

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

IN RE:	§	
	§	
RICHARD WOODROW MILLS,	§	CASE NO. 01-50721-7
	§	
Debtor	§	

RICHARD WOODROW MILLS,	§	
	§	
Plaintiff	§	
	§	
v.	§	ADVERSARY NO. 01-5033
	§	
PANHANDLE PLAINS HIGHER	§	
EDUCATION AUTHORITY and	§	
TEXAS GUARANTEED STUDENT	§	
LOAN CORPORATION,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Richard Woodrow Mills (Mills) initiated this adversary proceeding against Panhandle Plains Higher Education Authority (Panhandle Plains) and Texas Guaranteed Student Loan Corporation (TGS LC) seeking a determination of the dischargeability of student loans held by Panhandle Plains and guaranteed by TGS LC. Mills asks the court to declare his student loans fully dischargeable, while TGS LC argues that Mills's situation does not rise to the dire level required for a full discharge of student loans, or, in the alternative, that Mills should receive, at most, a partial discharge. Trial was held on December 18, 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

1. Mills filed this Chapter 7 case on June 8, 2001.

2. On July 19, 2001, Mills filed his original complaint initiating this adversary against Panhandle Plains, as the assignee and current holder of the student loan debt owed by Mills, and against TGSLC, as the guarantor of the student loan debt owed by Mills.

3. Mills argues that, pursuant to 11 U.S.C. § 523(a)(8), excepting his student loan debt from discharge would impose an undue hardship on Mills, and that his student loans should therefore be fully discharged. *See* Plaintiff's Complaint at ¶ 5.

4. Panhandle Plains did not answer the complaint or appear at trial. TGSLC answered the complaint, contending that the student loan debt should be declared nondischargeable because Mills has repayment options that do not impose an undue hardship. At trial, TGSLC argued that Mills's economic situation would soon improve, thereby enabling Mills to make payments on the student loans. Alternatively, TGSLC argued that Mills should receive, at most, a partial discharge of the student loans.¹

5. Mills is 51 years old.

6. After being injured as a firefighter, Mills began several years of post-secondary education in hopes of entering a new line of work. To this end, Mills received a bachelor's degree in 1989. From 1989 to 1991, Mills worked towards a Master of Public Administration degree, which he received in 1991. From 1991 to 1992, Mills was in a PhD program, which he did not finish. *See* Plaintiff's Ex. E.

¹Similarly, Mills argued for a partial discharge as an alternative to a finding of nondischargeability.

7. Mills took out student loans to pay for his graduate studies between 1989 and 1992, the first such loan being issued in the last semester of 1989. *See id.* at I. These loans were originally made by Wells Fargo Bank and guaranteed by TGSLC. The loans were subsequently assigned to Panhandle Plains.

8. Mills earned his MPA degree with the intent of becoming a city manager for a small town. The earning potential of such a job would have been sufficient to enable Mills to pay off his student loans. Mills applied for city manager type positions in several West Texas towns, as well as towns in Nebraska, Oregon, and Arizona. He was not offered any such positions and was forced to seek and did obtain employment as a counselor.

9. While Mills has applied for a relatively small number of positions, the court finds that Mills's chosen field of work is limited in the number of available positions, and Mills's degree is similarly limited in its scope. Accordingly, the court finds that Mills has acted with reasonable diligence in seeking employment and attempting to maximize his income.

10. From 1992 through 1997, Mills had several jobs in the counseling field. He worked for Texas Tech University, Lubbock County, and for himself. Through this time, there was also a year and a half interval during which he was unemployed. His annual income fluctuated from a high of approximately \$23,000.00 to a low of approximately \$15,000.00. He was unable to regularly make payments on his student loans. He therefore requested and received deferments and forbearance on his student loans. *See Plaintiff's Ex. I.*

11. Mills consolidated his student loans on August 13, 1997. As part of the consolidation, Mills signed a new promissory note, which capitalized accrued interest, in the original principal amount

of \$37,495.00. *See* Joint Pretrial Order at ¶ VIII.

12. Mills began interest only payments of \$313.00 a month on the consolidated loans in February 1999. The payout term is 15 years, as opposed to the original term of 10 years. Mills last made a payment in November 2000. Mills testified that he cannot continue making these payments and still pay his living expenses.

13. As of December 11, 2001, the total amount owed on the student loans was \$48,047.31, with interest accruing at \$11.53 per day. *See id.* at ¶ III.1.

14. Since January 1998, Mills has been employed by the State of Texas as a vocational counselor for people with disabilities. After receiving a promotion in the summer of 2001, Mills's current gross monthly income is \$2,991.52. *See* Plaintiff's Ex. D. After subtracting out monthly payroll deductions of \$1,283.41, Mills's current net monthly income is \$1,708.11. *See id.*

15. Mills pays \$400.00 a month, taken as a payroll deduction, for court awarded child support for his 15 year old son, arising out of his 1999 divorce. *See id.* Mills's obligation to pay this child support ceases May 2004, when his son graduates from high school. He will then have an additional \$400.00 per month in disposable income.

16. Mills has no dependants other than his son.

17. Mills's monthly expenses are \$1,407.50. *See id.* at B. Mills's expenses are reasonably necessary to maintain a minimal standard of living so that his needs, namely food, shelter, clothing, and medical treatment, are met.

18. Mills lives with his girlfriend, thereby saving on housing expenses. Mills pays her \$185.00 in rent per month, as well as his share of utilities. He testified that this living arrangement is not

permanent; in fact, he does not expect this living arrangement to continue much longer. Mills's housing costs will likely increase.

19. Allowable expenses for housing and utilities for a family of two or less living in Lubbock County is, according to the IRS, \$749.00. *See id.* at H. Currently, Mills spends approximately \$355.00 for rent and his share of utilities.

20. After two years, Mills will be eligible for merit promotions. In addition, he will likely receive cost of living increases in his salary, as well as small bonuses, longevity awards, and other minimal salary supplements. In addition to the potential for vertical promotions, Mills is eligible for lateral promotions, or transfers to different positions, within the State of Texas employment system.

21. Both Mills's income and living expenses will increase over the years.

22. If Mills retires at age 62, his monthly Social Security benefits will total \$636.00, assuming his current earnings rate. *See id.* at K. At the age of 66, such benefits will total \$919.00, and at age 70, such benefits will total \$1,302.00. *See id.* Mills will be eligible to begin receiving benefits under his employer-sponsored retirement plan at the approximate age of 66. These benefits will total \$766.89 when Mills will be 60 years of age, and they will continue to grow as long as Mills stays employed by his current employer. *See id.* at J. If Mills retires at the age of 66, he will, at a minimum, be eligible for approximately \$1,685.00 in monthly retirement benefits from the combined Social Security and employer sponsored benefits.

23. Mills could pay off his student loans by paying \$410.00 per month for the next 25 years – an option offered to Mills by TGSLC at trial. Under this option, Mills would pay off the student loans at the age of 76.

24. Mills will likely retire in his late 60's.

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

Conclusions of Law

A. Jurisdiction

26. 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

27. 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).

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

29. To decide the issue of “undue hardship,” this court first applies the *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).

30. 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).

31. Mills’s take-home pay is \$1,708.11. His monthly expenses are \$1,407.50. This includes approximately \$355.00 for his share of rent and utilities (including \$37.00 for cable), \$250.00 for food, \$165.00 for transportation, \$87.00 for car insurance, and a \$325.00 car payment. The expenses are minimal and leave little or no room for unforeseen expenses which certainly will occur. TGSLC did not question the propriety or necessity of any of Mills’s expenses. Mills testified that his present living arrangement is not long term. Common sense dictates that his expenses for housing will likely increase. Accordingly, under the best case scenario, Mills has approximately \$300.00 a month to pay against his student loans. Under the worst case, he can pay nothing.

32. The current “repayment” plan provides for interest only payments of \$313.00 a month. This does not repay the loan. Assuming repayment, i.e. payment of interest and reduction of principal each month, Mills falls well short – at least for the next two-plus years. Repayment would require that

he sacrifice on certain minimal needs such as food, housing, clothing, or medical treatment.

33. The court therefore concludes that Mills satisfies the first prong of the *Brunner* test.

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

35. While predicting Mills's future financial situation is somewhat speculative, the court concludes that Mills fails to satisfy the second prong of the *Brunner* test. In May 2004, when his son graduates, Mills's take-home income increases by \$400.00 per month, without any concomitant increase in expenses. While forcing Mills to make student loan payments under his current circumstances would jeopardize a minimal standard of living, requiring he pay \$400.00 a month after May 2004, does not. Accordingly, additional circumstances do not exist indicating Mills's state of affairs is likely to persist. Indeed, his circumstances should improve.

36. As to the third prong of the *Brunner* test, the court concludes that Mills has made good faith efforts to repay his student loans. "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). Mills made reasonable efforts to obtain employment as a city manager and to maximize his income; his inability to do so is likely due to factors other than a lack of good will or reasonable diligence. Mills has made payments against the loans. Mills has not misused bankruptcy protection and student loans by, for example, filing for bankruptcy immediately after graduation and

thereby absolving himself of his student loan obligations. *See id.*

C. Partial Discharge

37. Mills satisfies prongs one and three of the *Brunner* test; he fails to meet the second prong, however. The question, then, is whether denial of discharge of the student loans is required. The problem is that Mills is unable to pay in the near future. The court therefore considers the propriety of a partial discharge. In this regard, the court is guided by the District Court in *In re Nary*, which, in adopting an approach taken by the Sixth Circuit in *Tennessee 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;² *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).

38. Given the holding of *In re Nary*, the court is compelled to consider whether a partial

²In *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).

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. For example, if a debtor satisfies all three prongs of the *Brunner* test, the *Brunner* test dictates discharge in full of the student loan. However, the granting of a partial discharge recognizes a debtor's ability to pay a portion of the loan. To the contrary, as in this case, if the debtor fails to meet the *Brunner* test, *Brunner* requires denial of discharge. But if it is an undue burden to pay a portion of the student loan, as it is here for the next two-plus years, a partial discharge of the amounts the debtor is unable to pay equitably modifies the result reached under *Brunner*.

39. 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.

40. In fashioning a partial discharge, the court is free to alter the terms of repayment of the student loans by, for example, discharging a part of the principal, eliminating interest, and postponing payments. *See In re Hornsby*, 144 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 so alter the terms of repayment, the partial discharge that the court fashions must be grounded in the original contract between the parties. *See In re Nary*, 253 B.R. at 766.

41. In this regard, the court notes that Mills consolidated his student loans in August 1997. The consolidated loans were to have a 15 year payoff period. After obtaining a forbearance, Mills made payments from February 1999 through November 2000. Mills therefore made 22 payments out

of a scheduled 180 monthly payments. This leaves 158 payments remaining under the consolidation agreement.

42. Because the court finds that Mills will be unable to pay anything against the loans until May 2004, the court will suspend payment of the loans until that date, with the first payment due in June of 2004.

43. As of June 2004, Mills can pay \$400.00 per month on the student loans, without jeopardizing a minimal standard of living.

44. Accordingly, the court will restructure the payments on the student loans as follows: (1) no payments until June 2004; (2) thereafter, beginning in June 2004, and each month thereafter, Mills shall pay \$400.00 per month on the loans for 158 months. TGSLC is instructed to determine a new principal amount based on 158 monthly payments of \$400.00 each, beginning June 2004, with interest accruing at the current non-default interest rate. The balance – that being the amount by which the present, actual payoff under the loans exceeds the new principal amount – will be discharged.

Conclusion

45. Upon the foregoing, the court concludes that Mills will be granted a partial discharge. Mills is relieved of payments until June 2004. He is then required to pay \$400.00 a month for 158 months against the student loans. TGSLC shall determine a new principal amount based on such payments with interest at the current non-default rate. The balance of the student loans is discharged.

46. The court will prepare an order.

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

SIGNED February 21, 2002.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE