Missouri Law Review

Volume 64
Issue 1 *Winter 1999*

Article 14

Winter 1999

Too Much And Too Little: A Bankruptcy Balancing Act

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Too Much and Too Little: A Bankruptcy Balancing Act

Rose v. United States Department of Education (In re Rose)[1]

I. INTRODUCTION

This is a case of too much and too little. It represents one court's attempt to deal with problems created by too much Congressional guidance in one area of the Bankruptcy Code and too little guidance in another. In 1994, Congress revised 11 U.S.C. § 106, adding a provision declaring that when a state files a claim in a bankruptcy proceeding, it has waived its sovereign immunity as to that claim.[2] Two years later, the United States Supreme Court, in *Seminole Tribe v. Florida*,[3] limited Congress's power to expand Article III judicial powers to the Eleventh Amendment.[4] The *In re Rose* court had to determine if Congress went too far when it enacted 11 U.S.C. § 106(b).

The court also had to deal with too little guidance from Congress: a debtor seeking to discharge student loans within seven years after they first came due[5] must prove that repaying the loans would create an "undue hardship."[6] Courts have struggled with defining this term, but the growing trend is to adopt the *Brunner* test for undue hardship.[7] This case illustrates the amorphous nature of this test and how it can be used to discharge student loans.

II. FACTS AND HOLDING

As part of a Chapter 7 proceeding in the United States Bankruptcy Court for the Western District of Missouri, Jennifer Ruth Rose filed a complaint to determine the dischargeability of student loans used to finance her undergraduate and law degrees.[8] Rose owed more than $105,000 in student loans to eight

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1. 215 B.R. 755 (Bankr. W.D. Mo. 1997).
2. 11 U.S.C. § 106(b) (1994).
3. 517 U.S. 44 (1996).
4. *See infra* note 27 and the accompanying text.
5. 11 U.S.C. § 523(a)(8)(A) (1994). In the fall of 1998, Congress amended Section 523(a)(8) with the passage of the Higher Education Amendments of 1998, thereby eliminating Section 523(a)(8) in its entirety. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1584 (1998). For bankruptcy cases commenced after October 1, 1998, a student loan that first became due seven years before the date of the filing of the petition is no longer dischargeable on that basis. *See* Pub. L. No. 105-244, 112 Stat. 1581, 1584 (1998).
6. 11 U.S.C. § 523(a)(8)(B) (1994).
7. *See infra* notes 50-55 and the accompanying text.
8. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 762-63 (Bankr. W.D. Mo. 1997).

different defendants.[9] At the time of the bankruptcy, she was employed at a salary of just over $30,000 per year as a law clerk working for the Jackson County Associate Circuit Court.[10] Her husband, Michael, was unemployed and stayed home with the couple's two young children.[11] The couple sought to discharge the debt under Section 523(a)(8)(B), which allows discharge of a student loan obligation if excepting the debt would impose an "undue hardship" on the debtor.[12]

The Missouri Student Loan Program (MSLP) was the only defendant still party to the action who filed a brief contesting the court's jurisdiction on Eleventh Amendment grounds.[13] The MSLP contended that it was a government agency entitled to Eleventh Amendment protection. The MSLP also argued that by filing a proof of claim against Rose, the state did not agree to have the court determine whether the claim should be discharged; the Eleventh Amendment should shield the state from any adverse action against it.[14]

As a preliminary matter, the court determined that Section 106(b) of the Bankruptcy Code was unconstitutional to the "extent it attempts to dictate the circumstances constituting a waiver of immunity on the part of a state."[15] The court reasoned that Congress had attempted to unconstitutionally abrogate a state's Eleventh Amendment immunity by declaring that filing a proof of claim constituted a waiver of sovereign immunity.[16] Despite this constitutional infirmity, the court found that filing a claim in fact constituted such a waiver because once the claim was filed, the debtor's attempt to have the debt discharged was tantamount to a compulsory counterclaim, and the state had waived its Eleventh Amendment immunity as to that counterclaim.[17]

Having determined its jurisdiction to decide the matter, the court addressed the dischargeability of the student loans under Section 523(a)(8)(B) by applying

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9. *Id.* at 762. The defendants are the United States Department of Education, the Missouri Coordinating Board for Higher Education, the Missouri Student Loan Program, HEMAR Insurance Corporation of America, Illinois Guarantors Student Assistance, Nebraska Student Loan, the University of Missouri and North Star Guarantee. *Id.* at 766. North Star Guarantee did not answer the complaint and the court entered a default judgment against it in favor of Rose. *Id.* at 757. The University of Missouri filed a motion to dismiss contending that the action against it was barred by the Eleventh Amendment. *Id.* The Court granted the motion on that basis November 10, 1997. Rose v. United States Dep't of Educ. (*In re* Rose), 214 B.R. 372, 378 (Bankr. W.D. Mo. 1997).

10. *In re Rose*, 215 B.R. at 763.

11. *Id.*

12. 11 U.S.C. § 523(a)(8)(B) (1994).

13. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 758 (Bankr. W.D. Mo. 1997).

14. *Id.* at 760.

15. *Id.* at 758.

16. *Id.* at 758-59.

17. *Id.* at 762.

the *Brunner* test to determine whether requiring Rose to repay the loans would constitute an undue hardship.[18] Although the court expressed some distaste as to whether a debtor should be allowed to accumulate more than $100,000 in student loans and then discharge them in a Chapter 7 proceeding, the court concluded that Rose had satisfied the three-prong *Brunner* test for undue hardship and that the debts should be discharged.[19]

III. LEGAL BACKGROUND

A. State Sovereign Immunity

The Eleventh Amendment to the United States Constitution protects states from suit in federal court.[20] However, there are two exceptions to that protection: a state may be subject to suit if it waives its right to sovereign immunity[21] or if Congress abrogates that right.[22] In 1994, Congress attempted to abrogate that protection by enacting 11 U.S.C. § 106(b).[23] This section was added to the Bankruptcy Code to clarify when a compulsory counterclaim may be brought against a governmental unit, thereby overruling contrary case law which held that filing a proof of claim did not serve as a prerequisite for finding a waiver of sovereign immunity.[24] The new provision clearly dictates that the

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18. *Id.* at 763. Under the *Brunner* test, the debtor must establish (1) that he cannot maintain a minimal standard of living based on current income and expenses if forced to repay the loans, (2) that circumstances exist that indicate that the situation will persist for a significant portion of the repayment period, and (3) that he has made good faith efforts to repay the student loans. Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987).

19. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 766 (Bankr. W.D. Mo. 1997).

20. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

21. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

22. *See* Green v. Mansour, 474 U.S. 64, 68 (1985).

23. Section 106(b) provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. §106(b) (1994).

24. *See* NOTES OF COMM. ON THE JUDICIARY, S. REP. NO. 95-989 (1995); *see also In re* Town & Country Nursing Home Servs., Inc., 963 F.2d 1146 (9th Cir. 1992); *In re* Operation Open City, Inc., 170 B.R. 818 (S.D.N.Y. 1994); *In re* T.F. Stone Cos., 170 B.R. 884 (Bankr. N.D. Tex. 1994); *In re* Gribben, 158 B.R. 920 (Bankr. S.D.N.Y. 1993).

filing of a claim by a state constitutes a waiver of that state's sovereign immunity as to any compulsory counterclaim[25] arising from the same transaction or occurrence.[26]

In 1996, the United States Supreme Court called the constitutionality of this provision into question when it determined that Congress did not have plenary power to abrogate a state's sovereign immunity.[27] In *Seminole Tribe v. Florida*, the Court held that Congress could not abrogate a state's sovereign immunity under the Indian Commerce Clause found in Article I of the United States Constitution.[28]

In *Seminole Tribe*, the Court noted that in prior decisions, the Court had found constitutional authority for abrogating state sovereign immunity only under Section 5 of the Fourteenth Amendment[29] and the Interstate Commerce Clause.[30] The Court ultimately held that the Eleventh Amendment restricts Article III judicial power, and that Article I power may not be used as an end-run around the constitutional limitations placed on federal court jurisdiction.[31]

Since the Supreme Court's holding in *Seminole Tribe*, federal courts have questioned the constitutionality of 11 U.S.C. § 106(b) as an impermissible congressional abrogation of a state's sovereign immunity. Many courts confronting the question since the *Seminole Tribe* decision have sidestepped the constitutional issue by finding that either the state had waived its sovereign

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25. 11 U.S.C. §106(b) (1994).

26. The standards used to identify a compulsory counterclaim under FED. R. CIV. PRO. 13(a) are used to identify whether a bankruptcy claim is part of the same "transaction or occurrence." United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992).

27. *See* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1133 (1996).

28. *Id.* at 1131. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Id.*

29. "The Congress shall have power to enforce by appropriate legislation the provision of this article." U.S. CONST. amend. XIV, § 5. *See* Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976) (holding that Congress may abrogate a state's sovereign immunity under Section 5 of the Fourteenth Amendment).

30. *Seminole Tribe*, 116 S. Ct. at 1131. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (holding that Congress may abrogate a state's sovereign immunity under the Article I Interstate Commerce Clause), *overruled by Seminole Tribe*, 116 S. Ct. at 1114.

31. *Seminole Tribe*, 116 S. Ct. at 1131-32. This effectively overturned the holding in *Union Gas*, where the court had found constitutional authority for Congress to abrogate state sovereign immunity in the Interstate Commerce Clause. Justice Rehnquist, in delivering the opinion of the Court in *Seminole Tribe*, implicitly noted that the holding could apply to bankruptcy proceedings, but dismissed concern expressed by the dissent by noting that "[a]lthough the . . . bankruptcy laws have existed since our nation's inception . . . there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the states." *Id.* at 1132 n.16.

immunity or that Section 106(b) did not apply because no claim was filed by the state.[32] Of the courts directly addressing the issue, at least two have found Section 106(b) constitutional.[33] At least five courts, however, including the *Rose* court, have found 11 U.S.C. § 106(b) unconstitutional on the basis that Congress may not abrogate a state's sovereign immunity using Article I powers.[34] Regardless of the constitutionality of 11 U.S.C. § 106(b), courts on both sides of the issue have been willing to find a waiver of sovereign immunity if a state entity files a claim.[35]

B. Undue Hardship

In 1976, Congress amended the Bankruptcy Code to make student loans in the Chapter 7 context nondischargeable.[36] This provision was repealed by the Bankruptcy Reform Act of 1978 which incorporated the earlier provisions into 11 U.S.C. § 523(a)(8).[37] In 1990, Congress extended the prohibition against

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32. *See* AER-Aerotron, Inc. v. Texas Dep't of Transp. (*In re* AER-Aerotron), 104 F.3d 677, 680 (4th Cir. 1997); *In re* ABEPP Acquisition Corp., 215 B.R. 513, 518 (6th Cir. 1997); *In re* Sacred Heart Hosp., 204 B.R. 132, 141 (E.D. Pa. 1997), *aff'd*, 133 F.3d 237 (3d Cir. 1998); *In re* Lazar, 200 B.R. 358 (C.D. Cal. 1996); *In re* William Ross, Inc., 199 B.R. 551, 555 (W.D. Pa. 1996); *In re* Martinez, 196 B.R. 225, 229 (D.P.R. 1996); *In re* Koehler, 204 B.R. 210, 219 (Bankr. D. Minn. 1997); *In re* Stoecker, 202 B.R. 429, 448 (Bankr. N.D. Ill. 1996), *aff'd*, 1998 WL 644363 (N.D. Ill. Sept. 11, 1998).

33. *See In re* Straight, 209 B.R. 540 (D. Wyo. 1997) (holding that Section 106(b) was constitutional in that Congress intended to provide debtors with all the privileges and immunities provided by the Bankruptcy Code, thereby tying Congress's Article I Bankruptcy powers to the Fourteenth Amendment), *cert. denied*, 119 S. Ct. 446 (1998); *In re* Charter Oak, 203 B.R. 17, 22 (Bankr. D. Conn. 1996) (holding that Section 106(b) is consistent with the Supreme Court's holding in *Seminole Tribe*).

34. *See In re* Creative Goldsmiths, Inc., 119 F.3d 1140, 1147 (4th Cir. 1997), *cert. denied sub. nom.* Schlussberg v. Maryland Comptroller of Treasury, 118 S. Ct. 1517 (1998); *In re* C.J. Rogers, Inc., 212 B.R. 265, 273 (E.D. Mich. 1997); *In re* Value Added Communications, Inc., 216 B.R. 547, 549 (Bankr. N.D. Tex. 1997); *In re* NVR L.P., 206 B.R. 831, 837 (Bankr. E.D. Va. 1997), *aff'd sub. nom.* Clerk of the Circuit Court v. NVR Homes, Inc., 222 B.R. 514 (E.D. Va. 1998).

35. *See In re AER-Aerotron*, 104 F.3d at 681; *In re* Del Mission Ltd., 98 F.3d 1147, 1152 n.6 (9th Cir. 1996); *In re* Fennelly, 212 B.R. 61, 64 (D.N.J. 1997); *In re Straight*, 209 B.R. at 555-58; *In re* Lazar, 200 B.R. at 379; *In re Martinez*, 196 B.R. at 229-30; *In re* Lush Lawns, Inc., 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996); *In re* York-Hannover Devs., Inc., 201 B.R. 137, 142 (Bankr. E.D.N.C. 1996); *In re* Sacred Heart Hosp., 199 B.R. 129, 135 (Bankr. E.D. Pa. 1996), *rev'd*, 204 B.R. 132 (E.D. Pa. 1997), *aff'd*, 133 F.3d 237 (3d Cir. 1998).

36. 20 U.S.C. § 1087-3 (1976) (repealed 1978).

37. 11 U.S.C. § 523(a)(8) (1994).

discharge to debtors filing a Chapter 13[38] and extended the period for which a loan is nondischargeable under Section 523(a)(8)(A) from five to seven years.[39]

Despite these various iterations of the law, Congress has never defined the term "undue hardship" as used in Section 523(a)(8)(B). This task has been left to the courts,[40] and those courts addressing the issue have used five different approaches to define the term.[41] Some courts define the term based on the facts and circumstances of the case.[42] Others rely on the suggested four-factor test in the 1973 Report of the Bankruptcy Commission to determine what constitutes undue hardship.[43]

Three cases have been significant in the judiciary's attempt to define undue hardship and these cases have resulted in three different tests. *In re Johnson*[44]

38. 11 U.S.C. § 1328(a)(2) (1994).

39. *See* Pub. L. No. 101-647, § 3621(2) (1990). This provision has since been repealed. *See supra* note 5.

40. Courts generally recognize that defining the term is within their discretion. *See In re* Ipsen, 149 B.R. 583, 585 (Bankr. W.D. Mo. 1992); *In re* Johnson, 121 B.R. 91, 93 (Bankr. N.D. Okla. 1990).

41. *See* Craig A. Gargotta, *Undue Hardship and the Discharge of Student Loans*, 15 AM. BANKR. INST. J. 10, 10 (1996). Gargotta identifies four approaches used by the courts. *Id.* The fifth is an undefined approach relying on the facts and circumstances of the case. *See* Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 479-80 (1996).

42. *See* Somers & Hollis, *supra* note 41, at 479.

43. *See* Gargotta, *supra* note 41, at 10. The factors are (1) if the debtor has or will be able to accumulate wealth, (2) the debtor's employment and expected income, (3) the income required for the debtor to maintain a minimum standard of living, and (4) the existence of any income that would allow the debtor to repay the student loan while maintaining a minimum standard of living. *See* Gargotta, *supra* note 41, at 10.

44. 5 B.C.D 532 (Bankr. E.D. Pa. 1979).

gave rise to the *Johnson* test,[45] *In re Bryant*[46] produced the *Bryant* test,[47] and *In re Brunner*[48] resulted in the *Brunner* test.[49]

The *Brunner* test is perhaps the most widely used test for undue hardship.[50] It has been formally adopted as the test in the Second,[51] Third,[52] and Seventh[53] Circuits. The Sixth Circuit has not formally adopted the *Brunner* test but has implicitly made it the test in that circuit.[54] One commentator notes that eleven of the thirteen circuit courts either explicitly or implicitly apply the test.[55]

Although the Eighth Circuit has not formally adopted the *Brunner* test in any reported cases, the Bankruptcy Court for the Western District of Missouri has used it as the test for undue hardship since at least 1992.[56] The *In re Ipsen*[57] court announced that it used the *Brunner* test to determine whether a debtor's

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45. The *Johnson* test is made up of a mechanical test, a good faith test and a policy test. *Id.* at 539-42. Under the mechanical test, the court examines the debtor's income to determine whether he could live at subsistence or poverty level while repaying the loans. *Id.* at 544. In applying the good faith test, the court determined whether there was a good faith effort to repay the educational loan. *Id.* at 540. Even if the debtor fails the first two prongs, he may be entitled to a discharge under the policy test. *Id.* at 542-43. Under the policy test, the court determines whether the primary reason for filing the bankruptcy was to discharge the student loans and whether the debtor benefitted financially from the education. *Id.* at 544. If the answer to both questions is no, then the debt may be discharged. *Id.*

46. 72 B.R. 913 (Bankr. E.D. Pa. 1987). Note that this is the same court that formulated the *Johnson* test, but later refused to enforce it because it was too complicated. *Id.* at 915 n.2.

47. The *Bryant* test relies on federal poverty guidelines to determine dischargeability. *Id.* at 914. If a debtor's net income does not "substantially" exceed the federal poverty level guidelines, the debt may be discharged. *Id.*

48. 831 F.2d 395 (2d Cir. 1987).

49. *See supra* note 18 and accompanying text.

50. Jeffrey L. Zackerman, Note, *Discharging Student Loans in Bankruptcy: The Need for a Uniform "Undue Hardship" Test*, 65 U. CIN. L. REV. 691, 712 (1997).

51. *See* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987).

52. *See In re* Faish, 72 F.3d 298, 306 (3d Cir. 1995), *cert. denied*, 518 U.S. 1009 (1996).

53. *See In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

54. *See In re* Cheesman, 25 F.3d 356, 359-60 (6th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995). It has subsequently been applied as the test in the circuit. *See In re* Dolph, 215 B.R. 832 (6th Cir. 1998); *In re* Rice, 78 F.3d 1144 (6th Cir. 1996).

55. Zackerman, *supra* note 50, at 721 n.256.

56. *See In re* Ipsen, 149 B.R. 583 (Bankr. W.D. Mo. 1992). *In re Cardwell* cited to *Brunner*, noting that the court should look at the long-term prospects of the debtor when deciding undue hardship. *In re* Cardwell, 95 B.R. 121,122 (Bankr. W.D. Mo. 1989). However, the court did not formally announce it as the test it followed nor does the reference rise to the level of a tacit adoption. *Id.*

57. 149 B.R. 583 (Bankr. W.D. Mo. 1992).

circumstances would create an undue hardship if student loan debts were excepted from discharge.[58] The court held that K'Lynn Ipsen did not satisfy the first prong of the *Brunner* test because her husband provided for her housing and because her former husband provided other assistance which allowed her to maintain a minimal standard of living.[59] The court also found that she failed the second prong of the test because she did not establish an inability to pay the loan over the long-term, even though she was not able to find a full-time job using the skills her education provided her and even though she was scheduled for major surgery.[60]

The court also applied the test to Chapter 7 debtors seeking to discharge more than $35,000 in student loans.[61] The court determined that Jon Wardlow's $10,000 loans were dischargeable pursuant to "11 U.S.C. § 535(a)(8)(A)" [sic] because they first became due more than seven years before the petition was filed.[62] Renette Wardlow's debt was held to be nondischargeable because the couple failed to satisfy the first two prongs of the *Brunner* test.[63] The court found that the couple could maintain a minimal standard of living if forced to repay the loans,[64] and that there were no circumstances indicating a likelihood that the debtors would not be able to repay the loans for a significant portion of the repayment period.[65]

In 1994, the Bankruptcy Court for the Western District of Missouri began to find that debtors could satisfy the three-prong test. For example, in *In re O'Brien* the court held that Chronic Fatigue Syndrome prevented a Chapter 7 debtor from repaying her student loans.[66] The court held that the condition was likely to persist for a significant portion of the loan repayment period, that the circumstances of her illness were beyond her control, and that she did not willfully or negligently contribute to her default.[67]

In March 1997, the court discharged $12,736.64 in student loans for a Chapter 7 debtor even though her income exceeded her listed expenses by more

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58. *Id.* at 585.

59. *Id.* at 585-86.

60. *Id.* at 586.

61. *In re* Wardlow, 167 B.R. 148, 149-150 (Bankr. W.D. Mo. 1993).

62. *Id.* at 150-51.

63. *Id.* at 152.

64. *Id.* at 151. The court noted telephone, cable, recreation and miscellaneous expenses indicating that the debtors were "maintaining more than a minimal standard of living." *Id.*

65. *Id.* at 152. The court said despite child care expenses, recurrent ear infections in the children and Renette Wardlow's anxiety attacks and stress related problems, no long-term circumstances existed that would satisfy the second prong of the *Brunner* test. *Id.* at 151-52.

66. *In re* O'Brien, 165 B.R. 456, 460 (Bankr. W.D. Mo. 1994).

67. *Id.*

than $200 a month.[68] The court found that the debtor lived frugally and could not maintain a minimal standard of living if forced to repay her loans.[69] Furthermore, the court noted that her age and lack of experience made it unlikely that she would be able to improve her circumstances.[70] The court found that the third prong was satisfied in that the debtor continued to try to find a better paying job, lived frugally, and testified that she had made some payments on her student loan.[71]

In the most recent reported case prior to *In re Rose*, the Bankruptcy Court for the Western District of Missouri applied the *Brunner* test and discharged more than $100,000 in student loan debt for a Chapter 7 debtor who had used the money to obtain an advanced management degree.[72] In this case, the debtor was unable to keep a job commensurate with her education for an extended period.[73] Furthermore, she was facing felony charges for removing her children from the state of Missouri to California in direct violation of a court order.[74] The court found that the debtor's circumstances satisfied the first two prongs of the *Brunner* test[75] and that, although she had not been able to pay back any of her student loans, she had used her best efforts to obtain employment, maximize her income, and minimize her expenses.[76] These decisions laid the foundation for the holding of *In re Rose.*

IV. INSTANT DECISION

Because the issue was jurisdictional, the United States Bankruptcy Court for the Western District of Missouri initially addressed whether the MSLP had waived the state's sovereign immunity under Section 106(b) of the Bankruptcy Code by submitting a claim for the student loan that Jennifer Rose owed to the state.[77] The court determined that Section 106(b) was "unconstitutional to the extent it attempts to dictate the circumstances constituting a waiver of immunity on the part of the state."[78]

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68. *In re* Dotson-Cannon, 206 B.R. 530, 532 (Bankr. W.D. Mo. 1997). The court "found" an additional $400 a month in expenses to help her satisfy the first prong of the *Brunner* test. *Id.* at 533-34.

69. *Id.* at 534.

70. *Id.*

71. *Id.* at 535.

72. *In re* Clevenger, 212 B.R. 139 (Bankr. W.D. Mo. 1997).

73. *Id.* at 142-43.

74. *Id.* at 141.

75. *Id.* at 145.

76. *Id.* at 146.

77. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 758 (Bankr. W.D. Mo. 1997).

78. *Id.* at 758.

Relying heavily on *In re NVR L.P.*[79] and *In re C.J. Rogers, Inc.*,[80] the court reasoned that only a state can waive its own sovereign immunity and Congress cannot determine when such a waiver occurs.[81] In addition, the court concluded that no provision of Article I of the U.S. Constitution gave Congress the power to abrogate the state's sovereign immunity in the bankruptcy context.[82] The court reasoned that Congress did not act in accordance with valid constitutional power when it enacted Section 106(b) and, as a result, Section 106(b) was unconstitutional. Although Congress had unequivocally expressed its intent to abrogate a state's sovereign immunity in Section 106(b),[83] it could not constitutionally do so.[84]

Despite that conclusion, the court continued its inquiry. Although Section 106(b) was unconstitutional, the statute "may have correctly described those actions which, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment."[85] The court first noted that constructive waiver of the Eleventh Amendment is generally not recognized and that a waiver must be "unequivocally expressed."[86] The court also recognized that the State of Missouri had not waived its sovereign immunity by legislation nor intervened as a plaintiff in the case; therefore, case law was instructive on the issue.[87] The court relied on a 1947 Supreme Court decision which defined when a waiver of sovereign immunity occurs in bankruptcy proceedings.[88] Based on the reasoning expressed in *Gardner v. New Jersey*,[89] MSLP, in filing a claim, had waived its sovereign immunity as to that claim.[90] Furthermore, the court reasoned that it

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79. 206 B.R. 831 (Bankr. E.D. Va. 1997).

80. 212 B.R. 265 (E.D. Mich. 1997).

81. *In re Rose*, 215 B.R. at 758-59.

82. *Id.* at 759. Congress may abrogate a state's right to sovereign immunity only if the abrogation is unequivocally expressed and if Congress is acting according to a valid constitutional power. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1123 (1996) (citing Green v. Mansour, 106 S. Ct. 423, 426 (1985)).

83. The *Rose* court found that the language of Section 106(b) dictating when a state waived its sovereign immunity was an "attempted abrogation." Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 759 (Bankr. W.D. Mo. 1997) (citing *In re* NVR L.P., 206 B.R. 831, 839 (Bankr. W.D. Va. 1997)).

84. *Id.*

85. *Id.* at 759 (citing *In re* Creative Goldsmiths, 119 F.3d 1140, 1147 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998)).

86. *Id.*

87. *Id.*

88. *Id.* A state waives its sovereign immunity when it files a claim against the bankruptcy estate because "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." Gardner v. New Jersey, 329 U.S. 565, 573-74 (1947).

89. 329 U.S. 565 (1947).

90. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 760 (Bankr. W.D. Mo. 1997).

would be fundamentally unfair to allow the state to file a claim and then preclude the debtor from asserting any valid defenses to that claim.[91] The court concluded that, from an equity standpoint, MSLP could not have it "both ways;"[92] the filing of the claim was a valid waiver of the state's sovereign immunity as to the claim.[93]

Having established jurisdiction over the loan, the court turned to the issue of whether Rose's student loans were dischargeable under 11 U.S.C. § 523(a)(8)(B), which allows for discharge of a student loan if excepting the debt from discharge would impose undue hardship on the debtor.[94] Noting that the Bankruptcy Code does not define "undue hardship," the court stated that determining undue hardship was discretionary.[95] Furthermore, the court utilized the *Brunner* test to determine whether such a hardship existed.[96]

In determining whether Rose could maintain a minimal standard of living if forced to repay the loan,[97] the court detailed Rose's income and expenses, showing that she had monthly expenses of $1,819 per month and income of only $1,748 per month, leaving her with a deficit of $71 per month.[98] The court determined that Rose's monthly expenses were not excessive, and as a result, Rose could not maintain a minimal standard of living if forced to repay the student loans.[99] The court concluded that, based on her current income and expenses, the first prong of the test was satisfied.[100]

In determining whether the situation was likely to persist for a significant portion of the loan repayment period,[101] the court turned to Rose's family situation to satisfy the second element.[102] Rose's husband, Michael, was currently unemployed and stayed at home to take care of the couple's two

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91. *Id.* at 760-61.

92. *Id.* at 761. The court noted that MSLP had filed its claim in hopes of having it declared nondischargeable, and therefore it must accept that the court would declare it dischargeable. *Id.*

93. *Id.* at 762.

94. 11 U.S.C. § 523(a)(8)(B) (1994).

95. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 763 (Bankr. W.D. Mo. 1997) (citing Andrews v. South Dakota Student Loan Assistance Corp., 661 F.2d 702, 704 (8th Cir. 1981); *In re* Dotson-Cannon, 206 B.R. 530, 533 (Bankr. W.D. Mo. 1997)).

96. *Id.* *See supra* note 18 and accompanying text..

97. This is the first prong of the *Brunner* test. *See supra* note 18 and accompanying text.

98. *In re Rose*, 215 B.R. at 763.

99. *Id.* at 764.

100. *Id.*

101. This is the second prong of the *Brunner* test. *See supra* note 18 and accompanying text.

102. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 764 (Bankr. W.D. Mo. 1997).

children.[103] Any income he could potentially earn would be offset by the cost of child care.[104] Because the couple's youngest child was born during the pendency of the case, the court determined that Michael Rose was likely to remain unemployed for six more years.[105]

The court reasoned that because the typical repayment period is ten years, once Michael returned to work, he and Rose would have to repay $100,000 in student loans in four years.[106] The court also noted that it was unlikely that Rose would obtain a higher paying job.[107] Based on these facts, the court concluded that Rose would be unable to maintain a minimal standard of living for her family and repay the student loans for a period of ten years, the totality of the typical repayment period for student loans.[108] Therefore, the second prong of the test had been satisfied.[109]

In determining whether Rose had made good faith efforts to repay the student loans,[110] the court looked at Rose's "efforts to obtain a well-paying job, maximize income, and minimize expenses," as well as attempts to repay the student loans.[111] The court noted that Jennifer Rose had made reasonable efforts to get the best job she could.[112] The court also noted that Rose's expenses were minimal, and repaying the student loans was impossible because the couple already had a monthly deficit, excluding any loan payment.[113] Although Rose had not made any payments on the loans, she had researched the possibility of loan consolidation or increasing payment plans.[114] Based on these facts, the court concluded that the good faith prong of the *Brunner* test had been satisfied and the debts were dischargeable under Section 523(a)(8)(B).[115]

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 765. The court also noted that because of its earlier ruling declaring a $6,360 debt to the University of Missouri nondischargeable, that amount, plus interest, would also be due. *Id.*

107. *Id.* The court based this conclusion on the current market for new attorneys and, in a scathing comment, noted that based on Rose's presentation of the case, the court "consider[ed] it unlikely that she will obtain more lucrative employment in the foreseeable future." *Id.*

108. *Id.*

109. *Id.*

110. This is the third prong of the *Brunner* test. *See supra* note 18 and accompanying text.

111. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 765 (Bankr. W.D. Mo. 1997).

112. *Id.*

113. *Id.*

114. *Id.* at 766.

115. *Id.*

V. COMMENT

A. State Sovereign Immunity

In finding that Congress's Article I powers did not trump the Eleventh Amendment and that 11 U.S.C. § 106(b) was unconstitutional,[116] the Bankruptcy Court for the Western District of Missouri strictly applied the test put forth by the Supreme Court in *Seminole Tribe*.[117] The court also followed the growing trend among bankruptcy courts to find a waiver of sovereign immunity where the state has filed a bankruptcy claim.[118] The result was to mesh together new thoughts on the limits to which Congress can expand the powers of the judiciary through Article I of the Constitution with long-standing case law[119] regarding waiver and jurisdiction.

While the reasoning is sound, the court did not have to reach the constitutional issue to resolve the case.[120] The court, like others faced with the issue,[121] could have noted the constitutional question and determined that because MSLP had filed a claim, it had waived its sovereign immunity. The court could have exercised judicial restraint and still obtained jurisdiction to hear the matter without declaring Section 106(b) unconstitutional. However, the court decided that Congress cannot declare by statute that filing a claim in bankruptcy is a waiver of sovereign immunity.[122]

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116. There may be some question as to whether addressing the constitutional issue was necessary given that MSLP had filed a claim. *See infra* note 118 and the accompanying text.

117. Like the *Seminole Tribe* Court, which did not address whether the Fourteenth Amendment gave Congress the power to waive a state's sovereign immunity under the Indian Commerce Clause, the *Rose* court did not determine whether Section 5 of the Fourteenth Amendment gave Congress the power to enact 11 U.S.C. § 106(b) (1994). Other courts have rejected this argument in this context. For the reasoning behind these rejections, see *In re* Sacred Heart Hosp., 133 F.3d 237, 244-45 (3d Cir. 1998).

118. *See supra* note 34.

119. *See* Gardner v. New Jersey, 329 U.S. 565, 573-574 (1947).

120. *See* Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated on other grounds sub nom.* EPA v. Brown, 431 U.S. 99 (1977). "[I]f a case can be decided on either of two grounds one involving a constitutional question, and the other, a question of statutory construction or general law, the court should decide on the basis of the latter." *Id.* at 227.

121. *See In re* Martinez, 196 B.R. 225, 229-30 (D.P.R. 1996) (determining that constitutional issue need not be addressed because Section 106(b) did not apply in that the Department of the Treasury of the Commonwealth of Puerto Rico did not file a claim in the proceeding); *In re* Koehler, 204 B.R. 210, 219 (Bankr. D. Minn. 1997) (stating that it did not have to reach the constitutional issues related to Section 106(b) because the state did not file a claim); *In re* Lazar, 200 B.R. 358, 378-79 (Bankr. C.D. Cal. 1996) (holding that the state had filed a claim and had waived its sovereign immunity, thereby sidestepping the broader constitutional issue).

122. Underlying this is a fundamental separation of powers issue. The inquiry into

Perhaps a paradoxical aspect of the case is the practical rule created by the *Rose* court: if a state entity does not want a student loan discharged, it should do nothing. If it files a claim, it has waived sovereign immunity and the claim can be discharged. The best tactic is to wait until the debtor files a complaint to determine the dischargeability of the loans and then file a motion to dismiss for lack of subject matter jurisdiction.[123] The result is that the loan is not dischargeable, regardless of the exceptions found in 11 U.S.C. § 523(a)(8)(A) or (B).

The effect of such a rule is that debtors in bankruptcy with student loans are not afforded all the protections Congress intended. The "fresh start" is a strong policy underlying the Bankruptcy Code. Debtors should be allowed to discharge debts within defined limitations. Here, Congress limited the exceptions in 11 U.S.C. § 523(a)(8) to loans first coming due seven years before the filing of the bankruptcy petition and to loans that would impose an undue hardship on the debtor if they were not discharged.[124] The rule from *In re Rose* adds a controlling qualification to the two limitations: the debt will be discharged only if the debtor's bankruptcy court can obtain jurisdiction over the state agency holding the loans.

Because subject matter jurisdiction was addressed by first finding Section 106(b) unconstitutional and then finding a waiver by MSLP through the filing of a claim, the *Rose* court created a rule that has ramifications outside of the student loan context. For example, prior to *Rose*, when the state contended that a debt was not dischargeable because of fraud, larceny, or embezzlement,[125] the state had to file a claim and prove that the debt should not be discharged for that reason. The claim would then constitute a waiver of the state's sovereign immunity under Section 106(b). Now, the state need not file a claim, but can move for dismissal for lack of subject matter jurisdiction.[126] The state will be able to side-step the requirement that it establish that the debt was due to fraud, larceny, or embezzlement, and the debt will not be discharged.[127] The state is

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whether "Congress cannot dictate to the judiciary the standard for assessing whether a state has waived its Eleventh Amendment immunity. This begins and ends as a matter of constitutional interpretation." *In re* NVR L.P., 206 B.R. 831, 839 (Bankr. E.D. Va. 1997). *See* Marbury v. Madison, 5 U.S. 137 (1803).

123. This was the tactic successfully used by the University of Missouri. *See* Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755 (Bankr. W.D. Mo. 1997).

124. 11 U.S.C. § 523(a)(8) (1994). *See supra* note 5.

125. 11 U.S.C. § 523(a)(4) (1994).

126. The primary difference between the proposed scenario and the fact pattern of *In re Rose* is that to discharge student loans, the debtor carries the burden of proof and to have a fraud, embezzlement or larceny debt declared nondischargeable, the creditor carries the burden of proof.

127. Clearly, a court could rely on the reasoning that if the state wants the protection of the bankruptcy court, it will avail itself of the court's jurisdiction. However, with the protection of the Eleventh Amendment trumping the Bankruptcy

thereby elevated to the status of a "supercreditor," enjoying rights other creditors do not have.[128]

Judicial interpretations subsequent to the Supreme Court's *Seminole Tribe* holding have created an uneven application of the nation's bankruptcy laws. If a federal court cannot obtain subject matter jurisdiction over a claim because of sovereign immunity, a debtor may be forced to bring suit in state court.[129] This would add cost and difficulty to obtaining discharge of a debt owed to the state.[130] Ultimately, as the court delineated the parameters of Congress's power, it eroded the rights granted to bankrupt debtors.

Ironically, while the court made it harder to get jurisdiction over claims involving a state, it possibly made it easier to get a discharge of student loans. In each of the four reported cases decided on the basis of undue hardship in the Western District of Missouri since 1994, the court has granted a discharge of student loans.[131] Often the debtors were sympathetic, unemployed,[132] underemployed,[133] or disabled.[134] In *In re Rose*, however, Jennifer Rose was employed as a law clerk making $30,000 a year.[135] Her husband voluntarily decided not to work.[136] Based on the circumstances of the case, Rose and her husband were much better situated to repay the student loans than the other debtors that came before the court after 1994.

Code, the state may not need the court's protection to prevent a debt from being discharged. Because there is no subject matter jurisdiction, the court cannot rule on the matter.

128. Steven M. Richman used the term "supercreditor" to describe the status states have when they are not bound by bankruptcy court proceedings. *See* Steven M. Richman, *More Equal than Others: State Sovereign Immunity Under the Bankruptcy Code*, 21 RUTGERS L.J. 603, 604 (1990).

129. One court when addressing the constitutionality of Section 106(a), decided that it does not unconstitutionally compel a state to submit to the jurisdiction of a federal forum. *In re* O'Brien, 216 B.R. 731, 738 (Bankr. D. Vt. 1998). Even so, the court dismissed the case against the state, noting that the state had concurrent jurisdiction to determine the issue and the debtor could bring suit in state court. *Id.*

130. One commentator has suggested three possible solutions to the dilemma created by *Seminole Tribe* in the bankruptcy courts. Justin V.Switzer, *Did They Really Think This Over:* Seminole Tribe v. Florida *and the Bankruptcy Code*, 34 HOUS. L. REV 1243, 1269-76 (1997). Among the possible alternatives identified include suing the state in state court, letting the federal government sue the states, and vesting the estate in the United States. *Id.*

131. *See supra* notes 57-76 and the accompanying text.

132. *In re* Clevenger, 212 B.R. 139 (Bankr. W.D. Mo. 1997).

133. *In re* Dotson-Cannon, 206 B.R. 530 (Bankr. W.D. Mo. 1997).

134. *In re* O'Brien, 165 B.R. 456 (Bankr. W.D. Mo. 1994).

135. Rose v. United States Dep't of Educ. (*In re* Rose), 215 B.R. 755, 763 (Bankr. W.D. Mo. 1997).

136. *Id.* at 764.

The case illustrates the amorphous nature of the *Brunner* test. Where facts and circumstances indicate to the court that a discharge is warranted, the test is flexible enough for the court to satisfy its three prongs. It is no longer a test, but merely a framework for analysis.

V. CONCLUSION

Although Jennifer Rose obtained a discharge of more than $105,000 in student loans, the effect of her case could serve to limit the dischargeability of student loans and other claims by the state in the Bankruptcy Court for the Western District of Missouri. *In re Rose* has created a rule where the state wins in bankruptcy by doing no more than filing a motion to dismiss for lack of subject matter jurisdiction. Ironically, as the court elevated the status of debts owed to the state above other creditors, it lowered the hurdle for discharging student loans.

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