

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

IN RE: §  
§  
CYNTHIA DENÉ MERILLAT, § CASE NO. 01-20308-7  
§  
Debtor. §

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CYNTHIA DENÉ MERILLAT, §  
§  
Plaintiff, §  
§  
v. § ADVERSARY NO. 01-2017  
§  
SALLIE MAE, INC., §  
and STUDENT LOAN GUARANTEE §  
FOUNDATION OF ARKANSAS, §  
§  
Defendants. §

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Cynthia Dené Merillat (Merillat) initiated this adversary proceeding against Sallie Mae, Inc. (Sallie Mae) and Student Loan Guarantee Foundation of Arkansas (SLGFA) seeking a determination of the dischargeability of student loans guaranteed by SLGFA. Merillat argues that repayment of the loans constitutes an undue hardship under 11 U.S.C. § 523(a)(8). SLGFA argues that Merillat has repayment options under which she can repay the student loans without suffering an undue hardship. Trial was held on December 10, 2001. Upon consideration of the pleadings, the evidence presented, and the arguments made at trial, the court makes the following findings of fact and conclusions of law.

**Findings of Fact**

The parties submitted this case on the stipulated facts set forth in the Joint Pretrial Order, a copy of which is attached. The court adopts findings 1-27 set forth in the Pretrial Order.

28. At trial the parties further stipulated as follows: that Merillat is qualified to teach in the Dumas School District only; that she lives in Amarillo and thus commutes to work in Dumas; and that she cannot obtain a master's degree without effectively starting over on the degree program.

29. In addition, from the documentary evidence introduced, the court further finds that Merillat has the following repayment options available to her: the Standard Repayment Plan (Standard Plan), which provides for monthly payments of \$717.60 over a 10 year period; (2) the Extended Repayment Plan (Extended Plan), which provides for monthly payments of \$461.36 for 25 years; (3) the Graduated Repayment Plan (Graduated Plan), which provides for monthly payments of \$402.29 over 25 years; and (4) the Contingent Repayment Plan (ICR), which provides for initial monthly payments of approximately \$185.27 (adjusted annually and projected to increase to \$567.80). Plaintiff's Ex. 5.

30. If appropriate, these findings of fact shall be considered conclusions of law.

### **Conclusions of Law**

#### **A. Jurisdiction**

31. The court has jurisdiction over this matter under 28 U.S.C. § 1334 and 11 U.S.C. § 523(a)(8). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

#### **B. Standard for Dischargeability of Student Loans**

32. An “[educational] loan made, insured, or guaranteed by a governmental unit” is nondischargeable unless excepting such loan from discharge would impose “undue hardship” on the debtor. 11 U.S.C. § 523(a)(8) (2000).

33. Merillat’s student loans constitute loans within the meaning of section 523(a)(8). Section 523(a)(8), therefore, guides the inquiry of whether Merillat’s student loans are dischargeable. Accordingly, the legal standard which Merillat must meet to have her student loans declared dischargeable is the “undue hardship” test. *See id.*

34. To decide the issue of “undue hardship,” this court first applies the so-called *Brunner* test. *See Nary v. The Complete Source (In re Nary)*, 253 B.R. 752, 761 (N.D. Tex. 2000); *Educational Credit Mgmt. Corp. v. McLeroy (In re McLeroy)*, 250 B.R. 872, 878-79 (N.D. Tex. 2000). Under the *Brunner* test, a debtor satisfies the undue hardship test by establishing:

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

35. The first element of the *Brunner* test requires a determination of what constitutes a “minimal standard of living.” *Id.* While a definition has yet to be definitively provided, “[c]ourts universally require more than temporary financial adversity and typically stop short of utter hopelessness.” *In re Nary*, 253 B.R. at 761, quoting *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir. 1998). “Mere financial adversity is insufficient, for that is the basis of all petitions in bankruptcy. On the other hand, the Bankruptcy Code does not require that the debtor live in abject poverty before a student loan may be discharged.” *Yapuncich v. Montana Guaranteed Student Loan Program (In re Yapuncich)*, 266 B.R. 882, 888 (Bankr. D. Mont. 2001)(internal quotations omitted).

36. As stipulated, Merillat’s expenses are minimal. As of the petition date, Merillat’s schedules reflected that her net take-home exceeded her expenses by \$203.45. Plaintiff’s Ex. 6. Additional expenses of \$100.00 for home maintenance, \$100.00 for miscellaneous expenses, \$100.00 for “legal,” and \$25.00 for “[u]nreimbursed teaching” cause her expenses to exceed her net income by \$121.55. Merillat did not testify; these additional expenses were not explained and appear, to some extent, to be self-serving. Apart from the additional expenses, Merillat’s expenses cover housing (and utilities), food, clothing, medical, transportation, insurance (renter’s and auto), and taxes. She allocates nothing for recreation or charitable donations. On the income side, payroll taxes, social security insurance, and retirement are netted out from her gross income of \$2,038.00. Upon discounting the \$325.00 of “additional” expenses, Merillat’s life style, before repayment of any portion of the student loans, is modest with no extravagances. Moreover, no allocation is made for any unforeseen expenses. The requirement that she pay an additional \$717.60 a month against her student loans, the payment required under the Standard Plan, would adversely affect her standard of living. She would be forced to sacrifice on certain basic necessities – food, clothing, housing, and/or health insurance. While perhaps not “abject poverty,” it would place her below a minimal standard of living. This conclusion is not altered if either the Extended Plan (\$461.36 a month) or the Graduated Plan (\$402.29 a month) are applied. In either case, Merillat’s expenses would well exceed her income. Under the available options for repayment of the student loans, Merillat’s current income and expenses will not allow her to maintain a minimal standard of living and she therefore meets the first prong of the *Brunner* test.

37. The court does not consider the Income Contingent Repayment Plan. It provides for initial monthly payments of \$185.27, which is recalculated annually based on Merillat's income and the "Poverty Guidelines" for her as determined by the United States Department of Health and Human Service. Plaintiff's Ex. 5. The term is 25 years. *Id.* Under this plan, the estimated total payments are \$117,117.25. *Id.* However, the monthly payments cover interest only as the principal is not reduced. *Id.* At the conclusion of the term, the principal balance is discharged. *Id.* This does not repay the loan and is not therefore considered in determining whether repayment of the loan constitutes undue hardship.

38. The second prong of the *Brunner* test requires that the court determine whether additional circumstances exist indicating that Merillat's state of affairs is likely to persist for a significant portion of the repayment period of her student loans. *See Brunner*, 831 F.2d at 396. These circumstances must strongly suggest that Merillat will be unable to repay over any extended period of time. *See In re Nary*, 253 B.R. at 765.

39. Merillat does not have realistic prospects of significantly increasing her income. *See* Plaintiff's Ex. 7. Merillat cannot, at present, obtain employment as a teacher outside of Dumas. She should receive a salary increase of \$233.00 per month after seven years of further employment. Plaintiff's Ex. 7. Common sense dictates that her expenses for basic necessities will likewise increase. While predicting Merillat's future financial situation is somewhat speculative, the court concludes that, assuming repayment under any of the three repayment plans, Merillat meets the second prong of the *Brunner* test.

40. Under the third prong of the *Brunner* test, the debtor must have made a good faith effort to repay the loan. "Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses." *In re Nary*, 253 B.R. at 768 (internal quotations omitted). While no explanation was given why Merillat never received a master's degree, the parties have stipulated that Merillat is fully employed in her chosen profession and that she has minimized her expenses. Significantly, Merillat has paid \$12,547.13 since May 1995 toward her student loans, and her student loans are not currently in default. In addition, the court concludes that Merillat has not misused bankruptcy protection and student loans by, for example, filing for bankruptcy immediately after graduation and thereby absolving herself of her student loan obligations. *See In re Nary*, 253 B.R. at 768. The court therefore concludes that Merillat has met the good faith element of the *Brunner* test.

### C. Partial Discharge

41. As stated, the court's analysis of the first two prongs of the *Brunner* test assumes the repayment periods, and resulting monthly payments, under each of the three possible repayment plans – the Standard Plan, Extended Plan, or Graduated Plan. However, Merillat is certainly not destitute and can pay something against her student loans. In this regard, the court is guided by the District Court in *In re Nary*, which, in adopting the approach taken by the Sixth Circuit in *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998), held the bankruptcy court may grant a partial discharge of student loans where the undue hardship requirement is met as to part, but not all, of a student loan. *In re Nary*, 253 B.R. at 767.<sup>1</sup> See also *Yapuncich v. Mont. Guaranteed Student Loan Program (In re Yapuncich)*, 266 B.R. 882, 893-94 (Bankr. D. Mont. 2001); *Garybush v. U.S. Dep't of Educ. (In re Garybush)*, 265 B.R. 587, 592 (Bankr. S.D. Ohio 2001); *Logan v. N.C. State Educ. Assistance Auth. (In re Logan)*, 263 B.R. 796, 799 (Bankr. W.D. Ky. 2000). With a partial discharge, the court discharges a portion of the student loans so as to leave an amount which can be paid without undue hardship. See *In re Logan*, 263 B.R. at 799; *Bakkum v. Great Lakes Higher Educ. Corp. (In re Bakkum)*, 139 B.R. 680, 684 (Bankr. N.D. Ohio 1992).

42. Given the holding of *In re Nary*, the court is compelled to consider whether a partial discharge is warranted. In effect, after performing the *Brunner* analysis, the court determines if it is an undue hardship for the debtor to pay part but not all of the loan. A resolution of this follow-up issue may alter the conclusion reached upon a strict application of the *Brunner* test.

43. The granting of a partial discharge under the circumstances of this case reconciles the Bankruptcy Code's general goal of affording debtors a fresh start with the Code's specific policy of making student loans nondischargeable except in extreme cases. See *In re Nary*, 253 B.R. at 760.

44. In fashioning a partial discharge, the court may alter the terms of repayment of the student loans by, for example, discharging a part of the principal, eliminating interest, or postponing payments. See *In re Hornsby*, 144

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<sup>1</sup>In *Hornsby*, the Sixth Circuit concluded that section 105(a) of the Bankruptcy Code empowers the bankruptcy court to consider a partial discharge and to thereby “fashion a remedy allowing the [debtors] ultimately to satisfy their obligations to [the creditor] while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances.” *In re Hornsby* at 440. As noted by the District Court in *In re Nary*, other courts have adopted a different view by taking an “all or nothing” approach. *In re Nary* at 766, citing *In re Taylor*, 223 B.R. 747 (B.A.P. 9th Cir. 1998).

F.3d at 439-40; *In re Yapuncich*, 266 B.R. at 894-95; *In re Garybush*, 265 B.R. at 592. While the court may change the terms of repayment, the partial discharge fashioned by the court must be grounded in the original contract between the parties. *See In re Nary*, 253 B.R. at 766.

45. Merillat is currently on a 10 year payoff schedule under her consolidation agreement. The court therefore adopts a 10-year repayment period.

46. Merillat can pay \$203.00 per month against her student loans. She will have this amount available to service said loans for the next 10 years without jeopardizing her minimal standard of living.

47. A principal amount of \$16,550.00 can be amortized over 120 months at 8.25% interest with monthly payments of \$203.00. *See Joint Pretrial Order* at ¶ 23.

48. Merillat will be able to pay the \$16,550.00 principal as specified above without undue hardship. The remaining balance will be discharged.

#### CONCLUSION

49. Accordingly, the court discharges Merillat's student loans to the extent they exceed the amount of \$16,550.00. The \$16,550.00 will not be discharged, but will be paid, with 8.25% annual interest, over 120 months. This will result in a monthly payment of approximately \$203.00. The court will prepare an order.

50. Where appropriate, these conclusions of law shall be considered findings of fact.

SIGNED February 15, 2002.

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ROBERT L. JONES  
UNITED STATES BANKRUPTCY JUDGE