Discharging Student Loan Debt - Mission Impossible

By Henry Karwowski

Attorneys no doubt encounter, on occasion, prospective clients saddled with enormous student loan debt. Given the rising costs of an education, it is perhaps with greater frequency that we actually encounter *fellow practitioners* so burdened. In either instance, the question arises: Can bankruptcy serve as a means of eliminating this type of debt? The answer is—probably not. In fact, in the wake of a recent United States Court of Appeals for the Third Circuit decision addressing the issue, the more appropriate answer is—highly unlikely.

Applicable Statute/Historical Application

The United States Bankruptcy Code does not allow an individual debtor to discharge the following debt: 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 nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. *(11 U.S.C. § 523(a)(8).)*

Historically, the Third Circuit and New Jersey federal courts have interpreted the expression "undue hardship" in a manner unsympathetic to debtors. For instance, in *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298 (3d Cir. 1995), the Third Circuit found an absence of "undue hardship," despite the existence of the following factors: (i) the amount of student loan debt, over $32,000, in relation to the debtor's annual salary, approximately $27,000; (ii) the debtor's lack of success in obtaining a higher-paying job; (iii) the debtor's lack of secondary income; (iv) the lack of child support for the debtor's son; and (v) assorted medical problems. *See also Johnson v. Edinboro State College*, 728 F.2d 163, 164 (3d Cir. 1984) (noting that the bankruptcy court had found $1,700 student loan debt nondischargeable, where the debtor earned over $17,000 per year and the quarterly loan payments amounted to only $47.00); *Rappaport v. Orange Savs. Bank (In re Rappaport)*, 16 B.R. 615, 617-18 (Bankr. D.N.J. 1981) (finding hardship provision inapplicable in case in which debtor, a medical student, could expect future earning potential as doctor).

Brightful Decision

The Third Circuit recently had cause to revisit the "undue hardship" provision in *Brightful v. Pennsylvania Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324 (3d Cir. 2001). In *Brightful*, the Bankruptcy Court found that the debtor had established "undue hardship" on the grounds that "[the debtor] most likely would never attain her college degree, lacks useful vocational training, suffers glaring psychiatric problems, is emotionally unstable, and . . . her pursuit of sexual discrimination charges against [her employer] had both scarred her future prospects with that firm and accounted for [a] sharp reduction in her income." (Id. at 329).

The Third Circuit reversed. It noted its test, first employed in *Faish*, for determining the existence of "undue hardship." (Id. at 327). That test requires: (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 for student loans," and (3) "that the debtor has made good faith efforts to repay the loans." (Id.) In addressing the second element, the Third Circuit recognized that "it is not enough for [the debtor] to demonstrate that she is currently in financial straits; rather, she must prove a 'total incapacity . . . in the future to pay [her] debts for reasons not within [her] control.'" (Id. quoting *Faish*, 72 F.3d at 307).

The Third Circuit held that the debtor had failed to satisfy the second element. First, it found that the debtor, as an experienced legal secretary, did not lack "useful vocational training." (Id. at 329). Second, it observed that the debtor's continued employment and high rate of pay at the very firm at which the alleged sexual discrimination had occurred, belied the allegation that pursuit of charges had "scarred" the debtor. (Id.) Third, it determined that, although two (2) suicide attempts supported the "psychiatric problems" finding, the debtor had failed to demonstrate, in the absence of expert testimony or other detailed evidence, "*how* these problems prevent her from being gainfully employed." (Id. at 330) (emphasis added). Finally, it noted that "[the debtor] is intelligent, physically healthy, currently employed, possesses useful skills as a legal secretary, and has no extraordinary, non-discretionary expenses," and that "[her only dependent] is now only two years from the age of majority." (Id.)

Accordingly, while it conceded that its result might appear "harsh," the Third Circuit concluded that the debtor could not discharge the debt.

Conclusion

In the absence of truly compelling evidence signifying "undue hardship," debtors cannot expect to discharge student loan debt.

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