Student loan hardship discharge
Effect of Available Repayment Plans

Cianciulli v. ECMC and USDE, Adversary No. 03-6037-fra
Christopher and Dawn Cianciulli, Case No. 99-63486-fra

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Debtors filed adversary proceeding against student loan providers/insurers, seeking discharge of their student loans under Code § 523(a)(8) as constituting an undue hardship. Husband holds a bachelors degree and works as a carpenter, with earnings near the maximum he could expect to earn in the region. He testified that he enjoyed the work and had no present intention of changing fields, and declined to work overtime so as to spend adequate time with his children. Wife holds several bachelors degrees and testified that she has health problems which prevent her from working full time - her average work week being 20 hours. She testified that her condition is the result of Chrohn's Disease, but presented no expert testimony to support her belief. There was evidence in medical records that she was treated for Chrohn's, but the records were equivocal as to whether the condition persists and did not provide a basis for determining whether Debtor's current medical condition is attributable to a particular condition or is likely to persist. Debtors made insubstantial efforts to repay the loans. Wife testified that she contacted Defendant after the adversary proceeding was filed regarding loan consolidation, but was told it was not possible while the case was pending.

The court applied the Brunner test and found evidence lacking as to whether the Debtors' current financial condition is likely to persist. The court also held that in determining the payment a debtor is required to make to repay student loans for purposes of a hardship determination, the monthly payments should be calculated using the best repayment plan offered by the Department of Education for which the debtor qualifies. The Debtors' resulting payment using the ICRP Program, for which Defendants stated the Debtors qualify, was not so high as to be unconscionable under the present facts. Respecting the final Brunner element, a good faith effort to repay, the court held that the failure of Debtors to avail themselves of the ICRP Program prior to filing the adversary proceeding is highly determinative in the good faith analysis.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No. 99-63486-fra13
CHRISTOPHER D. CIANCIULLI and DAWN E. CIANCIULLI,	)	
Debtors.	)	
CHRISTOPHER D. CIANCIULLI and DAWN E. CIANCIULLI,	)	Adversary Proceeding No. 03-6037-fra
Plaintiffs,	)	
vs.	)	
STUDENT LOAN MARKETING ASSN.; SALLIE MAE SERVICING CORP. LP; STATE SCHOLARSHIP COMM.; EDUCATIONAL CREDIT MANAGEMENT CORP.; U.S. DEPT. OF EDUCATION,	)	
Defendants.	)	OPINION

I. INTRODUCTION

Plaintiffs seek a judgment declaring that their student loan obligation to Defendants, or Defendants' assignors, is excepted from discharge pursuant to 11 U.S.C. § 523(a)(8). Their plan of reorganization under Chapter 13 of the Bankruptcy Code was confirmed

on August 20, 1999. Defendants are the United States, acting through its Department of Education, and Educational Credit Management Corporation (ECMC). ECMC is a guarantor of student loans from various sources, and has standing in this case as assignee of the lender's interest in various qualifying educational loans to the Debtors. The Court, having reviewed the testimony, exhibits and arguments of the parties, concludes that the Debtors' obligation to their student loan lenders cannot be discharged under the Bankruptcy Code, and that a judgment dismissing this proceeding should be entered.

II. BACKGROUND

The Debtors reside with their two young children in Lane County, Oregon. Mr. Cianciulli holds a bachelor's degree, and is employed as a carpenter. He testified that his present earnings are at or near the maximum payable to someone of his experience and qualifications in the building industry in this region. He finds the work satisfying and has no present intention to change fields, even, evidently, for better compensation. He declines to do extensive overtime work in order to spend what he believes to be adequate time with his children.

Mrs. Cianciulli has attained bachelor's degrees in business administration, Russian language and psychology. She works roughly 20 hours per week. She testified to frequent bouts of nausea, back and joint pain, vomiting and other difficulties which prevent her from working full-time. She attributes her condition to Chrohn's

Disease, but she presents no expert testimony to support her belief. There are in evidence a number of medical records documenting that she was treated for Chrohn's; however, the records are equivocal as to whether the condition persists. Most suggest that the condition was in remission, but may have recurred. At least one report suggested that Mrs. Cianciulli has declined a suggested regime of anti-inflammatory drugs. However, she testified that she did not take the drugs because she could not afford them. In any case, there is no qualified evidence before the Court establishing that Mrs. Cianciulli's present difficulties (which the Court does not doubt actually exist) are attributable to any particular condition, or whether the condition is likely to persist. [1]

The Debtors' income as stated on their 2003 tax return was $43, 340. They testified to an average take home for the months preceding trial to be $2,633 per month. This average included two months during which Mr. Cianciulli was unemployed. The Debtors' Schedule J, which was filed some months previously, reflected monthly income of $2,836.

Expenses for the months preceding trial averaged $2,974. (The schedules set out in Schedule J were higher, at $3,255.) Expenses included $800 per month for food, and $223 per month for daycare for the youngest child.

[1] Defendants correctly assert that Mrs. Cianciulli is not competent to give testimony regarding the details of her medical condition or prognosis, as opposed to their symptoms.

The total debt owed by the Debtors on account of their student loans is $89,297.41, plus accrued interest.

Efforts to repay the student loans have been insubstantial. Mr. Cianciulli, in response to a pre-trial interrogatory, allowed that he had no recollection of ever having made monthly payments on student loans. Mrs. Cianciulli testified that she had made sporadic payments. In exploring alternatives, she testified that she "looked at the William Ford site, and did...the income calculations and what [she] thought was [their] entire student loan debt. And all those figures were above – even the income contingent - they were above what we could afford to pay." Apparently, no further exploration into the payment program was made prior to the time the adversary proceeding was commenced. Mrs. Cianciulli did testify that she contacted ECMC after the adversary proceeding commenced, but was advised that consolidation would not be possible as long as the adversary proceeding remained pending.

III. STATUTORY AND REGULATORY STANDARDS

A. 11 U.S.C. § 523(a)(8) and the Brunner Standard

Bankruptcy Code § 523(a)(8) excepts from discharge any debt for an educational loan funded in whole or in part by a governmental unit or nonprofit institution "unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependants." It is not disputed that the loans subject to this adversary proceeding qualify for the exception

from discharge under § 523(a)(8), if an undue hardship is demonstrated.

In assessing whether an "undue hardship" exists, courts in the Ninth Circuit apply a three-part test originally announced in In re Brunner, 46 B.R. 752 (Bankr. S.D. N.Y. 1985), aff'd, 831 F.2d 395 (2nd Cir. 1987); In re Pena, 155 F.3d 1108 (9th Cir. 1998). Under the Brunner/Pena test a plaintiff must prove, by a preponderance of the evidence, each of the following:

> 1. That the debtor cannot maintain, based on current income and expenses, a minimal standard of living for him or herself and dependants if forced to repay the loans.
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> 2. That additional circumstances exist indicating that the debtor's inability to repay, as addressed in the first test, is likely to persist for a significant portion of the repayment period of the loans.
>
> 3. That the debtor has made good faith efforts to repay the loans.

In order to satisfy the first test, a debtor must demonstrate more than simply tight finances; what is required is a showing that it would be unconscionable to require the debtor to take steps to earn more income or reduce expenses, given the overall circumstances of the case. In re Birrane, 287 B.R. 490, 495 (BAP 9th Cir. 2002), In re Nascimento, 241 B.R. 440, 445 (BAP 9th Cir. 1999). Put differently, student loan obligors are expected to maximize their income and minimize their expenses in order to pay their obligations, but not beyond the point where it would shock the conscience to require them to do so.

B. Regulation of Repayment of Student Loans

It is common for borrowers to accumulate several different student loans over time. Federal law permits such borrowers to consolidate these loans and repay them through a variety of different repayment plans. See, generally, 34 CFR § 685. Where, as here, the debtors are in default, their options are limited to the so-called Income Contingent Repayment Plan (ICRP). The ICRP is described in detail at 34 CFR § 685.209. The Plan is available to all borrowers, and Defendants in this case specifically acknowledge that the Debtors are eligible. The Plan permits a student loan debtor to pay, each month, the lesser of the monthly payment required to amortize the loan over 12 years, or 20% of the debtor's discretionary income. Discretionary income is the debtor's adjusted gross income minus the amount determined in the poverty guidelines of the Health and Human Services Department. 34 CFR § 685.209(a)(3). Under this formula, it is possible that a debtor living at or below the poverty line would not be required to make any monthly payments at all. After 25 years under the ICRP, the unpaid amount of the loan is discharged.

IV. DISCUSSION

A. Bankruptcy and Educational Loan Statutes

The Bankruptcy Code provides for discharge of student loan obligations upon a showing of undue hardship. There is substantial case law such as Brunner interpreting this provision. In addition, there have been established in the years since Brunner repayment

programs such as the ICRP, set out in the Code of Federal Regulations. Courts are obligated to construe statutes, and regulations (to which courts must defer if based on a permissible construction of the statute) in a manner that renders them consistent with each other. See Anderson v. U.S., 803 F.2d 1520, 1523 (9th Cir. 1986)(internal citation omitted); Rust v. Sullivan, 500 U.S. 173, 184 (1991). In other words, the Bankruptcy Code's directive that unduly burdensome student loans be discharged must be construed in light of the Congress' (and the Executives') provisions for repayment of loans by low income borrowers.

The first element of the Brunner test requires a showing that debtors are unable to repay the loans without suffering less than minimal living standards. Congress and the Executive have taken into account the prospect that some borrowers may be economically hampered in making student loan payments by establishing programs which provide for substantial reduction, if not elimination, of monthly payments. The financial hardship element of the Brunner test should be determined in light of the payments required under the best repayment plan for which the debtor qualifies.

The third element of the Brunner test requires a good faith effort to repay. In light of this requirement, debtors must avail themselves of available repayment plans, or demonstrate that these plans are inaccessible or inappropriate. See In re Birrane, 287 B.R. 490, 500 (BAP 9th Cir. 2002) (failure to take steps toward

renegotiating a repayment scheduled under the ICRP program supported finding that debtor failed to make a good faith effort to repay).

The Court had a number of questions for counsel during closing arguments,[2] intended to explore the view that exhausting available remedies under the CFR's has now become a prerequisite for discharge of student loans under the Bankruptcy Code. Defendants' response, in a thoughtful memorandum, was that Congress did not intend that the law go so far as that, and that a case by case analysis was preferable. Even so, the law is clear that failure to enroll in the ICRP or a similar program must weigh heavily against any debtor seeking to discharge student loans in bankruptcy.

B. Application to Debtors

The Court finds that, on the evidence presented, the Debtors have failed to carry their burden of proof as to any of the three Brunner elements. Specifically:

1. First test: It must be acknowledged that a $90,000 debt is a significant financial burden to a family making less than half that amount every year. However, the law requires that the Debtors demonstrate that they are unable to maintain a minimal standard of living even under available relief such as the ICRP. Debtors' monthly income after taxes and withholding exceeds $2,800; Debtors'

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[2] The questions were:

1. Does the Bankruptcy Code require exhaustion of remedies or relief available under the CFRs, such as the income contingent repayment plan, or proof that relief is not available, as a prerequisite to discharge in bankruptcy?

2. If a partial discharge were to reduce the monthly debt service to the same level that the ICRP would, does the law require or favor one approach over the other?

3. In applying the first prong of the Brunner test...does the court look to the circumstances presented by the loan as written, or the circumstances that would exist after adjustment under the ICRP?

monthly payments under the IRCP would be roughly $408.00. The evidence does not support a finding that requiring the Debtors to pay such an amount would be unconscionable.

2. Second test: As previously noted, there is no evidence to support a finding that the Debtors' current financial condition and other germane factors are likely to persist. Mr. Cianciulli has not sought to either change jobs for higher paying employment or to add to his hours. It may be said that his reasons for these choices are not unreasonable. However, the Code requires that the debtors' obligation to the government and taxpayers that have financed their educations, be balanced against these otherwise suitable choices. As for Mrs. Cianciulli, the Court does not dismiss her testimony that she is physically distressed; still, absent medical evidence that the condition is unremitting and likely to remain so, the Court cannot find that she will be permanently unable to work full-time.

3. Third test: Given the totality of the circumstances in this case, the Court finds that the Debtors' failure to enroll in the ICRP prior to commencing this adversary proceeding demonstrates a failure to make the good faith effort to repay required by the third element of the Brunner test. In fairness, Mrs. Cianciulli did attempt to discuss the issue with ECMC after the case was commenced. However, ECMC's internal rules prevent it from reassigning loans while the adversary proceeding is pending. As a result, entry into a repayment program is not possible until the adversary proceeding is ended. This may seem like a Catch-22: however, the Debtors'

actions must be considered in light of circumstances existing prior to the commencement of the case. Had the Debtors made a good faith effort to repay as required by Brunner and Pena, the problem presented by their inability to enter into the program after the case was commenced would not have come up.

The Defendant's witness testified at trial that the ICRP was available to the Debtors, and it appears from the Code that there is no restriction on their entry to the program after this matter is concluded.

V. CONCLUSION

The foregoing constitutes the Court's findings of fact and conclusions of law. The Debtors have not carried their burden of proof that they are entitled to discharge their student loan obligations under 11 U.S.C. § 523(a)(8). The Defendants are entitled to judgment for the amounts owed to them, as reflected in the pleadings.

Counsel for ECMC shall submit a form of order consistent with this opinion.

FRANK R. ALLEY, III
Bankruptcy Judge