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Hon. Marc L. Barreca
Chapter 7
Hearing Date: May 27, 2011
Hearing Time: 09:30 a.m.
Response Date: May 20, 2011
Hearing Location: Room 7106
US Courthouse, Seattle WA

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: Debtor. _____ , Plaintiff v. U.S. DEPARTMENT OF EDUCATION, Defendant. _____	Case no. 10-20018 Chapter 7 Adv. Proc. No. A10-01644 MLB MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

Debtor comes now before this court, through counsel, seeking summary judgment on her adversary action to discharge student loans. She argues that the Bankruptcy Code, as revised by Congress in 2005, contains a definition of "undue hardship" that, under accepted rules of statutory construction, provide sufficient guidance to allow a finding by this court that the debtor's student loans do indeed pose an "undue hardship" and should be discharged pursuant to

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this motion.

II. QUESTIONS PRESENTED

Does a debtor with $80,000.00 in student loans and approximately $25,000.00 in IRS debt, with income of $3,600.00 per month insufficient to meet her living expenses of $4,477.00 and debt obligations face "undue hardship," as required under Bankruptcy Code Section 523(a)(8)?

Is the term "undue hardship" as specified in §523(a)(8) equivalent to the term "undue hardship" as defined in §524?

Answers: Yes and yes.

III. FACTS

A. Background

Iisha XXXXX is a single woman who has worked with autistic and other vulnerable and disabled children since finishing her bachelor's degree in 1999. She is approved by the Behavior Analyst Certification Board to work as a Board Certified Associate Behavior Analyst (BCABA), which allows her to work as a contract-based in-home Behavior Therapist. BCABA contract work requires Ms. XXXXX to manage her own employment taxes and similar obligations. Unfortunately, Ms. XXXXX has not managed the business side of her career adequately, and owed approximately $20,000.00 to the IRS when she filed for Chapter 7 bankruptcy in August, 2010. Her 2010 taxes will add to this liability, for a likely total IRS debt of approximately $25,000. The exact total that will be owed after she files her 2010 taxes is uncertain.

In 2004, while working as a self-employed BCABA, Ms. XXXXX returned to school to pursue her Masters Degree in Counseling Psychology, which she earned from City University, a for-profit institution, in 2007. Her goal was and is to work as a counselor specializing in

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disabled children and their families. While she was pursuing her Masters, her student loan ballooned from approximately $20,000.00 to approximately $80,000.00.

Ms. XXXXX's graduate education prepared her to work as a therapist, a goal she maintains today. A necessary step for an unlicensed therapist is to work in a supervised capacity in a community mental health agency. (This requirement is recent, resulting from a change in Washington law in 2010.) In an effort to put her master's degree to work and begin the career that she had trained for, Ms. XXXXX accepted a job with Sound Mental Health in mid 2010, providing full-time therapy services. She earned a wage of $15.85 per hour.

Ms. XXXXX maintained several of her BCABA clients, with whom she worked on week nights and weekends. While she was working these two jobs, Ms. XXXXX filed for Chapter 7 bankruptcy protection, surrendering her vehicle and discharging unsecured debt that was too much of a burden. At the time she filed for bankruptcy, the debtor-plaintiff's Schedule I showed income from the two jobs described above.

Ms. XXXXX subsequently suffered what can only be called a breakdown resulting from working at two emotionally demanding jobs. She saw no choice but to leave her position at Sound Mental Health and return to the BCABA contract work that she was more familiar with. Her goal of working as a therapist is again on hold, since she cannot possibly make her debt payments while earning $15.00-$17.00 per hour. BCABA contract work brings in a little more income, but still leaves her unable to maintain a minimum standard of living and meet her existing debt obligations. In short, she cannot survive financially on what she earns at one job, and cannot survive emotionally working two jobs. Neither job, alone, provides enough income to pay her living expenses and remaining debt.

B. Facts Specifically Relevant to This Inquiry

Ms. XXXXX's income, as scheduled in her Bankruptcy filing, was artificially distorted by the fact that she held two jobs at the time of her filing. Following her breakdown in November, 2010, she gave notice to Sound Mental Health, and sought counseling. She spent

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December recuperating (during which time her health insurance lapsed), and began to build her BCABA clientele back up in January, 2011.

At present, Ms. XXXXX is maximizing her income by working a full slate of BCABA clients, and earning approximately $3,600.00 (gross) per month. She sees clients Monday through Friday in the afternoon and early evening, and all day Saturday and Sunday. Factoring in preparation time and travel to meet with clients, Ms. XXXXX's schedule has her working approximately 40 hours per week. Though it would likely be possible for Ms. XXXXX to schedule more clients, her recent burnout and breakdown illustrated the fact that working a more-than-full-time schedule is not a sustainable option for her.

The $3,600.00 current income figure is subject to decrease without warning if clients cease treatment. Ms. XXXXX has no retirement plan or benefits and is now purchasing health insurance for herself. Her income, while modest, would almost cover expenses but for the significant payments she is bound to make for the next few decades to pay for her student loans, plus the payments she must make to address her IRS debt.

Ms. XXXXX's monthly expenses are summarized as follows:

Income	$3,600.00
Housing	($1,100.00)
Cable and Internet	($91.00)
Phone	($125.00)
Puget Sound Energy (heat)	($70.00)
Car payment	($224.00)
Auto insurance	($100.00)
Fuel	($350.00)
Work materials	($35.00)
Professional Liability Insurance	($25.00)
Tax on contract Earnings, est. 20%	($720.00)
Food	($400.00)

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Individual Health Insurance	($217.00)
Pet Insurance	($35.00)
Dog food / supplies	($100.00)
Gym membership	($35.00)
Personal care	($50.00)
Clothing and personal items	($50.00)
Recreation	($50.00)
Retirement savings	($50.00) (0 actually applied at present)
Debt payment - student loan $80K balance	($400.00)
Debt payment - IRS [$20K + 2010 est]	($350.00)
Net Income	($877.00)

Post-Bankruptcy Debt Payments: $750

Student loan ($80,000 balance): $400[1]

IRS ($20,000 + *[2010 taxes]*): $350[2]

Earnings - expenses:

3,600.00 Earnings

- 4,477.00 Expenses including debt service

- 877.00 Net income[3]

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[1]Assuming a 5% interest rate, Ms. Gwynn will pay off her $80,000.00 in student loans in 35 years with a monthly payment of $403.75. She will be 68 years old.

[2]Assuming aggressive efforts to pay off the IRS debt, possibly within a Chapter 13 to stop interest from accruing further.

[3]Ms. Gwynn's declaration contains the same numbers as above, but the net income is different due to a mathematical error.

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The above analysis reveals that Ms. Gwynn's income is less than her expenses, taking into account the student loan and IRS debt she owes. Plaintiff asks for a determination that her financial situation, as laid out herein, rises to the standard of "undue hardship"

IV. ANALYSIS

Section 523(a)(8) provides that student loan debts are not dischargeable "unless excepting such debt from discharge... would impose an **undue hardship** on the debtor and the debtor's dependents..." [Emphasis added.]

The term "undue hardship" is not defined in Section 523 of the Bankruptcy Code, and courts have struggled to come to terms with what the term means in the student loan context.[4] However, every test was an attempt to define something Congress had left to the discretion of the courts.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) overhauled the Bankruptcy Code, and supplied the needed guidance. BAPCPA adopted a new definition of "Undue Hardship" The revised code added language to Section 524. Amended §524(m) now reads as follows:

> It shall be presumed that such agreement is an **undue hardship** on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. [Emphasis added.]

Significantly, the same phrase, "undue hardship" appears in both Sections: 523(a)(8) and

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[4]The 9th Circuit has adopted a test first set out in *Brunner v. New York State Higher Education Services Corp*., 831 F.2d 395 (2nd Circ. 1987), adopted in this circuit in *United Student Aid Funds, Inc. V. Pena (In re Pena),* 155 F.3d 1108 (9th Cir. 1998).

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524.

Where Congress uses the same language in different parts of the same act, it is presumed to have the same meaning in both places. *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986). It is a "normal rule of statutory construction... that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Id.* In *Sorenson*, the Court found that the term "overpayment" as it relates to the earned income tax credit (section 6402(a)) held the same meaning as "overpayment" that can be seized to offset past due child support assigned to the State (section 6402(c)).

Case law establishes that this rule– that identical words used in the same act are intended to have the same meaning– has its logical limitations. For instance, in *Atlantic Cleaners & Dyers Inc. v. United States*, 286 U.S. 427, 52 S.Ct. 607 (1932), business owners accused of conspiring to restrain trade argued that their business (cleaning, dying and renovating clothes) could not be subject to the Sherman Anti-Trust Act because their trade was not of a sort that would be subject to the commerce clause of the Constitution. Because Section 1 of the Sherman Anti-Trust Act rested solely on the Commerce Clause definition of trade, then (according to the Atlantic Cleaners and Dyers), the subsequent section (Section 3) being enforced against them by the United States government should be similarly constrained and, therefore, unenforceable against them. *Id.* at 432.

The Supreme Court disagreed, ruling that the term "restraint of trade or commerce" could relate to interstate and international trade in Section 1, and enjoy broader interpretation in Section 3. The court recognized that the underlying legislative intent of the Sherman Anti-Trust Act was to remedy the "mischief" of the period leading up to the creation of the Act, noting that "Congress meant to deal comprehensively and effectively with the evils resulting from [restraints on trade]... and to that end to exercise all the power it possessed." *Atlantic Cleaners and Dyers*, at 435. In other words, the court declined to allow a loophole to stand that would have nullified

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the power of the act as to any business whose scope is entirely within its home state or district.

Legislative intent and the purpose of the language in question came into play once more in *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 55 S.Ct. 50 (1934). Again, the Court determined that different meanings could be found because "the words, though in the same act, are found in **such dissimilar connections** as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering* at 87 (emphasis added). The court reasoned that in one part of the Revenue Act of 1926, the term "interest on interest bearing obligations" was to "aid the borrowing power of the federal government," while the other provision used the same term "to produce revenue." *Id.* The "obviously different Statutory aim" of the sections, reaching to the distinct purposes of the Act in question, persuaded the court that normal rules of construction should not apply.

Here, the phrase "undue hardship" crops up in notably *similar* contexts. The phrase relates to the same subjects and substantially identical inquiries. Specifically, "undue hardship" in reaffirmation and student loan inquiries both refer to the condition that will be caused to the debtor as a result of failure to discharge the debt in question. In one case, the debtor is reaffirming a consumer loan (typically an auto loan); in the other case, the debtor is seeking relief from continued liability on student loans.

The fact that the inquiry comes from two different directions – one where the debtor is seeking to keep the debt, and the other where the debtor is asking to be relieved– should not obscure the fundamental fact that the question is whether the debt in question will pose an unacceptable burden to the debtor and his dependents. In both cases, this court is empowered to rule on whether the debtor will go forward with a particular debt burden. The court's ruling sets the stage for the debtor's "fresh start." The principal purpose of the Bankruptcy Code is to grant a "'fresh start' " to the " 'honest but unfortunate debtor.' " *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367, 127 S.Ct. 1105 U.S. (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)).

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"It is presumable that Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Here, we ask that a that the court apply a basic rule of statutory construction– that identical words and phrases in a statute have equivalent meaning.

That Congress provided a means– indeed, a formula– to evaluate a claim of "undue hardship" in the reaffirmation context should provide equivalent guidance in the context of student loan litigation. Applying the test laid out in Section 524 of the Bankruptcy Code, "it *shall* be presumed" that the debt in question poses an undue hardship if the debtor's monthly income less the debtor's monthly expenses (laid out in support of this motion in declaration signed by the debtor) is less than the scheduled payments on the debt. The summary of income and expenses in Section III.B., above, clearly shows that Ms. Gwynn's income is not enough to meet her expenses, and that payment would pose an undue hardship.

In BAPCPA, Congress provided a definition of "undue hardship." The specificity with which Congress chose to define "undue hardship" in the comprehensive amendment to the Code leads to the conclusion that *Brunner* and its progeny were rendered obsolete and legislatively overruled. This motion does not attempt or intend to conduct analysis of Ms. Gwynn's situation in light of *Brunner*. A *Brunner* analysis is, by necessity, a multi-faceted and fact-intensive inquiry, appropriate for trial. Ms. Gwynn stands ready to present evidence in support of a *Brunner* inquiry at trial, should the Court deny this motion.

V. CONLCUSION

Iisha Gywnn, debtor-plaintiff in this action, requests this court grant her a discharge of her student loan debt because the debt presents an"undue hardship" as defined by Congress. Such application of the term in question would recognize the virtually identical nature of the inquiry at issue– specifically, the power of the court to determine whether the debtor should be permitted/bound to carry a given debt burden, based on the debtor's ability to pay that debt. The

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answer goes to the heart of the concept of the "fresh start" in bankruptcy.

We respectfully request this court find that for the reasons set forth above, Ms. Gwynn's student loans is an "undue hardship" and should be discharged.

Dated this 26th day of April, 2011.

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