

TETZLAFF: HAS THE “UNDUE HARDSHIP” TEST BECOME UNDUE?

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INTRODUCTION

The graduating class of 2015 is estimated to have a total education debt—including federal and private education loans—of approximately \$68 billion.¹ Almost 71% of the 2015 graduating class graduated with some form of student loan debt.² It seems like a major news outlet runs a student loan story every week.³ With indebtedness rising, and a stagnant wage market, many students will struggle to pay off their loans.⁴ Homeownership rates have plummeted, the birth rate

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¹ Jeffrey Sparshott, *Congratulations, Class of 2015. You’re the Most Indebted Ever (For Now)*, WALL ST. J. (May 8, 2015, 7:59 AM), <http://blogs.wsj.com/economics/2015/05/08/congratulations-class-of-2015-youre-the-most-indebted-ever-for-now/>.

² *Id.*

³ See, e.g., Kevin Carey, *Repayment Rates Show New Depths for Student Loan Debt*, N.Y. TIMES, Oct. 7, 2015, at A3; Gail MarksJarvis, *Illinois College Students Feeling Loan Pain*, CHI. TRIB. (Oct. 27, 2015), <http://www.chicagotribune.com/ct-student-loan-debt-1028-biz-20151027-story.html>.

⁴ See Lawrence Mishel, *Pay Is Stagnant for Vast Majority, Even When You Include Benefits*, ECON. POL’Y INST. (July 15, 2015), <http://www.epi.org/publication/pay-is-stagnant-for-vast-majority-even-when-you-include-benefits/>.

is declining, and default rates are rising—all can be attributed to the indebtedness of twenty-somethings.⁵ Some of these debtors will unquestionably be forced into bankruptcy.

Generally, student loans cannot be discharged through bankruptcy.⁶ However, there is an exception in the bankruptcy code that allows debtors to discharge their student loans if they can prove that maintaining their student loan debts will impose an “undue hardship” on the debtor.⁷ Congress did not define what exactly undue hardship meant when drafting the bankruptcy code, so the burden of defining this provision has fallen on the bankruptcy courts.⁸ This Comment aims to explain the context of the undue hardship definition, and apply that definition in light of the Seventh Circuit’s recent opinion in *Tetzlaff v. Educational Credit Management Corp.*⁹

This Comment will: first, describe the genesis and the various definitions of “undue hardship” that the circuit courts currently apply; second, consider, through hypotheticals, whether the differences between the circuits’ definitions create an outcome determinative circuit split; third, explain the facts at issue in *Tetzlaff*, the holding, and explain where the law regarding discharging student loans through bankruptcy in the Seventh Circuit rests; and fourth, conclude that the Seventh Circuit’s application is no longer consistent with the bankruptcy code, and call for legislative action. Ultimately, the Seventh Circuit no longer properly assesses undue hardship—the definition and application has now evolved into a test that is more difficult to pass than the already-exacting language of “undue hardship.”

⁵ See Kelley Holland, *The High Economic and Social Costs of Student Loan Debt*, CNBC ONLINE (June 15, 2015), <http://www.cnbc.com/2015/06/15/the-high-economic-and-social-costs-of-student-loan-debt.html>.

⁶ 11 U.S.C.A. § 523(a)(8) (West, Westlaw current through Pub. L. No. 114-119).

⁷ *Id.*

⁸ See H.R. DOC. NO. 93-137, pt. II, at 140 (1973).

⁹ *Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II)*, 794 F. 3d 756 (7th Cir. 2015).

Background - What Does “Undue Hardship” Mean?

The United States bankruptcy system as a whole is designed to relieve the honest debtor from the “burden of hopeless insolvency.”¹⁰ In other words, bankruptcy can help achieve a “fresh start” for the debtor.¹¹ Today, in the context of student loans, a debtor can receive a full or partial discharge of federal student loans through bankruptcy if the debtor can show that repaying the debt creates an “undue hardship” on the debtor and his or her dependents.¹² This undue hardship adversary proceeding looks very much like a civil bench trial.¹³ The debtor presents evidence in front of a bankruptcy court, and the credit company contests the evidence presented.¹⁴ Appeals are heard at the United States District Court level, and further appeals move up the federal appellate chain.¹⁵ To date, the Supreme Court has not heard an appeal stemming from an undue hardship adversary proceeding. This section of the Comment will focus on the legislative history behind “undue hardship,” the various applications of the undue hardship definitions in the courts, and will conclude that these differences in definitions can, in rare circumstances, create outcome determinative results.

A. Legislative History

Congress originally enacted section 523(a)(8) in 1978.¹⁶ The statute was enacted in response to the growing concern that college students would receive federal loans for their education and then

¹⁰ Neal v. Clark, 95 U.S. 704, 709 (1877).

¹¹ See H.R. REP. NO. 95-595, at 133-34 (1977).

¹² 11 U.S.C.A. § 523(a)(8) (West, Westlaw through Pub. L. No. 114-119).

¹³ Douglas G. Baird, Edward R. Morrison, *Adversary Proceedings In Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 951 (2005).

¹⁴ FED. R. BANKR. P. 9017; FED. R. CIV. P. 43, 44.

¹⁵ FED. R. BANKR. P. 8003.

¹⁶ See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. § 523(a)(8) (1994)).

discharge those loans through bankruptcy as soon as they could after graduation.¹⁷ For example, a New Jersey resident filed for bankruptcy fourteen days after graduating from Stanford Law School.¹⁸ He had already earned a business degree and a master's degree in engineering, and he filed for bankruptcy for the sole purpose of having his loans discharged.¹⁹ Another instance involved a Massachusetts couple; the husband held a law degree, the wife held a graduate degree, and both had a total of \$20,000 worth of student loans discharged immediately after graduation.²⁰ Stories like these received widespread media attention and prompted congress into action.²¹

At first, section 523(a)(8) provided that student loans were nondischargeable unless five years had passed since the loan first became due, or if an undue hardship would arise if the student was forced to repay the loan.²² This five-year provision was subsequently changed to seven years in 1990 for very much the same reasons it was instituted in the first place.²³ Due to concern over potential debtor abuse, the seven-year provision was abolished in 1998.²⁴ The only option for debtors to potentially discharge their federal student loan debt is now to show undue hardship.²⁵

¹⁷ See H.R. DOC. NO. 93-137, pt. II, at 140 (1973).

¹⁸ See Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the S. Comm. on Civil and Constitutional Rights of House Comm. on the Judiciary, 94th Cong. 1078 (1976) (statement of Hon. Edward York, U.S. Deputy Commissioner, U.S. Office of Education).

¹⁹ *Id.*

²⁰ Jennifer L. Frattini, Note & Comment, *The Dischargeability of Student Loans: An Undue Burden*, 17 BANKR. DEV. J. 537, 542 (2001).

²¹ *Id.*

²² Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. § 523(a)(8) (1994)).

²³ Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (codified as amended at 11 U.S.C.A. § 523(a)(8) (West, Westlaw through PL 101-647) (extending the period of nondischargeability from five to seven years).

²⁴ See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837 (1998) (codified as amended at 11 U.S.C. § 523(a)(8) (1999)).

²⁵ *In re Kuehn*, 563 F.3d 289, 294 (7th Cir. 2009).

B. How Courts Define Undue Hardship

The United States Constitution requires uniform federal bankruptcy laws applied throughout the states.²⁶ In theory, this uniformity requires debtors to be treated alike regardless of which bankruptcy court they appear in; however, in practice, when congress has remained silent in defining certain provisions of the bankruptcy code, different courts will interpret the provisions in different ways.²⁷ Here, for example, congress failed to define “undue hardship,” and failed to provide any suggestion to courts on how to interpret that language.²⁸ Because there is no legislative definition of “undue hardship,” various circuit courts define the term in different ways. For example, numerous circuit courts examine undue hardship with the *Brunner* test, a three-prong test that examines if: (1) 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) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans.²⁹ Conversely, the Eighth Circuit uses a totality of the circumstances test.³⁰

1. The *Brunner* Three-Prong Definition

The seminal undue hardship case is *Brunner v. New York State Higher Education Services Corp.* out of the Second Circuit. In

²⁶ U.S. CONST. art. I, § 8, cl. 4.

²⁷ See *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172-73 (1946).

²⁸ See *Fox v. Pa. Higher Educ. Assistance Agency*, 163 B.R. 975, 978 (Bankr. M.D. Pa. 1993) (“It’s troubling that Congress did not see fit to define the term ‘undue hardship’ in drafting the Bankruptcy Code.”).

²⁹ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

³⁰ *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549, 554 (2d Cir. 2003).

Brunner, the debtor received a Bachelor of Arts degree in 1979 and a Master's degree in social work in 1982.³¹ Approximately nine months after receiving her master's degree, the debtor filed to discharge her approximately \$9,000 in student loans through bankruptcy.³² After a brief oral hearing where the debtor described her "shaky finances" and her unsuccessful attempt to find work, her loans were successfully discharged.³³ On appeal, the district court took a harder look at the debtor's actual ability to pay off her loans.³⁴ Her greatest annual income was \$9,000 in the decade prior to the hearing. At the time of the hearing, she was receiving \$258 in public assistance, \$49 per month in food stamps, and Medicaid.³⁵ Her rent was \$200 per month.³⁶ The debtor further testified that she had sent out over a hundred resumes in search of employment, but was unsuccessful.³⁷ The district court reversed the bankruptcy court—holding that while the debtor might have proved a current inability to pay off her loans, she did not show that she could not pay off her loans in the future, nor did she show that she had even tried to pay off her loans.³⁸ This rationale was the foundation for the *Brunner* test.

On appeal, the Second Circuit affirmed the district court's judgment.³⁹ The Second Circuit further made the district court's holding into a three-pronged rule to determine undue hardship.⁴⁰ First, the debtor must show that she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her

³¹ In re *Brunner*, 46 B.R. 752, 753 (S.D.N.Y. 1985).

³² *Brunner*, 46 B.R. at 753.

³³ *Id.*

³⁴ *See id.* at 756.

³⁵ *Id.* at 757.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 757-58.

³⁹ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁴⁰ *Id.*

dependents if forced to repay the loans.⁴¹ This first prong has been applied as the bare minimum necessary to establish undue hardship.⁴² Second, the debtor must show that additional circumstances exist indicating that the debtor's state of affairs is likely to persist for a significant portion of the repayment period of the student loans.⁴³ The Second Circuit justified this second prong because of the "clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt."⁴⁴ Basically, proving a continuing inability to pay in the future is more likely to show that the hardship presented is undue.⁴⁵ Third, the debtor must show that she made good faith efforts to repay the loans.⁴⁶ This requirement was necessary for the Second Circuit to deter recent graduates from attempting to discharge their loans while looking for work, like the debtor in *Brunner*, and instead promote recent graduates unable to find work to request a deferment of payments on the loans.⁴⁷

2. The Totality of the Circumstances Definition

The Eighth Circuit decision of *Long v. Educational Credit Management Corp.* articulates the totality of the circumstances definition.⁴⁸ In *Long*, the debtor was a thirty-nine-year-old single mother.⁴⁹ She obtained her chiropractic degree by taking out substantial student loans.⁵⁰ She passed her state exam, worked at various clinics, and eventually owned and operated her own practice

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 397.

⁴⁸ *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549 (8th Cir. 2003).

⁴⁹ *Id.* at 551.

⁵⁰ *Id.*

up until her mental circumstances changed.⁵¹ She began to experience extreme fatigue, depression, and severe short-term memory loss.⁵² These symptoms affected her work; her clientele dropped, and she eventually closed her practice down altogether.⁵³ At one point in her downward spiral, she attempted suicide.⁵⁴ After seeking professional help, she fortunately began a recovery process.⁵⁵

At the time of the bankruptcy proceeding, the debtor in *Long* was making approximately \$1,163 per month.⁵⁶ She lived at home with her parents and paid them \$500-\$600 per month in return for them to subsidize her and her child's rent, utilities, car payment, car insurance, health insurance, cellular phone bill, child care, and food.⁵⁷ The remainder of her income went to her loans, and her pursuit of a four-year degree to get back on her feet.⁵⁸ At the time of the bankruptcy proceeding, the debtor's \$35,322.81 in student loans had increased to over \$61,000.⁵⁹ The bankruptcy court granted the debtor an undue hardship discharge because loan repayment would essentially impose a twenty-five-year sentence in payments on an obligation that she could never realistically expect to retire or reduce.⁶⁰

On appeal, the creditor urged the Eighth Circuit to adopt the *Brunner* test.⁶¹ The main reason behind this request was because the debtor made approximately ten years' of payments towards her debt, but defaulted after she became ill.⁶² If *Brunner* were to apply, she would not be able to discharge her loans since she would not meet the

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 551-52.

⁵⁸ *Id.* at 552.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 553.

⁶² *Id.* at 552.

third prong of the test—the good faith prong. The Eighth Circuit was not persuaded, however, because it specifically declined to apply *Brunner*.⁶³ The Eighth Circuit took issue with the fact that “under a *Brunner* analysis, if the bankruptcy court finds against the debtor on any of the three prongs of the test, the inquiry ends and the student loan is not dischargeable.”⁶⁴

The Eighth Circuit finally held that it preferred a “less restrictive approach” in defining undue hardship and decided that the totality-of-the-circumstances approach was best.⁶⁵ The Eighth Circuit stated, “that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.”⁶⁶ The court further held that the totality of the circumstances analysis considers: “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and her dependent’s reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each bankruptcy case.”⁶⁷ The Eighth Circuit believes in the simple premise that “if the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.”⁶⁸

3. How Other Circuits Define “Undue Hardship”

Unlike the Eighth Circuit, the majority of other circuit courts examine undue hardship using the *Brunner* test.⁶⁹ The Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits all have

⁶³ *Id.* at 553.

⁶⁴ *Id.*, at 554.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 554-555.

⁶⁹ *In re Hicks*, 331 B.R. 18, 30 (Bankr. D. Mass. 2005).

adopted some version of this *Brunner* three-prong test.⁷⁰ The First Circuit has declined to choose a specific test.⁷¹ The eight circuits that have adopted *Brunner* all seem to have different formulations of how these three general prongs are specifically defined. The courts agree on uniformly applying the first prong of *Brunner*—the debtor must show an inability to pay off the loans while still maintaining a minimal standard of living and while attempting to maximize income—but the application of the other two prongs has generated confusion.⁷²

Courts have differed on how to properly assess whether a debtor will likely have the same circumstances through most of the loan repayment period. The Seventh Circuit, along with three other circuits, has defined the second prong of *Brunner* to require that the debtor show a “certainty of hopelessness” before being allowed to discharge his/her loans.⁷³ In these circuits, a present inability to fulfill financial commitments is not enough for the second prong to be satisfied.⁷⁴ While no circuit has defined what this “certainty of hopelessness” truly means, the Fourth and Sixth Circuits have indicated that the debtor can demonstrate a certainty of hopelessness through “illness, disability, a lack of useable job skills, or the existence of a large number of dependents.”⁷⁵ In the Sixth Circuit, proving the second prong of *Brunner* requires a showing of “hopelessness” that is outside of the debtor’s control, and showing that these circumstances will

⁷⁰ *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *U.S. Dep’t of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Hemar Ins. Corp. of Am. v. Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).

⁷¹ *In re Nash*, 446 F.3d 188, 190 (1st Cir. 2006).

⁷² *See In re Bronsdon*, 435 B.R. 791, 806 (B.A.P. 1st Cir. 2010).

⁷³ *Oyler*, 397 F.3d at 386; *Frushour*, 433 F.3d at 396; *O’Hearn v. Educ. Credit Mgmt. Corp. (In re O’Hearn)*, 339 F.3d 559, 564 (7th Cir. 2003); *Faish*, 72 F.3d at 307.

⁷⁴ *O’Hearn*, 339 F.3d at 564.

⁷⁵ *Frushour*, 433 F.3d at 400; *Oyler*, 397 F.3d at 386.

continue to be hopeless for some period of time.⁷⁶ The Third Circuit defined certainty of hopelessness as “total incapacity now and in the future to pay [her] debts for reasons not within her control.”⁷⁷ The Fifth Circuit has not adopted the certainty of hopelessness standard, but it has nonetheless defined this prong of the *Brunner* test to require proving “total incapacity,” similar to the Third Circuit’s definition.⁷⁸

On the other hand, the Ninth Circuit does not require that certainty of hopelessness must be proven when evaluating “future hardship.”⁷⁹ The Tenth Circuit has explicitly rejected a certainty of hopelessness standard, instead requiring courts to take a “realistic look” at the debtor’s ability to “provide for adequate shelter, nutrition, health care, and the like.”⁸⁰ These two *Brunner*-applying circuits have a more lenient approach to the second prong of Brunner than the certainty of hopelessness circuits.

Courts disagree on the third prong of *Brunner* as well. Some courts have held that the failure to make any past payments on the precise student loan debt sought to be discharged is a per se bar to discharge because it does not meet the “good faith” requirement.⁸¹ In contrast, the Tenth and Eleventh Circuits have explicitly held that the failure to make student loan payments does not, standing alone, preclude a finding of prior good faith effort.⁸² These circuits view the good faith requirement as one that evaluates whether the debtor was attempting to abuse the student loan system—rather than one that

⁷⁶ *Oyler*, 397 F.3d at 386.

⁷⁷ *Faish*, 72 F.3d at 307.

⁷⁸ *Gerhardt*, 348 F.3d at 92 (quoting *Faish*, 72 F.3d at 307).

⁷⁹ *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 882-83 (9th Cir. 2006) (holding that a debtor does not have a “separate burden” to show exceptional circumstances beyond the inability to pay presently or in the future).

⁸⁰ *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004).

⁸¹ *Lehman v. N.Y. Higher Educ. Servs. Corp.*, 226 B.R. 805, 808-09 (Bankr. D. Vt. 1998).

⁸² *See In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *Polleys*, 356 F.3d at 1310.

evaluates whether the debtor was aggressively paying off the student loans under the circumstances.⁸³

C. Are These Definitions Outcome Determinative?

Despite the different verbal formulations, both the *Brunner* test and the “totality-of-the-circumstances” test use similar information and typically will lead to similar results. As the Tenth Circuit put it, “the two tests will often consider similar information—the debtor’s current and prospective financial situation in relation to the educational debt and the debtor’s efforts at repayment.”⁸⁴ The choice of “test” makes so little difference that the First Circuit refused even to choose between the two.⁸⁵

Other circuit courts agree with the First Circuit. For instance, while adopting the *Brunner* test, the Tenth Circuit rejected arguments that the two tests diverged: “We do not read *Brunner* to rule out consideration of all the facts and circumstances. . . . [*Brunner*] necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor’s education and skill level.”⁸⁶ Even the Eighth Circuit, the circuit known for applying the totality-of-the-circumstances test, acknowledged that whatever conflict exists between the two tests “may not be that significant.”⁸⁷ And this makes sense; both tests are designed to define “undue hardship,” after all. This section of the Comment will explain, through a hypothetical, how the *Brunner* and totality tests can be outcome determinative. This section will further explain how the different formulations of *Brunner* within the circuits look like they

⁸³ *Polleys*, 356 F.3d at 1312.

⁸⁴ *Id.* at 1309.

⁸⁵ In re Nash, 446 F.3d 188, 190 (1st Cir. 2006) (“We see no need in this case to pronounce our views of a preferred method of identifying a case of ‘undue hardship.’”).

⁸⁶ *Polleys*, 356 F.3d at 1309.

⁸⁷ *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 779 n.1 (8th Cir. 2009).

may produce different results, but do not actually do so when employed.

1. *Brunner* vs. Totality Tests

Even though both tests evaluate similar facts, there is no question that a debtor who fails to satisfy *any single* element of *Brunner* is automatically ineligible for discharge.⁸⁸ By contrast, courts applying the totality test simply ask the statutory question whether there is “undue hardship.”⁸⁹ These courts consider a broad range of factors, with no single dispositive consideration.⁹⁰ The “totality” approach rejects “strict parameters,” allowing courts to exercise “the inherent discretion contained in § 523(a)(8)(B).”⁹¹

While, in many cases, both tests lead to the same result, the legal profession recognizes that there can be significant differences between the two tests. The “totality” test is “more flexible and often more beneficial to the debtor.”⁹² “The two tests often produce different results” because of the compulsory-checklist nature of the *Brunner* test.⁹³ In many cases the *Brunner* test results in no discharge where “the likelihood of discharge would have been vastly improved” in a “totality” jurisdiction.⁹⁴

⁸⁸ See *Brunner v. N.Y. Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁸⁹ See e.g., *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554-55 (8th Cir. 2003).

⁹⁰ *Id.*

⁹¹ *Id.* at 554.

⁹² Adam J. Williams, Note, *Fixing the “Undue Hardship” Hardship: Solutions For The Problem of Discharging Educational Loans Through Bankruptcy*, 70 U. PITT. L. REV. 217, 228 (2008).

⁹³ Kurtis K. Wiard, Comment, *Brunner’s Folly: The Road to Discharging Student Loans Is Paved with Unfounded Optimism [Buckland v. Educ. Credit Mgmt. Corp. (In re Buckland)]*, 424 B.R. 883 (Bankr. D. Kan. 2010), 52 WASHBURN L.J. 357, 373 (2013).

⁹⁴ Adam Schlusberg, Comment, *In re Davis*, 53 N.Y.L. SCH. L. REV. 639, 650 (2009).

One hypothetical can help show how these standards can be outcome determinative. Assume there is an individual, Deborah, whose debt is somewhat similar to the debtor in *Long*—she has an advanced degree, say, a Master’s in Education rather than Long’s chiropractic degree.⁹⁵ But, Deborah cannot find full-time employment. Deborah has been searching for years; she has relocated cities just to look for jobs, but nothing is working out for her. She shares the cheapest apartment she can find with multiple roommates, she has not bought a new car, nor has she bought any extravagant items since receiving her diploma. She works as a part-time substitute teacher, works an additional part-time job, and is seeking employment in multiple job industries—but her efforts in securing employment are to no avail. Assume that she can spend only \$100 of her monthly income on paying off her loans under her small salaries and high loans. Under these circumstances, she should be able to pass the first prong of the *Brunner* test.⁹⁶ She has attempted to maximize her income while minimizing her expenses.

Now, let’s assume that Deborah gets ill. She loses her vision. Her circumstances are not likely to improve, nor will she realistically be able to utilize her advanced degree in the future. She will certainly meet the second prong of *Brunner*—her prospective circumstances are so dire that she will likely not be able to pay off her loans.⁹⁷ Finally, assume that Deborah has both private and federal student loans, and she has only paid off part of her private loans because she has a higher interest rate on those loans. Further, let’s assume that she stopped payment on both her private and federal loans when she became ill. This is where the *Brunner* and totality tests are outcome determinative. Despite what clearly looks like “undue hardship,” Deborah may not be able to discharge her federal loans in a circuit applying the *Brunner* test because she did not pay off her federal loans

⁹⁵ *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 551 (8th Cir. 2003).

⁹⁶ *See Brunner v. N.Y. Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁹⁷ *See id.*

in “good faith.”⁹⁸ Under a totality of circumstances jurisdiction, however, Deborah would likely be able to discharge her loans under the same fact pattern because a failure to satisfy one prong of *Brunner* is not dispositive.⁹⁹

While the Deborah analogy is severe and unlikely to occur often, if at all, it illustrates that the tests for undue hardship do not always work in the way that courts intend them to. Despite a debtor being in a hopeless situation, outside of her control, a court would still—strictly applying *Brunner*—conclude that she could not discharge her loans.

2. Are There Splits Within The *Brunner* Definition?

Brunner, in layman’s terms, held that someone could discharge their student loans through bankruptcy if they: (1) cannot repay their student loans based on their current circumstances; (2) will not be able to pay off their loans in the future based on prospective circumstances; and (3) have tried to pay off their loans.¹⁰⁰ As discussed previously, the eight circuits that have adopted *Brunner* all seem to have different formulations of how to apply the latter two prongs. The courts seem to agree on uniformly applying the first prong of *Brunner*, but the other two prongs could potentially create more outcome determinative splits.

Some circuits, under the “future hardship” prong of *Brunner*, require a showing of a “total incapacity” to pay the loans in the future; others require a showing of a “certainty of hopelessness;” while others simply require a “realistic look” at the debtor’s circumstances.¹⁰¹

⁹⁸ See *In re Spence*, 541 F.3d 538, 545 (4th Cir. 2008) (holding that a debtor’s choice to repay some of her loans does not demonstrate a good faith effort to pay all of the loans held by a creditor).

⁹⁹ See *Long*, 332 F.3d at 554.

¹⁰⁰ See *Brunner*, 831 F.2d at 396.

¹⁰¹ See *O’Hearn v. Educ. Credit Mgmt. Corp. (In re O’Hearn)*, 339 F.3d 559, 564 (7th Cir. 2003) (requiring a showing of certainty of hopelessness); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 307 (3d Cir. 1995) (requiring a showing of total incapacity); *Educ. Credit Mgmt. Corp. v. Polleys*, 356

Despite the differences in language, the courts generally agree that student loans are mortgages on the future, so the debtor must prove that her future is so bleak as to warrant a discharge of the loans.¹⁰² Typically, this is shown to bankruptcy courts through testimony that the debtor has: an illness, some disability, a lack of useable job skills, or the existence of a large number of dependents.¹⁰³ Because of the inherent discretion given to bankruptcy courts in weighing the facts and testimony presented to them, it is tough to come up with a hypothetical that would guarantee an outcome determinative circuit split.

Returning to the Deborah analogy, under the facts presented above—but also assuming she has attempted to pay her federal loans in good faith—she would be able to discharge her loans in any jurisdiction. Losing one’s eyesight due to circumstances outside the debtor’s control would meet any test adopted in the circuits. However, assuming that she did not fall ill, but was instead a single mother of two children; assuming that she had been fired and was looking for a steady job for five years while trying to make ends meet, the circuits would potentially disagree on whether the second prong of *Brunner* was satisfied. However, the disagreement would not be due to the test employed, but rather due to the discretion of the bankruptcy judge as to whether Deborah could definitely show that her situation was not likely to improve.

The third prong of *Brunner* could create outcome determinative splits if a jurisdiction holds that the failure to make any past payments on the precise student loan debt sought to be discharged is a per se bar. While the Tenth and Eleventh Circuits have explicitly held that the failure to make any student loan payments does not, standing alone, preclude a finding of prior good faith effort—no circuit court has held

F.3d 1302, 1310 (10th Cir. 2004) (requiring courts to take a realistic look at debtor’s ability to repay).

¹⁰² See e.g., *Polleys*, 356 F.3d at 1311.

¹⁰³ See *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 401 (4th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382, 386 (6th Cir. 2005).

that the failure does create an absolute bar.¹⁰⁴ In the cases where circuit courts have held that the good faith requirement is not met due to a debtor's choice to pay some loans, but not others, the courts have also held that other prongs of *Brunner* were not satisfied.¹⁰⁵ This is because the circuits agree that there can be circumstances where a debtor can be attempting to repay the loans in good faith, but simply cannot do so.¹⁰⁶ To conclude, while the language used by the various circuits to define the *Brunner* test differs, the actual application is not outcome determinative because of the leeway the fact-finder is given to determine what testimony is persuasive.

UNDUE HARDSHIP IN THE SEVENTH CIRCUIT

This section of the Comment focuses on the state of undue hardship in the Seventh Circuit specifically. The Seventh Circuit now employs one of the strictest standards for discharging student loans through bankruptcy, and it is important to understand why.

A. Background

While the Seventh Circuit has evaluated numerous undue hardship appeals, two cases stood out more than others in the formulation of the *Tetzlaff* opinion: *Matter of Roberson*, and *Krieger v. Educational Credit Management Corp.*¹⁰⁷ This section of the Comment explains both cases in light of how the holdings influenced the opinion in *Tetzlaff*.

¹⁰⁴ See *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *Polleys*, 356 F.3d at 1311.

¹⁰⁵ See *In re Spence*, 541 F.3d 538, 545 (4th Cir. 2008); see also *Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II)*, 794 F.3d 756, 761 (7th Cir. 2015).

¹⁰⁶ See e.g., *Mosley*, 494 F.3d at 1327.

¹⁰⁷ *Tetzlaff II*, 794 F.3d at 758-59.

1. *Roberson*

The Seventh Circuit first adopted the *Brunner* standard in *Matter of Roberson*.¹⁰⁸ Jerry Roberson, the debtor, was still paying off his student loans for his Bachelor of Science degree when his life began to fall apart in 1990.¹⁰⁹ His marriage failed, he lost his job, and he was no longer able to pay his creditors.¹¹⁰ Later that year, he filed for bankruptcy and attempted to discharge his loans.¹¹¹ The bankruptcy court determined that Roberson's loans were not dischargeable; Roberson appealed, and the district court reversed the bankruptcy court's decision and discharged the loans.¹¹² The creditor, Student Assistance Commission filed an appeal.¹¹³

The Seventh Circuit reversed the district court and adopted the *Brunner* three-prong test.¹¹⁴ The Seventh Circuit explained its choice behind adopting *Brunner*, stating that the three requirements effectively weed out debtors filing for bankruptcy to primarily avoid loan repayment.¹¹⁵ The court continued:

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.¹¹⁶

¹⁰⁸ *Matter of Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).

¹⁰⁹ *Id.* at 1134.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1135.

¹¹⁵ *Id.* at 1136.

¹¹⁶ *Id.* at 1137.

The Seventh Circuit reasoned that the first prong of *Brunner*—the minimal standard of living prong—was the proper starting point for the undue hardship inquiry because this information is generally concrete and readily obtainable.¹¹⁷ The court continued by reasoning that the second prong of *Brunner*—the debtor’s condition is likely to persist for a significant portion of the repayment period—is necessary because student loans are effectively mortgages on the debtor’s future.¹¹⁸ The court next reasoned that the third prong of *Brunner*—the good faith effort to repay loans—would be measured by the debtor’s efforts to obtain employment, maximize income, and minimize expenses.¹¹⁹ Finally, the Seventh Circuit held that the *Brunner* test requires a debtor to prove a “certainty of hopelessness.”¹²⁰

2. *Krieger*

In 2013, the Seventh Circuit revisited the standard set by *Roberson* in *Krieger v. Educational Credit Management Corp.*¹²¹ The bankruptcy court held that the debtor in *Krieger* had adequately proven undue hardship.¹²² The creditor appealed, and the district court reversed; holding that the debtor could have searched harder for work, and that she failed the good faith prong because she had not enrolled in a twenty-five-year payment program.¹²³ The Seventh Circuit reversed the district court and remanded to reinstate the discharge issued by the bankruptcy judge.¹²⁴ While this holding had more to do with the district court misapplying the standard of review—a clear

¹¹⁷ *Id.* at 1135.

¹¹⁸ *Id.* at 1135-36.

¹¹⁹ *Id.* at 1136.

¹²⁰ *Id.* at 1136; *see* O’Hearn v. Educ. Credit Mgmt. Corp. (*In re* O’Hearn), 339 F.3d 559, 564 (7th Cir. 2003) (holding that the certainty of hopelessness requirement is part of the second prong of the *Brunner* test).

¹²¹ *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 883 (7th Cir. 2013).

¹²² *Id.*

¹²³ *Id.* at 883-84.

¹²⁴ *Id.* at 885.

error standard for the factual findings of the bankruptcy judge—the Seventh Circuit further elaborated on the standard set in *Roberson*.¹²⁵

The Seventh Circuit first discussed the third prong of *Roberson*, and therefore *Brunner*.¹²⁶ The court held that the good faith prong could not require a commitment to future efforts to repay—because that would create a situation where no educational loan could ever be discharged.¹²⁷ As to the second prong of *Brunner*, the Seventh Circuit held that the debtor proved that her circumstances were likely to persist indefinitely.¹²⁸ The court made specific note that the debtor—had she signed up for a twenty-five-year repayment period—would realistically not be able to pay anything towards her loans, and interest would accrue, until her loans would be forgiven pursuant to the plan.¹²⁹ The Seventh Circuit criticized the “certainty of hopelessness” language in dicta, but ultimately held that *Krieger* was a scenario where there truly was no hope without a discharge of the loans.¹³⁰

B. Facts of Tetzlaff

Mark Warren Tetzlaff was fifty-four-years-old at the time he filed his bankruptcy and adversary complaint.¹³¹ His student loan debt was nearly \$260,000 when he filed for Chapter 7 bankruptcy in 2012.¹³² Tetzlaff’s debt was guaranteed by Educational Credit Management Corporation.¹³³ Tetzlaff also held \$18,940 in private student loan debt

¹²⁵ *Id.* at 884-85.

¹²⁶ *Id.* at 884.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 884-85.

¹³⁰ *Id.* at 885 (“[Certainty of hopelessness] sounds more restrictive than the statutory ‘undue hardship,’ but at all events the bankruptcy judge found that *Krieger*’s situation is hopeless.”).

¹³¹ Petition for Writ of Certiorari at 3, *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 136 S.Ct 803 (2016) (No. 15-485).

¹³² *Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II)*, 794 F. 3d 756, 757 (7th Cir. 2015).

¹³³ *Id.*

and \$75,776.37 in private non-student loan debt.¹³⁴ The mix of federal and private student loans was used to pay for Tetzlaff's graduate education at Marquette University, 1992-1994 (MBA received); DePaul University College of Law, 1994-1998 (no degree received); and Florida Coastal School of Law, 1999-2005 (JD received).¹³⁵ Tetzlaff also has a Master's in Religion from Trinity International University, but those loans, if there are any, were not at issue in his bankruptcy case.¹³⁶

The original repayment period for Tetzlaff's consolidated federal student loan debt was twenty years.¹³⁷ Based on an interest rate of 4.125 percent and an eight-year amortization schedule through retirement at age sixty-five, Tetzlaff would need approximately \$38,107 of excess annual cash flow per year to repay just his consolidated federal student loan debt.¹³⁸

Tetzlaff currently resides in Waukesha, Wisconsin, with his 86-year-old mother.¹³⁹ They subsist together solely on his mother's Social Security payments.¹⁴⁰ Tetzlaff is divorced, currently unemployed, and has twice failed the bar exam.¹⁴¹ Prior to attending graduate school, Tetzlaff worked in the employee benefits industry, as a stockbroker, as an insurance salesman, and as a financial advisor.¹⁴² He has been unable to find work in these fields since completing law school.¹⁴³ In addition, Tetzlaff is a recovering alcoholic and faces other challenges

¹³⁴ Petition for Writ of Certiorari at 7, *Tetzlaff*, 136 S.Ct 803 (No. 15-485).

¹³⁵ *Id.*

¹³⁶ Brief in Opposition to Certiorari at 5, *Tetzlaff*, 136 S.Ct. 803 (No. 15-485).

¹³⁷ Petition for Writ of Certiorari at 7, *Tetzlaff*, 136 S.Ct. 803 (No. 15-485).

¹³⁸ *Id.*

¹³⁹ *Id.* at 8.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

that contribute to his difficulties in obtaining employment, including several misdemeanor convictions.¹⁴⁴

C. Procedural History

On May 1, 2014, the bankruptcy court issued an order holding the loans nondischargeable.¹⁴⁵ The bankruptcy court found that with Tetzlaff's current income, he was unable to pay his student loan debt and maintain a minimum standard of living—the first *Brunner* prong was met.¹⁴⁶ The court turned next to *Brunner*'s second prong, and concluded that Tetzlaff failed to meet it; he failed to establish that he would be unable to pay back his student loan debt in the future.¹⁴⁷ In doing so, the bankruptcy court noted that although “the ‘certainty of hopelessness’ standard . . . was criticized in dicta in *Krieger*, it was not explicitly overruled.”¹⁴⁸ The bankruptcy court then clarified that “even if the lesser standard were applicable to this case, Mr. Tetzlaff has not met this test.”¹⁴⁹

In analyzing Tetzlaff's future ability to repay his student loans, the bankruptcy court's conclusions were based on its credibility determinations of two competing experts, Dr. Ackerman (a forensic psychologist hired by the creditor) and Dr. Gurka (Tetzlaff's treating psychologist).¹⁵⁰ The court found Dr. Ackerman's testimony more compelling as it was more complete and more current than Dr. Gurka's.¹⁵¹ The court also noted that Dr. Ackerman testified forensically, not just clinically, and therefore her testimony was particularly

¹⁴⁴ Tetzlaff v. Educ. Credit Mgmt. Corp. (*Tetzlaff II*), 794 F. 3d 756, 758 (7th Cir. 2015).

¹⁴⁵ Petition for Writ of Certiorari at IV, *Tetzlaff*, 136 S.Ct. 803 (No. 15-485).

¹⁴⁶ Tetzlaff v. Educ. Credit Mgmt. Corp. (*Tetzlaff I*), 521 B.R. 875, 877 (E.D. Wisc. 2014).

¹⁴⁷ *Id.*

¹⁴⁸ Brief in Opposition to Certiorari at 6, *Tetzlaff*, 136 S.Ct. 803 (No. 15-485).

¹⁴⁹ *Id.* at 6-7.

¹⁵⁰ *Id.* at 7.

¹⁵¹ *Id.*

credible.¹⁵² Her tests results showed that Tetzlaff was likely malingering - he scored extremely high on the portion of the testing that indicated he was feigning at least some of his symptoms.¹⁵³ As the trier of fact, the bankruptcy court weighed all testimony and concluded Tetzlaff did not establish he was unable to earn more money in the future.¹⁵⁴ The bankruptcy court concluded that even if Tetzlaff was continually unable to pass a bar exam or practice law, he would still be able to find work if he put forth some effort.¹⁵⁵ The bankruptcy court touted Tetzlaff's educational accomplishments, intelligence, advanced degrees, and continued good health, stating:

Even if he is never able to pass a bar exam, he has an MBA, is a good writer, is intelligent, and family issues are largely over. While he has challenges with past alcohol abuse and interpersonal relationships, he is not mentally ill and is able to earn a living . . . Mr. Tetzlaff's marital problems, personality problems, misdemeanor convictions, care-taking responsibilities, and failure of the bar exams do not meet the level of undue hardship necessary to discharge student loans. They are typical of many bankruptcy debtors.¹⁵⁶

In its discussion of *Brunner's* third prong—good faith efforts to repay—the bankruptcy court took note of both Tetzlaff's failure to make any payments on the loans at issue as well as the fact that he made payments towards a “loan” directly to Florida Coastal.¹⁵⁷ Tetzlaff argued that he made late tuition payments directly to Florida Coastal for his law school education, and that the tuition payments

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 7-8.

¹⁵⁷ *Id.* at 8.

should be characterized as payments on a student loan.¹⁵⁸ The bankruptcy court characterized Tetzlaff as a “malingerer,” and held that this did not constitute making a good faith payment on his loans.¹⁵⁹

Tetzlaff appealed this decision to the district court, which affirmed the bankruptcy court.¹⁶⁰ The district court concluded that the bankruptcy judge was entitled, as the trier of fact, to weigh and discount evidence.¹⁶¹ The district court held “[it could not] upset the bankruptcy judge’s finding of no undue hardship, which was reasonable given the evidence presented at trial concerning Tetzlaff’s effort to find employment.”¹⁶² The bankruptcy court’s decision turned on its factual findings that Tetzlaff was feigning psychological symptoms and not trying to work up to his abilities.¹⁶³ The district court noted that “the bankruptcy court did not, as Tetzlaff claims, apply the ‘certainty of hopelessness’ test . . . [T]he bankruptcy judge concluded that Tetzlaff had failed to meet even the lesser standard that he advocated for.”¹⁶⁴

D. Holding

On further appeal, the Seventh Circuit again affirmed the bankruptcy court’s conclusion that Tetzlaff had failed to establish undue hardship.¹⁶⁵ The Seventh Circuit specifically discussed the second and third prongs of the *Brunner* test—since the district and bankruptcy courts concluded that Tetzlaff could not maintain a

¹⁵⁸ Tetzlaff v. Educ. Credit Mgmt. Corp. (*Tetzlaff I*), 521 B.R. 875, 881 (E.D. Wisc. 2014).

¹⁵⁹ *Id.* at 881-82.

¹⁶⁰ *Id.* at 875.

¹⁶¹ *Id.* at 880.

¹⁶² *Id.* at 881.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Tetzlaff v. Educ. Credit Mgmt. Corp. (*Tetzlaff II*), 794 F. 3d 756, 761 (7th Cir. 2015).

minimal standard of living if forced to repay the loans.¹⁶⁶ Since the bankruptcy court's findings were findings of facts, the standard of review was therefore clear error.¹⁶⁷

When looking at the second prong of *Brunner*—that there are additional circumstances showing a certainty of hopelessness—the Seventh Circuit was not persuaded.¹⁶⁸ Judge Flaum, writing for the unanimous panel, noted that the evidence presented at trial indicated that Tetzlaff did not suffer from clinical levels of anxiety or depression and that he “may, in fact, be exaggerating his symptoms.”¹⁶⁹ The Seventh Circuit observed that Tetzlaff’s academic degrees, prior work experience, age, and commendable pro se representation in the case, all indicated he was fully capable of earning a living and that his efforts to maximize his income were insufficient.¹⁷⁰ The court justified this rationale by stating that undue hardship encompasses a notion that the debtor may not cause his own default.¹⁷¹ Instead, the debtor’s condition must result from factors beyond his reasonable control.¹⁷²

As to the good faith prong of *Brunner*, Tetzlaff argued that his late tuition payments directly to Florida Coastal should count as a good faith effort to repay his loans.¹⁷³ The Seventh Circuit disagreed.¹⁷⁴ The court criticized Tetzlaff’s argument, holding that the good faith prong is centered on the debt subject to the discharge action itself.¹⁷⁵ The court further opined, “it seems that Tetzlaff repaid his debt to Florida Coastal largely because he needed the school’s cooperation in releasing his diploma and transcript.”¹⁷⁶ As a result, the court affirmed

¹⁶⁶ *Id.* at 759-61.

¹⁶⁷ *Id.* at 759-60.

¹⁶⁸ *Id.* at 760.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 761.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

the lower court's holding that Tetzlaff did not make a good faith effort to pay down his loan debt.¹⁷⁷

E. State of the Law

After *Tetzlaff*, the Seventh Circuit is now one of the most exacting circuits when it comes to the undue hardship analysis. Debtors in Illinois, Indiana, and Wisconsin have to conform to the rigidity of the *Brunner* prongs, and prove standards that have intensified since *Brunner* was originally incorporated in *Roberson*.¹⁷⁸ First, a debtor must prove he cannot maintain a minimal standard of living if forced to repay the loans.¹⁷⁹ Second, a debtor must prove additional circumstances exist, outside of the debtors control, that would lead to a certainty of hopelessness if forced to pay the loans.¹⁸⁰ Third, the debtor must show good faith in attempting to obtain employment, maximize income, minimize expenses, and pay off the loans at issue in the adversary proceeding.¹⁸¹ If a debtor is unable to prove all three prongs in the original bankruptcy proceeding, the debtor is extremely unlikely to win on appeal because of the clear error standard of review employed by the courts when reviewing factual findings.¹⁸²

ANALYSIS

A. The Seventh Circuit Got Tetzlaff Right

The Seventh Circuit came to the correct conclusion under the facts, that Mark Tetzlaff was a malingerer who could not prove that his circumstances were outside his control. Now, part of this decision was because Tetzlaff was not allowed to disclose expert witnesses who

¹⁷⁷ *Id.*

¹⁷⁸ *See* Matter of Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

¹⁷⁹ *Tetzlaff II*, 794 F.3d at 758-59.

¹⁸⁰ *Id.* at 759-60.

¹⁸¹ *Id.* at 760-61.

¹⁸² *See id.* at 759.

would testify that he was suffering from memory problems that would likely prohibit him from ever passing a bar exam.¹⁸³ Tetzlaff missed the thrice-extended deadline to disclose these experts by eight months.¹⁸⁴ Under a clear error standard, the Tetzlaff judgment was fairly straightforward.

Tetzlaff's case would have had the same result had it been decided in a totality of the circumstances jurisdiction. Courts applying the totality test in the handful of cases that do involve factual circumstances similar to this case have had the same result. The Eighth Circuit's decision in *Educational Credit Management Corp. v. Jesperson* is a good example.¹⁸⁵ The debtor in *Jesperson* had previous was highly educated, had a J.D., and had just as much debt as Tetzlaff.¹⁸⁶ Just like Tetzlaff, the debtor in *Jesperson* was determined to be unmotivated to work to his potential, and was denied a discharge of his more than \$300,000 debt.¹⁸⁷ Tetzlaff is also similar to the debtor in *In re Shadwick*.¹⁸⁸ Both Shadwick and Tetzlaff have J.D.s, and were unable to pass the bar exam.¹⁸⁹ Shadwick, however, had three small, dependent children, including one with significant disabilities, and was still denied a discharge.¹⁹⁰ Both *Shadwick* and *Jesperson* were decided in the Eighth Circuit—the circuit known for using the totality of the circumstances test rather than *Brunner*.

There is simply no reason to suppose that a circuit employing the totality test would find Tetzlaff's evidence of an undue hardship any more persuasive. Tetzlaff was ultimately denied a discharge of his student debt because of his failure to work up to his abilities, his lack

¹⁸³ *Id.* at 760.

¹⁸⁴ *Id.*

¹⁸⁵ *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775 (8th Cir. 2009).

¹⁸⁶ *Id.* at 784-85.

¹⁸⁷ *Id.* at 784-85; *see also* *In re Lofton*, 371 B.R. 402, 410-11 (N.D. Iowa 2007)

(a 43-year-old debtor with three children and two graduate degrees was not sufficiently maximizing his income to warrant discharge of this \$300,000 debt).

¹⁸⁸ *In re Shadwick*, 341 B.R. 6 (W.D. Mo. 2006).

¹⁸⁹ *See id.* at 9.

¹⁹⁰ *Id.* at 12; *see also* *In re Tyer*, 384 B.R. 230 (Bankr. N.D. Iowa 2008) (discharge denied of more than \$120,000 to 63-year-old debtor).

of significant health issues, his impressive educational achievements, the court's credibility determinations, and the likelihood that he was feigning psychological symptoms.¹⁹¹ Precisely those considerations would have led a court using the slightly different verbal formulation applied in the Eighth Circuit to reach the same result.

B. The Seventh Circuit Got “Undue Hardship” Wrong

Where the Seventh Circuit erred in the *Tetzlaff* opinion was in the third prong of *Brunner*—the good faith test. It was not necessary for the Seventh Circuit to hold that Tetzlaff's payments to Florida Coastal did not constitute good faith. As discussed above, the court could have easily affirmed on the additional circumstances prong alone. In fact, this is exactly what the district court did in affirming the bankruptcy court before the Seventh Circuit heard the appeal.¹⁹² What the court has now done is create a landscape where debtors may not be able to discharge their loans despite showing strong examples of “undue hardship.”¹⁹³ The Deborah hypothetical from earlier in this Comment is an appropriate example.

To review, Deborah was the debtor who had: an advanced degree, difficulty finding employment, and significant loan debt. Deborah also had both private and federal loans, with the private loans at a much higher interest rate. Deborah is rational; she chose to use her limited income to pay off the loans with a higher interest rate first—similar to how Tetzlaff paid Florida Coastal for his diploma and transcript so he

¹⁹¹ See *Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff II)*, 794 F. 3d 756, 759-60 (7th Cir. 2015).

¹⁹² See *Tetzlaff v. Educ. Credit Mgmt. Corp. (Tetzlaff I)*, 521 B.R. 875, 881-82 (E.D. Wisc. 2014) (“[T]he appropriate characterization of his debt to Florida Coastal is irrelevant. . . . even if the bankruptcy judge had viewed the payments to Florida Coastal as payments on a student loan, she would have found that Tetzlaff had failed [to maximize his income].”).

¹⁹³ See *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549, 551-52 (8th Cir. 2003) (where the debtor suffered undue hardship due to a mental breakdown, but stopped paying the loans she had been paying for ten years due to her illness).

could apply for jobs.¹⁹⁴ If Deborah then became ill and lost her vision, or had a mental breakdown that an expert could testify was out of her control, Deborah would not be able to discharge her federal loans unless the Seventh Circuit decides to create an exception from its holding in *Tetzlaff*. While Deborah would be able to prove that her circumstances show a certainty of hopelessness, Deborah did not, in good faith, pay off the loans at issue in her adversarial proceeding. This is wrong.

The Seventh Circuit, in applying *Brunner* to the circumstances of Tetzlaff's case, forgot why *Brunner* was even instituted. The good faith prong exists in the first place because Ms. Brunner attempted to discharge her loans ten months after graduating without making a single payment.¹⁹⁵ Now, the Seventh Circuit is confusing the overall purpose of section 523(a)(8) with the nuances in applying a test designed to encapsulate that purpose. Debtors should not be able to discharge their student loans if they merely miscalculated their job prospects, or if they made a poor choice in what degree to obtain. Debtors *should* be able to discharge their student loans through bankruptcy if they can show that undue hardship will occur if they are forced to repay—bar none. That is the language of the bankruptcy code, and that is what the Seventh Circuit must apply. With the recent holding in *Tetzlaff*, the Seventh Circuit is now applying a stricter standard than the code defines. Multiple factors go into each prong of the *Brunner* analysis, so the holding that a failure to pay the loans at issue is now a dispositive factor does not comport with the history of the analysis. The Seventh Circuit did not consider the possibility that a debtor could have a valid reason for not paying the loan at issue—a reason that would still constitute good faith—and it should do so if that case appears on the docket.

¹⁹⁴ See *Tetzlaff II*, 794 F.3d at 761.

¹⁹⁵ See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 397 (2d Cir. 1987).

CONCLUSION

While Mark Tetzlaff may not have been the “perfect plaintiff,” the rigidity of the *Brunner* standard—coupled with the stringent applications of *Brunner* within the Seventh Circuit—creates a situation in which people truly suffering from undue hardship will nonetheless be unable to partially or fully discharge their student loans. The easiest way to solve this in its entirety is for Congress to define what “undue hardship” means within the bankruptcy code. However, recognizing that this may not happen, the Seventh Circuit should consider stepping back from the application of *Brunner* articulated in *Tetzlaff*. The Seventh Circuit should instead adopt a less rigid standard; a standard that gives discretion to the courts to determine what constitutes undue hardship without forcing reliance on a single dispositive factor—such as a failure to make payments to the loan at issue.