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**COMMENTARY**

*A NEW ERA FOR STUDENT LOANS: DISCHARGE IN BANKRUPTCY*

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Rising student loan debt has been a prevalent issue in the lives of many Americans, both young and old. With tuition costs on the rise, the primary concern with student loans is that they seem to be taking longer to pay off and are accompanied by higher interest rates or repayment plans.<sup>1</sup> Many students face hundreds of thousands of dollars of student loan debt as soon as they graduate from a university or college. The problem is widespread, and many students unfortunately find themselves in bankruptcy—unable to pay off their total debts.

Traditionally, student loans have never been a dischargeable debt for an individual who is in bankruptcy.<sup>2</sup> Whereas one may be able to discharge (or abolish his or her) mortgage or credit card debt, a higher bar must be met in order to meet the exception for non-dischargeable student loan debt.<sup>3</sup>

In January 2020, the court in *Rosenberg*, for first time in history, discharged a student loan debt in bankruptcy.<sup>4</sup> There, Rosenberg borrowed money to fund his education in 1993, and subsequently served in the United States Navy.<sup>5</sup> The total outstanding loan balance for the student loan was \$221,385.49.<sup>6</sup> Though he made many payments on the debt, Rosenberg was unable to pay the full debt and, thereby, went into default.<sup>7</sup>

Under federal law, “a discharge . . . does not discharge an individual debtor from any debt – unless excepting such debt from discharge . . . would impose an undue hardship on the debtor . . . for an educational . . . loan made.”<sup>8</sup> Still, “in a student-loan discharge case where undue hardship

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<sup>1</sup> Dickler, Jessica, “Student Loan Balances Jump Nearly 150 Percent in a Decade,” CNBC, (Aug. 2017).

<sup>2</sup> 11 U.S.C. § 523(a)(8).

<sup>3</sup> *Id.*

<sup>4</sup> *In re Rosenberg*, U.S. Bankr. Ct, S.D. N.Y., 2020 WL 130302, at 1 (2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 4.

<sup>8</sup> 11 U.S.C. § 523(a)(8).

does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act.”<sup>9</sup>

Applying the *Brunner* test, discussed below, the court found that Rosenberg could not repay his student loan and also maintain a “minimal” standard of living.<sup>10</sup> Indeed, Rosenberg had approximately a 40% rate of payment over a thirteen-year period; thus, the court found that Rosenberg made a good faith effort to repay his student loan ergo satisfying the *Brunner* test.<sup>11</sup> This was the first case in which a court found that a student loan imposed an undue hardship on a bankrupt petitioner, and subsequently discharged the student loan.<sup>12</sup>

In short, in all courts of law, aside from the 1st and 8th Circuits, if an individual can prove financial or undue hardship, an exception to the traditional non-dischargeable status of student loan debt exists.<sup>13</sup> The standard that *Brunner* codifies to meet the exception of “financial hardship” is as follows: (1) the borrower has extenuating circumstances creating a hardship; (2) those circumstances are likely to continue for a term of the loan; and (3) the borrower has made good faith attempts to repay the loan.<sup>14</sup> This “judge-made” or common law approach may indeed provide bankrupt individuals an avenue to circumvent non-discharge statutes enacted by Congress; however, this common law approach may also subvert Congress’ roles in making the laws and in legislating issues like dischargeable status in bankruptcy.

In sum, though the non-discharge status of student loan debt in Bankruptcy Court has been upheld adamantly until the year 2020, there is indeed now some glimpse of hope for any given individual to discharge his or her debt should he or she be able to successfully meet the standards found in the *Brunner* test. If a financial burden and undue hardship can be elementally proven in a bankruptcy court, student loan debt can be discharged

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<sup>9</sup> *In re Hornsby*, 144 F.3d 433, at 439-40 (6th Cir. 1998).

<sup>10</sup> *In re Rosenberg*, at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Brunner v. NY Higher Educ. Services Corp.*, 831 F.2d 395, at 396 (1987).

<sup>14</sup> *Id.*