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

In re

Case No. 01-31594

RICHARD LEE BASKIN
LAURA JEAN SEWARD BASKIN

Debtors

RICHARD LEE BASKIN

Plaintiff

v. Adv. Proc. No. 01-3089

EDUCATIONAL CREDIT MANAGEMENT CORPORATION

Defendant

M E M O R A N D U M

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court on the Plaintiff Richard Lee Baskin's (Debtor) Complaint to Determine Dischargeability filed July 10, 2001. Pursuant to the January 10, 2002 Agreed Order Consolidating Cases, Adversary Proceedings 01-3089, 01-3190, and 01-3091 were consolidated into a single proceeding, 01-3089, with Educational Credit Management Corporation (ECMC) substituted as the sole Defendant.[1] The Debtor seeks a full or partial discharge of his student loan obligations on undue hardship grounds pursuant to 11 U.S.C.A. § 523(a)(8) (West Supp. 2002).

This matter was tried before the court on July 9, 2002. The record consists of undisputed facts and documents stipulated into evidence through a written Stipulation of Debtor and Educational Credit Management Corporation filed July 3, 2002, and the testimony of the Debtor.

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

I

Between December 1990 and August 2000 the Debtor, while working on his doctorate degree, incurred twenty-two student loans. As of October 25, 2001, the outstanding loan balance totaled $142,967.78, consisting of $125,441.50 in principal and $17,526.28 in capitalized interest, with additional interest accruing at $26.23 per day.

[1] The original Defendant in Adversary Proceedings 01-3089 and 01-3090 was the Tennessee Student Assistance Corporation. In Adversary Proceeding 01-3091, the original Defendant was Educational Services of America. The disputed loans have all been assigned to ECMC.

The Debtor, who is forty-five years old and in good health, graduated from the University of Tennessee in August 2000 with a Ph.D. in English. He is presently employed as an Assistant Professor of English at Roane State Community College earning $42,000.00 per year. The first payment on his student loan obligations was due in March 2001 six months after he obtained his degree. The Debtor did not make a payment, instead filing his Joint Voluntary Chapter 7 Petition on March 29, 2001.

The Debtor is married with four children who were aged five, ten, sixteen, and eighteen on the date of the bankruptcy filing. The Debtor's wife is employed by the University of Tennessee Medical Center as a medical transcriptionist earning more than $24,500.00 per year. The Debtor's eldest child attends Randolph-Macon College, a private school in Virginia, and his second eldest child will enter Randolph-Macon next fall. The Debtor contributes $673.00 per month in tuition for these children.[2]

According to the Debtor's Revised Schedule I, his total monthly income is $5,700.00. This figure includes his wife's earnings and $650.00 in monthly income from a rental property. The Debtor's Revised Schedule J lists $6,028.00 in total monthly expenses. In addition to his daughters' private school tuition, this amount includes $160.00 in recreation and entertainment expenses, $600.00 for transportation (not including car payments), and $500.00 for an ?anticipated

[2] The Debtor testified that although his second child has not yet started college he has already commenced paying her tuition. Both daughters will also receive financial aid.

automobile payment."[3] He also lists $285.00 per month in telephone charges, which appear to be largely offset by $250.00 in ?wife's phone expense reimbursement."

The Debtor and his family reside on acreage owned by his parents in Sunbright, Tennessee, approximately forty miles from the Roane County State Community College campus in Harriman, Tennessee, where he teaches. The Debtor's original plan upon obtaining his doctorate degree was to teach at a major university. However, he changed his mind and limited his job search to two local community colleges, Roane State and Pellissippi State. The Debtor testified that he has not pursued other teaching opportunities although he knows he could make more money outside of Tennessee. He also testified that he knows he could reduce the amount he pays for rent if he would move to Harriman.[4] He is not willing to move, however, because he and his wife would then not be able to operate a dog and horse breeding business they established several years ago.

II

Student loan debts are nondischargeable under the Bankruptcy Code unless ?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). Section 523(a)(8) was enacted to protect student loan programs by eliminating abuse by students who, soon after graduation, filed bankruptcy in order

[3] The Debtor testified that he and his wife are now driving older model cars and that this expense is for an automobile he anticipates purchasing after the older girls are out of college.

[4] The Debtor pays $788.00 in monthly rent and also allocates $350.00 monthly for additional building and upkeep on his home. *See* Ex. 5. This results in a total monthly outlay of $1,133.00 for the Debtor's residence.

to obtain a discharge of their educational loans. *See Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 740 (6th Cir. 1992).

The Sixth Circuit has endorsed the Second Circuit's *Brunner* test for determining undue hardship under § 523(a)(8). *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir. 1998) (quoting *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994) (quoting *Brunner v. N. Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam))). The *Brunner* test requires a debtor to show:

> (1) that the debtor cannot maintain, based on current income and expenses, a ?minimal" standard of living for himself and his 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.

Id. The debtor bears 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).

Brunner's ?minimal standard of living" prong does not require a finding of abject poverty. *See Hornsby*, 144 F.3d at 438. Instead, the court should conduct a totality of the circumstances analysis focusing on the overall living situation of the debtor. *See Afflitto v. United States of Am. (In re Afflitto)*, 273 B.R. 162, 170 (Bankr. W.D. Tenn. 2001) (quotation omitted). The court should especially consider the necessity of the debtor's expenses and whether the debtor has maximized his employment opportunities. *See Afflitto*, 273 B.R. at 170.

Brunner's second prong requires a debtor to show that his 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. 242, 247 (Bankr. N.D. Ohio 1999).

That the Debtor's children are approaching the age of majority (two have already reached it) is relevant to the first and second elements of the *Brunner* test. In Tennessee, the age of majority is eighteen. *See* TENN. CODE ANN. § 1-3-105(1) (1994). Once a child reaches that age, ?the parents' legal duty to support the child is terminated." *Garey v. Garey*, 482 S.W.2d 133, 135 (Tenn. 1972). Although it is ?morally commendable" for the Debtor to fund his daughters' education, this expenditure weighs heavily against a finding of undue hardship. *See Perry v. Student Loan Guarantee Found. of Ark. (In re Perry)*, 239 B.R. 801, 811-12 (Bankr. W.D. Ark. 1999). ?It is unreasonable to expect creditors holding legitimate claims to remain unpaid to any extent while the Debtor is supporting any adult children in [his] home." *Logan v. N.C. State Educ. Assistance Auth. (In re Logan)*, 263 B.R. 796, 800 (Bankr. W.D. Ky. 2000). Additionally, the Debtor and his wife have potential business earnings from breeding dogs and horses. Although their business had no income in 2001, in a February 17, 2002 note attached to his 2001 income tax return the Debtor wrote that ?[w]e still expect to put the business in the black."

As for the good faith prong of the *Brunner* test, the court should consider a number of factors in evaluating the debtor's good faith efforts toward repayment:

(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. Educ. Credit Mgmt. (In re Wilcox), 265 B.R. 864, 870 (Bankr. N.D. Ohio 2001).

Here, within just a few weeks, if not days, after his student loans first became due, the Debtor filed his bankruptcy petition. *See In re Merchant*, 958 F.2d at 740 (?[T]he exclusion of educational loans from the discharge provisions was designed to remedy an abuse by students who, immediately upon graduation, filed [a] petition for bankruptcy and obtained a discharge of their educational loans."); *see also Cheesman*, 25 F.3d at 360 (Citing, as an example of the absence of good faith, ?a case where the petitioner seeks discharge within a month of loans becoming due."). He made no effort to make even one payment on his student loans.

The Debtor spent ten years in obtaining the degree for which the loans were made, yet he does not now want to maximize the value of that degree. The court is satisfied that this Debtor has an earning potential far beyond his present level of employment. For reasons not satisfactorily explained, he has chosen not to pursue a level of employment commensurate with the doctoral degree the student loans at issue equipped him to obtain. The Debtor has not established that his

failure to repay the student loans are attributable to factors beyond his reasonable control. In fact, as discussed, the court believes that the Debtor's ability to repay is very much within his control.

> The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.

In re Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993).

The Debtor has not met his burden of proof under any prong of the *Brunner* test. His student loans are accordingly nondischargeable.

A judgment consistent with this Memorandum will be entered.

FILED: July 18, 2002

BY THE COURT

/s/

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, containing findings of fact and conclusions of law as required by FED. R. CIV. P. 52(a), it is ORDERED, ADJUDGED, and DECREED that the Plaintiff Richard Lee Baskin's obligations to the Defendant Educational Credit Management Corporation on the twenty-two student loans which are the subject matter of this adversary proceeding are nondischargeable.

ENTER: July 18, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE