
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
CYNTHIA RENA WEBB)	
(Chapter 7 Case <u>94-40802</u>))	Number <u>94-4077</u>
)	
<i>Debtor</i>)	
)	
)	
CYNTHIA RENA WEBB)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
LAW STUDENT LOAN/EDU SERV.)	
and)	
HEMAR INSURANCE)	
CORPORATION OF AMERICA,)	
a South Dakota Corporation)	
)	
<i>Defendants</i>)	

MEMORANDUM AND ORDER

The Debtor, Cynthia Rena Webb, filed a voluntary petition under Chapter

7 of the Bankruptcy Code on May 13, 1994. On June 21, 1994, the Debtor filed the instant adversary proceeding against Law Student Loan/Edu Serv. to determine the dischargeability of certain student loans. The Defendant, HEMAR Insurance Corporation of America ("HICA") answered and filed a counterclaim for judgment on the notes and reasonable attorney's fees as provided therein. HICA also filed a Motion to be jointed as a Defendant, which was granted by this Court. HICA and Debtor thereafter filed cross motions for summary judgment as to the issues of whether the student loans at issue fall within the general exception to discharge outlined in section 523(a)(8) of the Code, and whether the Debtor could show "undue hardship" under the exception set forth in section 523(a)(8)(B).

By Order entered December 13, 1994, this Court ruled that the loans did fall within the exception to discharge contained in Section 523(a)(8), but reserved the issue of undue hardship for trial. The parties came before this Court on January 31, 1995, for trial. After considering the evidence adduced at trial, as well as the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor obtained student loans from Norwest Bank of South Dakota in the amounts of \$5,000.00 on or about May 15, 1990, and \$2,900.00 on or about February 21,

1991 (Exhibit D-1). The Debtor attended and successfully completed her education in May 1992 at the George Washington School of Law in Washington, D.C., specializing in tax law. The notes became due nine months after graduation or about March 1993, and were to be paid off over a fifteen year period, although refinancing for thirty years is offered. Total monthly payments due at the time the loans were originally due were approximately \$50.00 (interest only) and current monthly payments would be approximately \$120.00. The Debtor is currently in default on the notes and has made no payments since they became due. The current balance outstanding on the loans is \$11,023.17.

The Debtor is currently self-employed in Savannah, Georgia. Her business gross receipts for 1994 were approximately \$22,300.00.¹ 1993 total income was \$6,875.00 and 1994 total income was \$15,163.00. Ms. Webb has sought employment as an attorney in Savannah, but has been unsuccessful to date. She is currently licensed to practice in the District of Columbia and before the United States Tax Court. To date she has been unable to gain admission to the Georgia Bar.² Prior to law school she earned a Bachelor of Science Degree from the University of California in Irvine. Ms. Webb has worked previously as a law clerk for the Office of General Counsel for MCI in Washington, D.C., for the County Attorney's Office in Savannah, Georgia, for the Public Defender's Office

¹ Evidence introduced at trial indicated that deposits into her checking account for the calendar year 1994 exceeded \$33,000.00.

² Ms. Webb is currently prohibited from sitting for the Georgia State Bar because she is in default on her student loans.

in Destin Beach, Florida, and for Truesdell Labs in California as a biologist. She continues to seek work as a paralegal and has worked as a consultant to local certified public accountants and tax attorneys.

Ms. Webb's total current expenditures are approximately \$1,788.00 per month per the schedule she submitted in response to Interrogatories (Exhibit D-2). Some expenses contended by the Defendant to be excessive are listed as follows:

Telephone	\$100.00 monthly
Clothing	\$150.00 monthly
Charitable Contributions	\$ 80.00 monthly
Recreation, Clubs, Entertainment, etc.	\$100.00 monthly
Automobile Payments	\$250.00 monthly

A portion of the Debtor's expenditures relate to her minor child, Shelby Lynn Webb, over whom she has custody. Ms. Webb receives approximately \$400.00 per month in Court ordered child support, and in addition the child's father is required to carry both medical and dental insurance for the child until the age of majority. Ms. Webb is responsible for one-half of the uncovered costs which she estimates to be approximately 15% of any medical expenses of the child.

Based in part on Ms. Webb's inability to obtain a position as an attorney in Savannah, she contends that repayment of her student loans imposes an undue hardship upon her. As a result, she seeks a discharge of the loans pursuant to 11 U.S.C. Section 523(a)(8)(B).

HICA contends that the undue hardship standard contained in Section 523(a)(8) requires exceptional circumstances, and, while the payment of the loans may impose some hardship on the Debtor, she is capable of making the payments without experiencing undue hardship. In support of its position, HICA contends that the Debtor's living expenses are higher than absolutely necessary, that her situation is not likely to persist over the life of the loan (which is a minimum of 15 years) and that she has made no good faith effort to repay the loans. Finally, HICA introduced evidence that it has incurred \$3,985.00 in fees and costs prior to trial in enforcing the notes. The notes provide for the recovery of reasonable attorney's fees and costs.

CONCLUSIONS OF LAW

11 U.S.C. Section 523(a)(8) provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or non-profit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless--

(A) Such loan, benefit, scholarship, or stipend overpayment first became due before more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) Excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Although the overriding policy of the Bankruptcy Code is to provide debtors with a fresh start, *see Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934), it is clear that Congress intended to make the discharge of student loans more difficult than the discharge of other debts. *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987). As a result, Section 523(a)(8) excepts from discharge a debt which is based upon an educational loan when such a loan is made, insured or guaranteed by a governmental unit or non-profit institution, unless one of the following two conditions are present: (1) The debtor filed his or her bankruptcy petition more than seven years after the loan first became due; or (2) expecting the debt from

discharge will impose an undue hardship upon the debtor and the debtor's dependents.

The creditor bears the burden of proving by a preponderance of the evidence that the debt falls within the general exception to discharge stated in Section 523(a)(8), while the debtor bears the burden of proving by a preponderance of the evidence that the debt falls within either of the exceptions stated in subsections (A) and (B) of Section 523(a)(8). *See Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991); *In re Ballard*, 60 B.R. 673, 674 (Bankr. W.D.Va. 1986).

The Court has already ruled that the debts at issue are student loans that fall within the general exception to discharge stated in Section 523(a)(8). The burden now shifts to the Debtor to prove that the loans fall within one of the exceptions contained in subsections (A) and (B) of Section 523(a)(8).

There is no dispute that Debtor filed her Chapter 7 petition within seven years of her student loans coming due, and as a result, the exception stated in subsection (A) of Section 523(a)(8) is not applicable to this case. Thus, the remaining issue in this case is whether Debtor has proven that excepting the student loans at issue from discharge will impose an undue hardship upon her.

A showing of mere hardship without showing *undue* hardship is not sufficient, *see* Ballard, 60 B.R. at 674. According to one court:

The fact that a debtor's budget may be tight for the foreseeable future is the norm rather than the exception when one files for bankruptcy. Undue hardship is not established by proof that repayment of a student loan would merely bring about unpleasantness. More than present inability to repay is required to establish undue hardship.

In re Burton, 117 B.R. 167, 169 (Bankr. W.D.Pa. 1990) (citations omitted). Whether a debtor will experience undue hardship must be determined on a case-by-case basis after a fact specific inquiry. *See* Andrews v. South Dakota Student Loan Assistance Corp., (In re Andrews), 661 F.2d 702 (8th Cir. 1981). In previous decisions dealing with the issue of undue hardship under section 523(a)(8)(B), this Court has adopted the three-part test set forth in In re Brunner, 46 B.R. 752 (D.C.N.Y. 1985) *aff'd* 831 F.2d 395 (2nd Cir. 1987). *See* Linda Bruyette Gado Alexander v. Fla. Dept. of Educ., et.al. (In re Linda Bruyette Gado Alexander), Ch.7 Case No. 488-00306, Adv. Pro. No. 488-0065, slip op. at 6 (Bankr. S.D.Ga. June 14, 1989); Kelli Marie Cheshier v. Georgia Higher Education Assistance Corp (In re Kelli Marie Cheshier), Ch.7 Case No. 91-41090, Adv. Pro. No. 91-4086, slip op. at 7 (Bankr. S.D.Ga. March 2, 1992). This test requires a debtor seeking a discharge of a student loan under the undue hardship exception to satisfy each of the following three elements:

- (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 of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396.

Although it is not the only test adopted by courts dealing with the undue hardship standard, the Brunner test has been, and continues to be, widely followed. *See e.g.*, In re Healey, 161 B.R. 389 (E.D.Mich. 1993); In re Conner, 89 B.R. 744, 747 (Bankr.N.D.Ill. 1988); In re Webb, 132 B.R. 199, 201 (Bankr. M.D.Fla. 1991); In re Ipsen, 149 B.R. 583, 585 (Bankr. W.D.Mo. 1992); In re Bakkum, 139 B.R. 680, 682 (Bankr. N.D.Ohio 1992); In re Connor, 83 B.R. 440, 445 (Bankr. E.D.Mich. 1988). Accordingly, this Court will continue to employ the Brunner test in determining whether a debtor has met his or her burden under the undue hardship standard of section 523(a)(8)(B).

In applying the test to the facts of the instant case, the Debtor has not carried her burden under any of its three prongs. First, the Debtor has not shown that she will be

unable to maintain a minimal standard of living for herself and her dependent. While the Debtor's monthly budget is by no means extravagant, it does reveal relatively large expenses on such items as \$100.00 per month for telephone, \$80.00 per month for charitable contributions, \$150.00 per month for clothes, \$250.00 for automobile, \$100.00 for recreation, clubs, and entertainment. While these budget items are not excessive on their face, they far exceed the level of expenditures for similar items of the vast majority of debtors who come to this Court. There is no question that Debtor incurs expenses of these amounts. Rather, the question is whether she has proven that she cannot accommodate the loan repayment in question, and a corresponding reduction in some of the line items in this budget, without an "undue" hardship. I rule that she has not. A monthly payment on the student loans at issue would only be somewhere between \$50.00 if the Debtor elects an interest only option, and \$120.00, if she elects to amortize the debt. It appears, therefore, that there is sufficient room in the Debtor's monthly expenses to allow her to service this student loan and maintain a "minimal" standard of living.

Under the second prong of the test, there is absolutely no evidence, aside from speculation by the Debtor, that there are circumstances which will prevent her from being able to repay the loans during their term. The term of both loans is fifteen years, and they only became due approximately eighteen months ago. In addition, Debtor has indicated that she has not attempted to refinance the loans, which she may be able to do for a term of

30 years. Although Ms. Webb has had difficulty in obtaining a job commensurate with her education in Georgia, and has been unable to qualify to take the Georgia Bar (because she is in default of her student loans), there is no evidence to support a finding that Ms. Webb will continue to have these problems for fifteen (or thirty) years into the future. Ms. Webb is licensed to practice law in the District of Columbia and voluntarily moved from there. She is free to return and establish a practice there and, according to the evidence, may qualify for the Georgia Bar if she complies with a payment plan on her student loans for a period of six months. Moreover, her income trend is clearly upward. She earned only \$6,000.00 her first full year out of law school, but increased to over \$14,000.00 the second year. In addition to those funds she receives child support and insurance for her daughter. She is obviously bright, articulate, well-educated and capable. There is no doubt that her present circumstances, no matter how difficult, are not likely to persist for fifteen years.

Under the third prong of the test, Ms. Webb has not demonstrated her good faith by attempting to repay the loans. In fact, Ms. Webb has admitted that she has not made a single payment on the loans at issue. Ms. Webb requested two forbearances from the bank and received them. In the middle of her second forbearance, she voluntarily filed for bankruptcy and now attempts to discharge these loans. Ms. Webb, in response to Defendant's Notice to Produce, did not produce a single piece of correspondence between herself and the bank evidencing her alleged good faith communications or attempts to repay.

It is, therefore, clear that Debtor has not borne her burden of proving that excepting these loans from discharge will impose an undue hardship upon her. Accordingly, Defendant, HICA, is entitled to judgment on its Counterclaim in the amount of \$11,023.17 plus accrued interest as provided for in the notes. This court denies any award of attorney's fees as part of the HICA's judgment because there is no evidence that Debtor was given the statutory ten-day notice of its intent to enforce the attorney's fees provision in the notes. Such notice is a "condition precedent" under O.C.G.A. § 13-1-11 to the enforcement of an attorney's fees provision within a contract or note,³ and that requirement is enforceable in bankruptcy.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the debt owed by the Debtor, Cynthia Rena Webb, to HICA as assignee from Norwest Bank and others, is hereby declared nondischargeable under 11 U.S.C. Section 523(a)(8). Furthermore, HICA is entitled to judgment on its Counterclaim in the amount of \$11,023.17 principal and accrued interest on the note.

³ See Merritt v. First State Bank of Randolph County, 162 Ga. App. 15, 16, 289 S.E.2d 547, 549 (1982).

Lamar W . Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1995.