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Eighth Circuit Applies Novel Test in Recent Student Loan Discharge Case

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November 17, 2014 - In a recent decision considering the dischargeability of student loan debt, the Eighth Circuit Court of Appeals affirmed a lower court's decision establishing a unique and flexible test for determining whether repaying student loans imposes an "undue hardship" on a debtor.

Under the Bankruptcy Code, graduates generally cannot discharge student loan debt absent certain conditions. Section 528(a)(8) of the Bankruptcy Code provides that a bankruptcy discharge does not apply to student loans unless excepting student loans from discharge "would impose an undue hardship on the debtor and the debtor's dependents[.]" 11 U.S.C. § 528(a)(8). In the absence of an "undue hardship" definition in the Bankruptcy Code, most courts rely on *Brunner v. New York State Higher Education Services* to determine whether a student loan imposes an undue hardship, and is therefore dischargeable in bankruptcy. 831 F.2d 395 (2d Cir. 1987). Under the *Brunner* test, a student loan debtor must demonstrate:

1. She cannot maintain a minimal standard of living for herself and her dependents if required to repay the loans;
2. That additional circumstances exist indicating that her financial condition is "likely to persist for a significant portion of the [loan] repayment period."; and
3. That she has made a good faith effort to repay the loan.

See *id.* at 396. Most courts, applying the *Brunner* test, find that a college degree militates against a finding of undue hardship because the mere existence of the college degree indicates that a graduate's financial condition can improve.

The Eighth Circuit took a different approach in *Conway v. National Collegiate Trust*. In *Conway*, the debtor graduated with a B.A. in Media Communications and fifteen student loans with an aggregate balance of over $118,000. Following a series of lay-offs from her post-graduation jobs, Ms. Conway filed for chapter 7 bankruptcy and sought to discharge her student loans. Ms. Conway's private student loan provider, National Collegiate Trust, contested the discharge and the Missouri bankruptcy court refused discharge, citing Conway's college degree and

"at least 30 years left to navigate the job market" as support for her ability to repay the loans. *Conway v. Nat'l Collegiate Trust (In re Conway)*, 489 B.R. 828 (Bankr. E.D. Mo. 2013).

On appeal, the Eighth Circuit Bankruptcy Appellate Panel overturned the bankruptcy court's decision applying a test that looked beyond the *Brunner* test to instead review the debtor's past, present and future financial resources to determine whether the student loans presented an undue hardship. *Conway v. Nat'l Collegiate Trust (In re Conway)*, 495 B.R. 416 (B.A.P. 8th Cir. 2013). The court found that even with her degree, the debtor did not necessarily have the ability to make enough money to make minimum monthly payments, given that she had been laid off from previous jobs, had applied to hundreds of jobs in the interim, and was currently employed as a waitress. *Id.* at 421-22. While the court found that Ms. Conway's disposable income was insufficient to make the full monthly payments on all fifteen loans, the panel remanded the case to the Bankruptcy Court to determine whether the debtor's disposable income could be sufficient to service the minimum monthly payment on any of the individual loans. *Id.* at 424. The Eighth Circuit affirmed the decision in a short, unpublished, per curiam opinion. *Conway v. Nat'l Collegiate Trust (In re Conway)*, 559 Fed. Appx. 610 (8th Cir. 2014).

While the *Conway* decision may provide a more flexible test for the discharge of student loans, the impact of the decision should not be overstated. First, the Eighth Circuit merely remanded the matter to the bankruptcy court to evaluate each loan individually. Second, the Eighth Circuit only includes South Dakota, North Dakota, Minnesota, Nebraska, Iowa, Missouri, and Arkansas. The *Brunner* test continues to be applied by courts in other circuits.

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