IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	**CHAPTER 7**
	)	
REBA PAMELA FRAZIER	)	**CASE NO. 04-74946**
	)	
DEBTOR.	)	

	)	
REBA PAMELA FRAZIER,	)	
	)	
PLAINTIFF,	)	
	)	**ADVERSARY PROCEEDING**
v.	)	**NO. 05-07015**
	)	
U.S. DEPARTMENT OF EDUCATION,	)	
	)	
DEFENDANT	)	

MEMORANDUM DECISION

In this adversary proceeding, the Chapter 7 Debtor, Reba Pamela Frazier, seeks a discharge of her responsibility for certain educational loans from the U. S. Department of Education ("Department of Education") on the grounds that being forced to pay the loans would subject the Debtor to an undue hardship within the meaning of 11 U.S.C. § 523(a)(8). The Department of Education filed a Motion to Dismiss the Debtor's complaint for failure to exhaust available administrative remedies pursuant to Fed. R. Civ. P. 12(b)(1), made applicable by Fed. R. Bankr. P. 7012(b). For the reasons stated below, the Court will deny the Motion to Dismiss.

FINDINGS OF FACT

On August 17, 1992, Reba Pamela Frazier signed a promissory note to obtain a Stafford Loan to attend Clinch Valley College in Wise, VA. On August 20, 2002, Ms. Frazier consolidated her outstanding loans[1], which resulted in one William D. Ford Federal Direct Consolidation loan[2] in the amount of $19,041.50. The first payment on this loan was due on October 7, 2002. On December 12, 2002, Ms. Frazier submitted a General Forbearance Request to the Department of Education asking to temporarily stop making payments on her loan because she had severe low iron and had barely been able to get out of bed for eight years.[3] The Department of Education granted Ms. Frazier's request on December 30, 2002 and began the General Forbearance on October 7, 2002 and scheduled it to end on September 7, 2003. Accordingly, her first loan payment was due on October 7, 2003.

From October 2003 to May 2004, the Department of Education attempted to collect a loan payment from Ms. Frazier. On May 20, 2004, the Department of Education granted the Debtor an over the phone general forbearance scheduled to end on June 7, 2004.[4] Ms. Frazier was to begin repaying the loan on July 7, 2004. On June 15, 2004, the Debtor submitted an Economic Hardship Deferment Request to the Department of Education asking that

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[1] No evidence of other loans obtained by the Debtor has been provided.

[2] The William D. Ford Federal Direct Loan Program is governed by 20 U.S.C. §§ 1087a-1087j and 34 C.F.R. §§ 685.100-.402.

[3] Ms. Frazier also indicated that she was receiving supplemental security income payments.

[4] The general forbearance was granted because Ms. Frazier asserted financial hardship and willingness but inability to make loan payments.

her loan payments be deferred.[5] The Department of Education granted Ms. Frazier an Economic Hardship Deferment on June 29, 2004 beginning on June 15, 2004 and scheduled to end June 25, 2005.

On December 13, 2004, Ms. Frazier filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. According to the Department of Education, Ms. Frazier has made no payments on her student loans. (Def.'s Mem. 2). Schedule E lists the Department of Education as the only scheduled priority creditor with an unsecured claim of $21,295.92.[6] The Debtor lists no secured debts on Schedule D. The unsecured non-priority claims listed on Schedule F, mainly credit card debt, total $13,050.66. The Debtor's monthly income per Schedule I is $564.00, all of which is Supplemental Security Income (SSI). The Debtor's monthly expenses total $530.00 per Schedule J. An order generally discharging the Debtor was entered on November 23, 2005. The question addressed in this Decision is whether the Debtor is likewise to be relieved of liability for her educational loan obligation.

On January 31, 2005, the Debtor filed this adversary proceeding to have her student loans discharged pursuant to 11 U.S.C. §523(a)(8) alleging that the Debtor, due to an unspecified "undue hardship," is not now and will never be able to repay the student loan. The Department of Education filed a Motion to Dismiss the adversary proceeding for failure to

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[5] The request indicated that Ms. Frazier's monthly income was $564.00 and that she received payments under a federal or state public assistance program, such as Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Food Stamps or state general public assistance.

[6] Ms. Frazier incorrectly listed her student loans as a priority claim on Schedule E. Educational loans are not accorded priority status under 11 U.S.C. § 507(a); thus Ms. Frazier should have listed this debt on Schedule F as a general unsecured non-priority debt.

exhaust available administrative remedies on September 27, 2005.[7] Pursuant to 34 C.F.R. § 685.213, a borrower may be eligible for a total and permanent disability discharge. The Secretary of the Department of Education ("Secretary") makes an initial determination that a borrower is totally and permanently disabled if the borrower "provides the Secretary with a certification (on a form approved by the Secretary) by a physician who is a doctor of medicine or osteopathy and legally authorized to practice in a State that the borrower is totally and permanently disabled . . . ."[8] 34 C.F.R. § 685.213(b). If the Secretary determines that the borrower is totally and permanently disabled, the borrower's loan is conditionally discharged for up to three years from the date the borrower became totally and permanently disabled and collection activity on the loan is suspended. *See* 34 C.F.R. §685.213(a)(1). If during and at the end of the conditional discharge period, the borrower remains totally and permanently disabled and satisfies certain requirements relating income, the loan is discharged.[9] *See* 34 C.F.R. §685.213(a)(2)(I), (c). A hearing was held on the matter on November 8, 2005 and both parties have since submitted written arguments to the Court. The matter is now ready for decision.

[7] Direct loans may be discharged on several grounds: death, total and permanent disability, bankruptcy, closed school, false certification and unauthorized disbursement, and unpaid refunds. *See* 34 C.F.R. §685.212.

[8] Totally and permanently disabled is defined as "[t]he condition of an individual who is unable to work and earn money because of an injury or illness that is expected to continue indefinitely or result in death." 34 C.F.R. §682.200(b).

[9] 34 C.F.R. §685.213(c) provides that "[t]he borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act" and the borrower does not receive a new loan during the conditional discharge period.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. Determination of the dischargeability of particular debts is a "core" bankruptcy proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) may be made "when the allegations of the complaint are facially insufficient to sustain the court's jurisdiction. When confronted with a motion of this kind, the court must proceed as it would for failure to state a claim under Fed. R. Civ. P. 12(b)(6)." *Ward v. IRS,* 2002 U.S. Dist. LEXIS 15824, at *4-*5 (W.D. Va. July 24, 2002) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). "In considering a motion to dismiss, the court accepts as true all well-pleaded allegations and views the complaint in the light most favorable to the plaintiff. *Id.* at *5 (citing *Mylan Labs, Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1993)).

The Department of Education filed a Motion to Dismiss for the debtor's failure to exhaust available administrative remedies pursuant to Fed. R. Civ. P. 12(b)(1). In *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991), the Fourth Circuit made clear that a failure to exhaust administrative remedies under the statutory and regulatory framework could not be a jurisdictional issue under the situation presented in the present dispute. "'Only when Congress states in clear unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision . . . has the Supreme Court held that exhaustion is a jurisdictional prerequisite.'" *Id.* (quoting *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.,* 727 F.2d 1204, 1207 (D.C. Cir. 1984)). Counsel for the Department of Education

admitted in his written argument that "there is no statute or regulation that expressly mandates that the plaintiff exhaust her administrative remedies before she seeks judicial discharge of her student loan debt." (Def.'s Mem. 6.) The Department of Education's counsel has not cited and this Court has been unable to find a statutory provision contemplating an administrative discharge of a Direct loan in the event of disability, although 29 U.S.C. §1087e(e) provides for the income contingent repayment plan, which is not in issue here. Furthermore, the regulation setting forth the grounds for discharge of a Direct loan, 34 C.F.R. §685.212, expressly recognizes the possibility of a discharge via bankruptcy. *See* 34 C.F.R. §685.212(c).

When the provision for a discharge of a student loan outside of the bankruptcy arena is made in a statute, bankruptcy courts have required the debtor to exhaust administrative remedies before seeking a discharge in bankruptcy. For example, the bankruptcy court in *In re Scholl,* 259 B.R. 345, 348-49 (Bankr. N.D. Iowa 2001), determined that 20 U.S.C. §1087(c) precluded it from determining whether the student loan debt would impose an undue hardship on the debtor under 11 U.S.C. §523(a)(8). Section 1087(c) provides that the Secretary of the Department of Education "shall discharge the borrower's liability on the loan" if the borrower is unable "to complete the program in which such student is enrolled due to the closure of the institution or if such student's eligibility to borrow . . . was falsely certified by the eligible institution, or if the institution failed to make a refund of loan proceeds which the institution owed to such student's lender." The *Scholl* court reasoned "this statute does not provide for a private cause of action by a debtor in bankruptcy under Chapter 7 of 11 U.S.C. The Code of Federal Regulations sets forth the procedure that must be followed to seek relief under the foregoing provisions of the Higher Education Act." 259 B.R. at 349 (citations omitted).

Similarly, the bankruptcy court in *In re Barton,* 266 B.R. 922, 924 (Bankr. S.D. Ga. 2001) characterized 20 U.S.C. §1087(c) as an "exclusive administrative remedy." Because no private cause of action is created under the statute and the only recourse the debtor has in bankruptcy court is the undue hardship exception under §523(a)(8), the *Barton* court granted summary judgment in favor of the defendant as to any cause of action asserted under 20 U.S.C. §1087(c). *Id* at 924-25.

In the absence of a statutory provision recognizing the student loan discharge, bankruptcy courts have dealt with the issue of debtors being able to seek a possible administrative discharge of their student loans in several different ways. One court has held that the bankruptcy debtor must exhaust available administrative remedies, specifically a total and permanent disability discharge, before seeking a student loan hardship discharge under the Bankruptcy Code. *See In re VerMass,* 302 B.R. 650, 655, 660 (Bankr. D. Neb. 2003). The *VerMass* court held that "[u]nless a debtor provides the [student loan] program with sufficient information to apply its administrative procedures, there is no legal or factual basis for granting a hardship discharge under the Bankruptcy Code." *Id.* at 660. The court noted although it was unlikely the student loan program would ever obtain payments from the borrower, the program administrators have "the right to the opportunity to evaluate his financial circumstances and apply their regulatory procedures." *Id.*

In *In re Waterston,* 2002 WL 31856714, *8 (Bankr. E.D. Pa. Nov. 26, 2002), however, the court declined to find an exhaustion of administrative remedies requirement under the good faith prong of the test set forth in *Brunner v. New York State Higher Education Services*

Corp., 831 F.2d 395, 396 (2d Cir. 1987).[10] Prior to filing bankruptcy, the borrower had requested and was granted two unemployment deferments and a temporary hardship deferment. *Waterston,* 2002 WL 31856714, at *4. The court noted that in addition to the deferments taken by the borrower, federal regulations provided the borrower with several other administrative remedies, such as loan consolidation, the Income Contingent Repayment Plan, and a total and permanent disability discharge. *Id.* Despite the availability of these administrative remedies, the court found that the borrower had satisfied all three prongs of the *Brunner* test and discharged the student loans pursuant to 11 U.S.C. § 523(a)(8). *Id.* at *9.

In the greater number of cases, the court considers whether the debtor has made any effort to pursue any available administrative remedies as a factor under the good faith prong of the *Brunner* test.[11] *See, e.g., In re Healey,* 161 B.R. 389, 397 (E.D. Mich. 1993); *In re Brosnan,* 323 B.R. 533, 538-39 (Bankr. M.D. Fl. 2005); *In re Folsom,* 315 B.R. 161, 165-66 (Bankr. M.D. Fl. 2004). Recently, the Fourth Circuit in *Educational Credit Management Corp. v. Frushour (In re Frushour),* No. 04-2553, slip op. at 2 (4th Cir. Dec. 30, 2005), held that the debtor failed to prove undue hardship because she failed to seriously consider the income

[10] The Fourth Circuit adopted the *Brunner* three-part test to determine whether a Chapter 7 debtor has shown "undue hardship" within the meaning of 11 U.S.C. § 523(a)(8) in *Educational Credit Management Corp. v. Frushour (In re Frushour),* No. 04-2553, slip op. at 8 (4th Cir. Dec. 30, 2005). The Fourth Circuit applied the *Brunner* three-part test in the Chapter 13 context in *Ekenasi v. Education Resources Institute (In re Ekenasi),* 325 F.3d 541, 546 (4th Cir. 2003).

[11] In jurisdictions which have not adopted *Brunner*, the court has considered whether the debtor has made any effort to pursue any administrative remedies under the good faith prong of the test employed in that jurisdiction. *See, e.g., In re Bethune,* 164 B.R. 258, 259-60 (Bankr. E.D. Ark. 1994) (considering debtor's failure to pursue available administrative remedies under the good faith part of the test derived in *In re Johnson,* 5 B.R. 532 (Bankr. E.D. Pa. 1979)).

contingent plan that would reduce her current payments.[12] "The debtor's effort to seek out loan consolidation options that make the debt less onerous is an important component of the good-faith inquiry. Although not always dispositive, it illustrates that the debtor takes her loan obligations seriously, and is doing her utmost to repay them despite her unfortunate circumstances." *Id.* at 11 (citations omitted). The Fourth Circuit determined that the debtor "provided insufficient justifications for refusing to take a simple step that would have allowed her to fulfill her commitments in a manageable way;"thus the debtor failed to satisfy the third prong of the *Brunner* test. *Id.* at 12.

Given the absence of a statutory provision requiring the debtor to exhaust administrative remedies before seeking a discharge of the student loan debt in bankruptcy and the specific inclusion in the Bankruptcy Code of a provision allowing for bankruptcy discharge of an educational loan in limited circumstances, this Court concludes that it has jurisdiction to determine whether the student loan debt would constitute an undue hardship on the Debtor under 11 U.S.C. §523(a)(8)[13] even when the Debtor has not exhausted all possible administrative options for the deferral or discharge of the obligation. Any such failure must be considered in the context of applying the *Brunner* test. This conclusion is consistent with the Fourth Circuit's holdings in *McDonald* and *Frushour*, which are binding precedent on this Court, and the

[12] The plan would have allowed her to pay between zero and five dollars per month unless her income increased. *Id.* at 12.

[13] As part of this Decision, this Court has made no determination on the merits of the Debtor's cause of action seeking discharge of her student loan debt, including the effect of the Debtor's failure to exhaust administrative remedies under the good faith prong of the *Brunner* test.

statutory provisions[14] granting this Court jurisdiction to hear and decide this matter. Accordingly, the Court will deny the Department of Education's Motion to Dismiss. An order to such effect will be entered contemporaneously with the signing of this Decision.

This 10th day of January, 2006.

William F. Stone, Jr.

UNITED STATES BANKRUPTCY JUDGE

[14] 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984 give this Court jurisdiction to determine the dischargeability of student loan debt. *See also* 28 U.S.C. § 157(b)(2)(I).