

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-32744

PATRICIA MICHELLE MILLER

Debtor

PATRICIA MICHELLE MILLER

Plaintiff

v.

Adv. Proc. No. 01-3076

PENNSYLVANIA HIGHER EDUCATION
ASSISTANCE AGENCY/STUDENT LOAN
SERVICING CENTER, SALLIE MAE
SERVICING CORPORATION, and
JUNIATA COLLEGE

Defendants

<i>NOTICE OF APPEAL FILED:</i>	May 16, 2002
<i>NOTICE OF CROSS APPEAL FILED:</i>	May 21, 2002
<i>DISTRICT COURT No.:</i>	3:02-cv-378
<i>DISPOSITION:</i>	<ol style="list-style-type: none">1. United States District Judge Leon Jordan overruled and dismissed appeal and cross appeal on December 18, 2002.2. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit filed by Defendant on January 21, 2003.3. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit filed by Plaintiff on January 24, 2003.4. United States Court of Appeals for the Sixth Circuit reversed district court's order with instructions to remand to the bankruptcy court on July 30, 2004.5. United States Bankruptcy Court Memorandum on Remand entered on October 8, 2004.6. Plaintiff's Notice of Appeal filed October 18, 2004.7. Affirmed by United States District Judge Thomas Varlan.

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MEMORANDUM

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Plaintiff Patricia Michelle Miller (Debtor) filed the Complaint commencing this adversary proceeding on June 11, 2001. She asks the court to determine that her student loan obligations are nondischargeable pursuant to 11 U.S.C.A. § 523(a)(8) (West Supp. 2001). Default judgments have previously been entered against Defendants Sallie Mae Servicing Corporation and Juniata College, thereby discharging the Debtor's obligations as to those creditors. *See Miller v. Pennsylvania Higher Educ. Assistance Agency/Student Loan Serv. Ctr. (In re Miller)*, 275 B.R. 271 (Bankr. E.D. Tenn. 2002).

The court held a trial on April 30, 2002, on the claims of Pennsylvania Higher Education Assistance Agency (PHEAA), the sole remaining Defendant. PHEAA and the Debtor filed Stipulations of Fact on April 24, 2002, and Additional Stipulations of Fact on April 30, 2002. Additionally, the court heard the Debtor's testimony at trial.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Debtor filed her Chapter 7 Petition on June 1, 2001. PHEAA is the guarantor of fifteen separate Stafford loans received by the Debtor between 1984 and 1996. The balance of the PHEAA indebtedness, as of April 26, 2002, is \$89,832.16.

The loan proceeds were used by the Debtor for educational purposes. She received an undergraduate degree in philosophy from Juniata College in 1988 and a Master of Arts in Philosophy from the University of Tennessee (U.T.) in 1992. The Debtor worked toward a Doctorate of Philosophy at U.T.

from 1992 through 1997 but did not complete the requirements for that degree. To date, the Debtor has not found meaningful employment in her field of study.

After leaving school in 1997, the Debtor requested and received forbearances and deferments on her loans. She has made only \$368.00 in repayments, has not applied for any form of a restructuring or consolidation loan,¹ and is in default on her obligation to PHEAA.

The Debtor is single, 35 years old, and has no dependants. She is well-spoken and intelligent. She admittedly filed bankruptcy in order to obtain a discharge of her credit card and student loan debts. At least five credit card obligations, scheduled at more than \$17,000.00 and representing between \$350.00 and \$400.00 in monthly payments, have been discharged.²

The Debtor is employed, at \$10.50 per hour, as a full-time administrative assistant for Nova, Inc., a construction company. She also works part-time, at \$9.58 per hour, as a call center representative for America's Collectibles Network (ACN).³ Each of these jobs offer limited opportunities for advancement. The Debtor recently interviewed with a local employer offering a greater likelihood of advancement.

¹ The Debtor argues that even the most liberal consolidation option - \$290.17 monthly payments for 25 years - is beyond her ability to pay.

² PHEAA contends, in part, that the elimination of the Debtor's credit card bills frees up funds which should now be applied toward her student loan debt. The Debtor counters that her credit card bills were often paid at the expense of other obligations, such as her automobile loan.

³ The Debtor testified that she has traditionally worked eight to ten hours per week at ACN. Since early this year, however, she is required to be scheduled at least sixteen hours per week. To PHEAA, the income resulting from these additional hours further enables the Debtor to meet her student loan obligation.

However, the Debtor would have to start out in a similar-paying telemarketing position whose hours would interfere with her present ability to work at ACN.

The Debtor testified that she is determined to find a better-paying job. In furtherance of that goal, she regularly searches the internet for employment openings. The Debtor further testified that most opportunities to use her master's degree are located in the northeastern United States. The perceived high cost of moving deters her from pursuing those options.

The Debtor's approximate gross annual income in the last four years has been: \$17,250.00 in 1998; \$18,414.00 in 1999; \$25,845.00 in 2000; and \$26,464.00 in 2001. The parties stipulate that, as of October 23, 2001, the Debtor's gross monthly income was \$2,197.00. She scheduled a net monthly income of \$1,685.96. Her scheduled monthly expenses total \$1,646.10, including: \$90.00 for land-line telephone service;⁴ \$40.00 for cell phone;⁵ \$45.00 for cable television; \$25.00 for internet service; \$385.00 for rent; and a \$210.00 car payment for a 1992 Oldsmobile purchased by her parents and repaid under a flexible schedule. Additionally, the Debtor testified that she currently invests \$12.60 per week in an IRA.

⁴ The Debtor testified that she has a high long distance bill because most of her family and friends live out of town. She also maintains additional phone services such as Caller ID.

⁵ The Debtor testified that she maintains a cellular telephone for security purposes in the event that her car were to break down late at night. Her cell phone package provides her with unlimited local minutes. PHEAA correctly suggests that the Debtor could meet her security needs through a less expensive plan offering fewer monthly minutes.

II

Student loan debts are dischargeable in bankruptcy only if “excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents[.]” 11 U.S.C.A. § 523(a)(8) (West Supp. 2001). Section 523(a)(8) balances a debtor’s “fresh start” with society’s need to maximize student loan repayment. *See, e.g., Afflitto v. United States of America (In re Afflitto)*, 273 B.R. 162, 173 (Bankr. W.D. Tenn. 2001). While declining to adopt any single definition of “undue hardship” under § 523(a)(8), the Sixth Circuit has endorsed the Second Circuit’s *Brunner* test, under which a debtor must show:

- (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period . . . ; and
- (3) that the debtor has made good faith efforts to repay the loans.

Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 437 (6th Cir. 1998) (quoting *Cheeseman v. Tennessee Student Assistance Corp. (In re Cheeseman)*, 25 F.3d 356, 359 (6th Cir. 1994) (quoting *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam))).

Debtors bear the burden of proof by a preponderance of the evidence. *See Daugherty v. First Tenn. Bank (In re Daugherty)*, 175 B.R. 953, 955 (Bankr. E.D. Tenn. 1994). In the present case, the Debtor has not met this burden - particularly as to *Brunner’s* second and third prongs - and accordingly her debt to PHEAA cannot be fully discharged.

Brunner's second prong requires a debtor to show that her financial adversity is "more than a temporary state of affairs." *Swinney v. Academic Fin. Servs. (In re Swinney)*, 266 B.R. 800, 805 (Bankr. N.D. Ohio 2001). "[I]f the inability to repay will extend well into the future, then it is likely that requiring payment would be an undue hardship." *Markley*, 236 B.R. at 247.

As noted above, the Debtor is young, well-spoken, intelligent, and in possession of a master's degree. She is also underemployed and, despite her obvious potential, is presently in a professional situation where she is "bored" and able to do little more than "spin her wheels" financially. However, the court is confident that the Debtor has the ability and education to, with some help and aggressiveness on her part, move beyond her present condition. The court therefore cannot find those "additional circumstances . . . indicating that this state of affairs is likely to persist for a significant portion of the repayment period[.]" *Hornsby*, 144 F.3d at 437.

Further, the Debtor has not met her burden regarding *Brunner's* good faith prong. In evaluating a debtor's good faith efforts toward repayment, the court should consider:

- (1) the portion of the loan actually repaid by the debtor;
- (2) whether a debtor's failure to repay the obligation is truly from factors beyond the debtor's reasonable control;
- (3) whether the debtor has realistically used all her available financial resources to pay the debt;
- (4) whether the debtor has, in fact, attempted to repay the student loan at all;
- (5) the length of time after the student loan first becomes due that the debtor seeks to discharge the debt; and
- (6) the percentage of the student loan in relation to the debtor's total indebtedness.

Wilcox v. Educational Credit Management (In re Wilcox), 265 B.R. 864, 870 (Bankr. N.D. Ohio 2001). In the last five years, the Debtor has repaid a mere \$368.00 of her student loan obligation while maintaining internet service, a high long distance bill, an unlimited-minutes cell phone plan, and cable television. In light of these indulgences, the court simply cannot find that the Debtor has made a good faith effort to repay her student loans.

III

Where a debtor fails to demonstrate undue hardship as to her entire student loan, the court may still utilize its § 105(a)⁶ powers to partially discharge the debt. *See Hornsby*, 144 F.3d at 438-440. A partial discharge may occur:

by discharging an arbitrary amount of the principal, interest accrued, or attorney's fees; by instituting a repayment schedule; by deferring the debtor's repayment of the student loans; or by simply acknowledging that a debtor may reopen bankruptcy proceedings to revisit the question of undue hardship.

Id. at 440.

As noted, the court cannot agree that the Debtor is entitled to a complete discharge of her student loans - but it also cannot find that the Debtor is able to repay her obligation in full. The Debtor, for the most part, leads a modest lifestyle. PHEAA's sought-after reduction of the Debtor's phone expenses and the total elimination of her cable and internet services would barely generate a third of the funds necessary to meet even the most basic loan consolidation schedule. Further, earnings from additional hours worked at

⁶ "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C.A. § 105(a) (West 1993).

the Debtor's second job are not a permanent solution to this dilemma. The court will not require the Debtor to work 56 hours per week for the next 25 years in order to repay her student loans. To do so would make her a slave to the loans and would deprive her of any future hope for financial independence. The court also cannot place total reliance on the funds freed up by the discharge of the Debtor's credit card bills. Those funds, while substantial, are partially offset by automobile payments and the inevitable maintenance and replacement costs associated with an older used car.

Accordingly, the court will discharge all interest, costs, and fees associated with the Debtor's student loans and will further discharge part of the principal, leaving in place a nondischargeable debt to PHEAA in the amount of \$34,200.00, upon which no interest shall accrue. PHEAA is directed to provide the Debtor with an address to which payments on the nondischargeable obligation may be tendered. The Debtor's payments will be due on the first day of every month, commencing in the first month following receipt of PHEAA's payment address.

For the first twelve months of repayment the Debtor shall remit to PHEAA at least \$50.00 monthly. Beginning in the thirteenth month the Debtor shall remit to PHEAA at least \$200.00 monthly, continuing until the \$34,200.00 nondischargeable obligation is satisfied in full.

By requiring minimal payments during the coming year, the court hopes to permit the Debtor to escape from her current circumstances in which, as noted, she is simply spinning her wheels. Specifically, the court expects that during the coming year the Debtor will diligently strive to, among other things, substantially reduce or eliminate her car payment and set aside sufficient funds to cover moving expenses

should she find suitable employment in another city. The court further expects that the Debtor will make every reasonable effort to obtain employment more consistent with her education and abilities. The Debtor is also directed to thoughtfully reevaluate every aspect of her monthly budget - beginning with her cable, long distance, internet, and cell phone expenditures - to insure the repayment of her nondischargeable student loan obligation.

A judgment consistent with this Memorandum will be entered.

FILED: May 6, 2002

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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J U D G M E N T

For the reasons stated in the Memorandum filed this date, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Plaintiff's nondischargeable student loan obligation owing the Defendant Pennsylvania Higher Education Assistance Agency/Student Loan Servicing Center pursuant to 11 U.S.C.A. § 523(a)(8) (West Supp. 2001) is fixed at \$34,200.00. The balance of the Plaintiff's obligation to this Defendant is discharged.

2. The Defendant Pennsylvania Higher Education Assistance Agency/Student Loan Servicing Center will provide the Plaintiff with the address to which payments on the Plaintiff's nondischargeable obligation are to be tendered.

3. The Plaintiff's \$34,200.00 nondischargeable student loan obligation shall be liquidated, without interest, as follows: the Plaintiff's payments will be due on the first (1st) day of every month, commencing in the first month following receipt of the Defendant Pennsylvania Higher Education Assistance Agency/Student Loan Servicing Center's payment address; for the first twelve (12) months of repayment the Plaintiff shall remit to the Defendant Pennsylvania Higher Education Assistance Agency/Student Loan Servicing Center at least \$50.00 monthly; beginning in the thirteenth (13th) month, the Plaintiff shall remit at least \$200.00 monthly, continuing until the entire \$34,200.00 nondischargeable debt is satisfied in full.

ENTER: May 6, 2002

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE