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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:)
LYNDA M. BOOTH,)
Debtor.)
_____)
LYNDA M. BOOTH,)
Plaintiff,)
vs.)
U.S. DEPARTMENT OF EDUCATION,)
WASHINGTON STUDENT LOAN FINANCE)
ASSOCIATION, ACS, INC., and EDUCATIONAL)
CREDIT MANAGEMENT CORPORATION, as)
a substituted party,)
Defendants.)
_____)

Case No. 08-03493-PCW7

Adv. No. 08-80130-PCW

MEMORANDUM DECISION RE:
UNITED STATES OF AMERICA'S
MOTION FOR SUMMARY
JUDGMENT

PATRICIA C. WILLIAMS, Presiding Judge

THIS MATTER came before the Court on Defendants' Joint Motion for Summary Judgment seeking a finding that, as a matter of law, plaintiff/debtor's student loans are not dischargeable under 11 U.S.C. § 523(a)(8). All parties stipulate that the material facts are uncontested for the purpose of this motion.

Debtor commenced this adversary proceeding on November 21, 2008, seeking a discharge of her student loan obligations held by the U.S. Department of Education and by Educational Credit Management Corporation. As of 2008, she owed \$160,606.42. Prior to commencing her Chapter 7, the debtor had participated in the Income Contingent Repayment Loan Program (ICRP). The defendants filed a Motion for Summary Judgment in the adversary proceeding seeking a determination that if participation in the ICRP results in a zero dollars per month repayment schedule, as a matter of law, undue hardship as required by 11 U.S.C. § 523(a)(8) does not exist.

FACTS

With the utilization of student loans, the plaintiff attended Eastern Washington University from

1 the fall of 1985 through the summer of 1990 and obtained a Bachelors degree in Sociology with a minor
2 in Spanish. Her degree resulted in full time employment. She again utilized student loans to enroll in
3 a Masters program between 1994 and 1996, at which time her studies were disrupted. She again enrolled
4 in the Masters degree program between 2003 and 2004, but did not complete the program. The debtor
5 is currently 45 years of age and employed part time utilizing her degree in Sociology with net income
6 of \$927.23 per month. The reasons for the failure to complete the Masters program and the less than
7 full time employment are not germane to the current motion. In this situation, interest on the obligation
8 accrues at a greater monthly rate than the debtor's monthly income of \$927.23. The last payment debtor
9 made on her student loans was in March, 2003, and since acceptance in the ICRP, her monthly payment
10 has been zero dollars.

11 ISSUE

12 Since the debtor's participation in the ICRP results in no current requirement to make a monthly
13 payment, is the debtor precluded from demonstrating that, based upon current income and expenses, she
14 cannot maintain a minimal standard of living if forced to repay the loan?

15 DISCUSSION

16 11 U.S.C. § 523(a)(8) exempts student loan obligations from discharge “. . . unless excepting
17 such debt from discharge under this paragraph would impose an undue hardship on the debtor and the
18 debtor's dependents . . . ”

19 The Ninth Circuit has adopted the Brunner test to determine whether undue hardship exists.

20 An educational loan is dischargeable in bankruptcy if ‘excepting such debt from
21 discharge . . . will impose an undue hardship on the debtor and the debtor's dependents.’
22 *11 U.S.C. § 523(a)(8); Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th
23 Cir. 2001).* To determine if excepting student debt from discharge will impose an undue
24 hardship, we apply the three-part test first enunciated by the Second Circuit in *Brunner*
25 *v. New York State Higher Education Services Corp. (In re Brunner), 831 F.2d 395, 396*
26 *(2d Cir. 1987). United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108,*
1112 (9th Cir. 1998). Under the *Brunner* test, the debtor must prove: (1) that she cannot
maintain, based on current income and expenses, a “minimal” standard of living for her-
self 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. *Id. at 1111; In re Brunner, 831 F.2d at 396.*

27 In re Saxman, 325 F.3d 1168, 1172-1173 (9th Cir. 2003).

28 The debtor bears the burden of persuasion as to each prong of the Brunner test. Rifino, supra;

1 In re Carnduff, 367 B.R. 120 (9th Cir. BAP 2007).

2 The Motion for Summary Judgment relates only to the first prong of the Brunner test. The parties
3 have agreed that consideration of the second and third prongs of the test, including the relationship
4 between participation in ICRP and those prongs, is not now at issue. The Brunner court did not consider
5 a borrower's opportunity to participate in any student loan deferral program when it first articulated the
6 test to determine undue hardship. Defendants argue that the first prong of the Brunner test cannot be met
7 if a debtor's participation in the ICRP results in a zero monthly payment on student loans.

8 To decide the issue, a comparison must be made between the relief granted debtors under the
9 Bankruptcy Code and the relief allowed under the ICRP. It is also necessary to compare the requirements
10 imposed to obtain the appropriate relief.

11 **RELIEF UNDER 11 U.S.C. § 523(a)(8)**

12 The Bankruptcy Code focuses on repayment and discharge of debt. The Code provides for a
13 discharge which relieves that debtor from any further personal liability for the obligation. As the
14 obligation is extinguished, no action can be taken to collect or realize upon the discharged debt.
15 11 U.S.C. § 524. The granting of a discharge is effective immediately upon the entry of an order of
16 discharge, typically 62 days after the date of the originally scheduled first meeting of creditors. 11 U.S.C.
17 § 727. The granting of the discharge is the fundamental building block of the goal of providing honest,
18 but unfortunate, debtors with a fresh start. The relief provided under § 523(a)(8), assuming undue
19 hardship is proven, allows a person immediately after discharge to manage their financial lives without
20 the burden of a student loan obligation. It may also result in a debtor receiving a "partial discharge," i.e.,
21 some portion of a student loan obligation may be discharged with a continuing duty to repay the non-
22 discharged portion. Saxman, supra.

23 **RELIEF UNDER ICRP**

24 The relief provided under ICRP differs greatly from the relief provided by § 528(a)(8). The ICRP
25 is an administrative regulation of the Department of Education found at 34 C.F.R. § 685.209 and adopted
26 under the authority of 20 U.S.C. § 1087e (d)-(e) (2000). Simplistically, the ICRP requires a borrower to
27 repay under one of two options. The first option is repayment based upon a 12 year amortization derived
28 by application of an annually adjusted percentage of the debtor's adjusted gross income. The second

1 option is repayment of the amount of 20% of debtor's annually adjusted discretionary income, which is
2 defined as adjusted gross income less applicable federal poverty level guidelines. 34 C.F.R. § 685.209
3 (a)(2), (3), (6). If the borrower is unable to fully repay the loans on either basis, the repayment period
4 is extended to a maximum of 25 years. During the repayment period, the obligation continues to exist.
5 The debtor would have to list the obligation on a credit application or financial statement. It would
6 appear on the debtor's credit report. During the repayment period, interest continues to accrue on the
7 obligation and the debtor is required to annually report income to ICRP. 34 C.F.R. § 685.209 (a)(5), (7)
8 and (b)(7).

9 Application of the ICRP does not result in a discharge of the debt nor relieve the debtor from
10 personal liability on the debt. Further action may, and will, be taken to collect the obligation, even if that
11 action is simply requiring the debtor to provide annual financial information to the Department of
12 Education. The ICRP does not grant a discharge, but lapse of a period as long as 25 years may result in
13 cancellation or forgiveness of the debt. There is no provision in the regulation for "partial" cancellation
14 or forgiveness of the obligation. Unlike a discharge, cancellation or forgiveness of a debt results in a tax
15 liability. As interest accrues during the 25 years or lesser repayment period, the amount of debt cancelled
16 will be quite large. The resulting tax liability would not be subject to discharge in a later bankruptcy
17 proceeding.

18 The focus of the ICRP is on deferral, not discharge, of debt. This is the antithesis of a fresh start.
19 Congress has provided bankruptcy debtors relief which is not provided in the ICRP regulations.¹
20 Compliance with ICRP regulations will not result in the same relief which can be granted by the courts
21 under 11 U.S.C. § 523(a)(8).

22 **THE STANDARDS FOR UNDUE HARDSHIP DIFFER**
23 **FROM THE STANDARDS FOR COMPLIANCE WITH ICRP**

24 Not only is the relief under the Bankruptcy Code different from the relief granted by the
25 Department of Education, the standards used to assess whether the relief is appropriate also differ.

26 _____
27 ¹A discharge of certain student loans can be granted by the Department of Education if specific
28 conditions are met. For example, 34 C.F.R. § 674.33(g) discharges a Perkins student loan if the school
closes while the student was enrolled or within 90 days of the student's withdrawal from the school.

1 Under the first prong of the Brunner test, the debtor must demonstrate that she cannot maintain
2 a minimal standard of living at the present time if required to repay the loan. This burden requires more
3 than a simple mathematical calculation of income minus expense. The court must consider whether it
4 would be unconscionable to require the debtor to reduce expenses or acquire more income in order to
5 make payments in an amount which would be reasonably sufficient to service part or all of the obligation.
6 Carnduff, supra. In reaching a conclusion as to whether undue hardship exists, the court considers the
7 reasonableness or necessity of all expenses including private school tuition for children, the type of
8 vehicle driven by the debtor and payment required for it, and personal expenses such as clothing and
9 tanning salons. Rifino, supra. Comparisons are made with expenses allowed under Chapter 13 Trustee
10 guidelines for debtor's expenses as well as IRS guidelines. In re Cota, 298 B.R. 408 (Bankr. D. Ariz.
11 2003). As to the income side of the equation, bankruptcy courts do not just compare a debtor's
12 household income to federal poverty level guidelines. Rather, bankruptcy courts consider, in both the
13 first and third prong of the Brunner test, whether the debtor historically has maximized, or in the future
14 will be able to maximize income. In re Geyer, 344 B.R. 129 (S.D. Cal. 2006); In re Birrane, 287 B.R.
15 490 (9th Cir. BAP 2002); In re Nascimento, 241 B.R. 440 (9th Cir. BAP 1999). Undue hardship under
16 the Bankruptcy Code is determined at the time of hearing based upon the evidence which then exists and
17 that determination is final.

18 Unlike undue hardship which requires a case-by-case analysis, application of ICRP is determined
19 by a formula. Application of ICRP is an administrative procedure subject to the administrative rule-
20 making process. Calculations under the formula, such as percentage of adjusted gross income, may
21 change on an annual basis. Application of ICRP and the determination of the appropriate monthly
22 payment repeats on an annual basis for as long as 25 years. In contrast with the Bankruptcy Code's
23 determination of an ability to repay, the formulaic administrative process does not consider the
24 reasonableness of a debtor's expenses nor the ability to maximize income. Thus, issues required to be
25 addressed under the first prong of the Brunner test, are not considered in the administrative process.

26 **ICRP SHOULD NOT OPERATE TO REPEAL 11 U.S.C. § 523(a)(8)**

27 A debtor's participation in ICRP is relevant to much of the analysis conducted by a bankruptcy
28 court to determine if undue hardship exists. However, this current motion is limited to determining as

1 a matter of law, if a zero monthly payment plan under ICRP prevents a debtor from demonstrating an
2 inability, based on current circumstances, to repay a student loan obligation. Granting this motion would
3 replace a court's conclusion regarding permanent relief from the underlying obligation with an
4 administrative agency conclusion that repayment of a debt should be deferred. Terrence L. Michael &
5 Janie M. Phelps, Judges?! - We Don't Need No Stinking Judges!!!: The Discharge of Student Loans In
6 Bankruptcy Cases And The Income Contingent Repayment Plan, 38 TEX. TECH L. REV. 73 (2005).

7 Holding that an administrative decision to temporarily defer monthly repayments precludes
8 application of the statutory undue hardship standards usurps the Bankruptcy Code. It destroys the
9 jurisdiction of the bankruptcy court and would not allow any exercise of discretion by a bankruptcy
10 judge. Granting the defendants' motion would effectively replace a statutory case-by-case analysis
11 potentially relieving a debtor from liability with an administrative formula which potentially defers
12 liability.

13 CONCLUSION

14 ICRP undoubtedly provides benefit to borrowers who do not qualify or do not desire to
15 commence a bankruptcy proceeding. Once a bankruptcy proceeding is commenced, the debtor's financial
16 situation must be analyzed in accordance with the Code and the entitlement to a fresh start must be
17 determined by application of the Code. 11 U.S.C. § 523(a)(8) establishes the relief available to debtors
18 and the considerations for granting that relief as it relates to student loans. Should public policy require
19 the replacement of the relief set forth in § 523(a)(8) with participation in the ICRP, it is for Congress to
20 express that public policy by amending § 523(a)(8).

21 Accordingly, defendants' Motion for Summary Judgment is **DENIED**.

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27 Patricia C. Williams
28 Bankruptcy Judge

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