Circuit and the Tenth Circuit reached similar conclusions that exceptions to discharge should be interpreted narrowly in favor of the debtor and analyzed congressional intent broadly to that effect. The Tenth Circuit distinguished the terms "educational loan" versus "obligation to repay funds received as an educational benefit" finding the latter to be more analogous to stipends or grants that were conditioned upon service obligations.

Other Courts have developed less restrictive formulations of the Brunner test altogether. Notably, while ruling in favor of discharge ability, the Southern District of New

---

[1] Brunner v. New York State Higher Education Services , 831 F.2d 395 (2d. Cir. 1987).

[2] See for example, Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler), 397 F.3d 382 (6th Cir. 2005); In re Faish, 72 F.3d 298 (3d Cir. 1995); In re Roberson, 999 F.2d 1132 (7th. Cir. 1993); Ekenasi v. Educ. Resource Inst. (In re Ekenasi), 325 F.3d 541 (4th Cir. 2003).

[3] See McDaniel v. Navient Solutions 973 F.3d 1083 (10th Cir. 2020); Crocker v. Navient Solutions 941 F.3d 206 (5th Cir. 2019).

York,[4] looked only at the Debtor's current circumstances by reasoning that because the loan was accelerated and the repayment period for the loan had ended, the Debtor easily satisfied the second prong in showing that "his circumstances will certainly exist for the remainder of the repayment period."

Yet not all Courts are relying exclusively on Brunner-type cases for dealing with student loans in Bankruptcy. Recognizing the vast challenges of opting for student loan discharge ability even under the least restrictive interpretation of Brunner, some Bankruptcy Courts have proactively engaged in an alternate and emerging trend to potential student loan resolution via loss-mitigation and mediation programs. Shortly after the Rosenberg decision, the United States Bankruptcy Court for the Southern District of New York inaugurated its Student Loan Mediation Before Litigation Program (SLM), effective January 27, 2020. According to the program's stated purpose, "the SLM Program creates a forum for debtors and lenders to discuss consensual repayment options for any Student Loan." [5] The SLM Program also "facilitates two different types of Student Loan negotiations: (1) requests for Student Loan Repayment Option relief, such as a loan modification, and (2) requests for the resolution of disputes over the discharge ability of a Student Loan deb." The SML program for the Southern District of New York's Bankruptcy Court is only available to Debtors who have a Student Loan case pending before that Court.

Alternatively, in October 1, 2019, the Bankruptcy Court for the Middle District of Florida implemented a Student Loan Management Program (SLMP),[6] which is available to any Bankruptcy Debtor wishing to Mediate repayment and relief options with their consenting student loan lenders. The SLMP Program relies on the use of a portal to allow transparency in communications "and the exchange of information in an efficient and transparent manner." The program's stated purpose is also to "encourage the parties to consensually reach a feasible and jointly beneficial agreement" under the Court's supervision.

Although Student Loan Mediation as a potential road to relief is in its initial stages, Florida Bankruptcy Courts were also pioneers in their Mortgage Modification Mediation Programs (MMM). MMM Programs in Florida began in one District and are now available in all three districts with such a high degree of success that other Bankruptcy Courts throughout the country, including the Northern District of California, Eastern District of Wisconsin, District of Nevada and the Southern District of Ohio have since adopted their own versions of the program. Similarly, the emergence of Bankruptcy Mediation programs in the student loan context appears indicative of a different approach to student loan relief. Like their mortgage mediation counterparts, these programs are likely to remain consensual. Nevertheless, although the road towards student loan relief in Bankruptcy remains fraught with challenges,

---

[4] Rosenberg v. New York State Higher Education Services (In re Rosenberg), 610 B.R. 454 (Bankr. S.D.N.Y. 2020).
[5] https://www.nysb.uscourts.gov/sites/default/files/SLM_Procedures.pdf
[6] See Third Amended Administrative Order FLMB-2019-5
http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=88

the transparency of portal communication paired with the Court's oversight in these emerging Mediation programs could make the difference needed for a significant number of borrowers in their "fresh start."

a sizable difference by increasing borrower's awareness of their available options and lender's willingness to work with them. Ultimately, although the road towards student loan relief in Bankruptcy remains fraught with challenges, Mediation could make a